IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 100 OF 2008

W.D.R. MACDONALD KIMAMBO @ ADEN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(An appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Shangwa, J.)
dated the 7th day of March 2005
in
Criminal Session No. 82 of 2001.

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JUDGMENT OF THE COURT

1 December, 2009 & 1 February, 2010

KIMARO, J.A.

The appellant, W.D.R.Macdonald Kimambo @ Aden was charged and convicted of four counts of murder contrary to section 196 of the Penal Code,[CAP 16.R.E.2002] and was sentenced to death. Aggrieved by the convictions and the sentence, he is now before the Court with this appeal. Although the appellant is defended, he did, before being assigned a counsel to represent him, file six grounds of appeal in which he mainly complained that there was no sufficient evidence to find him guilty of murder and that he killed because of provocation. Mr. Peter Swai, learned

advocate assigned to represent him, and appeared before us to argue the appeal for him, filed two grounds of appeal complaining that:

> *"1. The trial court erred in law and in fact for not accepting the defence of provocation raised by the appellant and therefore reduced the offences charged to manslaughter.*
>
> *2. This Honorable Court is requested to accept the said defence of provocation and set aside the conviction and sentence of the trial court and in lieu thereof convict the appellant for manslaughter. "*

The respondent Republic was represented by Mr. Sunday Hyera, learned State Attorney and was assisted by Mr. Bernard Kongola learned State Attorney.

The submissions made by the learned advocate for the appellant in support of the grounds of appeal and the response by the State Attorneys are brief. But before going into those submissions, let us first see the facts giving rise to the appellant's convictions. On the morning of 7th April, 1999, the appellant who was a Prison Warder, stationed at Wazo Hill Prison, was assigned to guard prisoners who had to work in a "shamba ". For that purpose he was given a gun. Without permission from his employer, and with that gun, the appellant went to the "shamba" of Daniel Mwanja (PW1) where Vivian Zephania Mwanja (deceased), Happiness Chundu @ Chausuku, (deceased), Ramadhani Ally (PW3) and Elina Nathaniel (PW4) were working. According to PW3 and PW4 who were eye witnesses to the killing of Vivian Zephania Mwanja and Happiness Chundu @ Chausiku, the appellant on arriving at the "shamba", greeted them and

then called Vivian Zephania Mwanja for a private talk. The appellant and Vivian were lovers and had a child called Eilen born out of wedlock. They also happened to live together for one year and two months before they separated. At the time the killing took place, Vivian was living with PW1, his elder father and she was recovering from an abortion.

Apparently PW3 and PW4 did not hear the conversation that took place between the deceased Vivian, and the appellant. Both said in their evidence that the appellant suddenly shot the deceased and then shot Happiness Chundu @ Chausiku. Vivian died on the spot but Happiness died while being rushed to Muhimbili Hospital for treatment.

In the meantime, PW1 a retired Prison Officer at the time he gave evidence, but was stationed at Wazo Hill Prison at the time the killings took place, was at his place of work. His wife, No. 1099 Cpl. Janeth Hamis, another victim of the killings, was also working at the Wazo Hill Prison and was also at her place of work. From the testimony of PW1 he heard the gun shots when the appellant shot Vivian and Happiness. Since the gunshots came from the location of his house, his late wife and other Prison Officers were the first to rush at the scene of crime. When PW1 arrived at the scene of crime, he saw and heard his wife and other women Prison Officers crying. He saw Hapiness struggling to stand up but she could not make it. Vivian was lying dead on the ground. The appellant was also lying down because he had shot himself on the mouth, and that has permanently incapacitated him in speech

Then the appellant stood up and picked the gun. The wife of PW1, Cpl. Asha and Cpl. Veronika Kalungula started running but the appellant shot at the wife of PW1 and she fell down. The appellant followed her and shot her again. He also shot Cpl. Veronica Kalungula. It was then PW1 took courage and confronted the appellant. In that struggle the appellant threw away the gun and grabbed PW1. He overpowered PW1 because he was younger and stronger than him. Fortunately, the Prison Officer in charge of the Wazo Hill Prison arrived at the scene of crime and rescued PW1. The appellant was then arrested. Cpl. Veronika Kalungula died two days after, at Muhimbili Hospital where she was rushed for treatment. From the testimony of PW1, a day before the killings, the appellant, PW1, his deceased wife Janeth, and the appellant's lover Vivian had a meeting at the residence of PW1 where the appellant asked for an apology for living with Vivian without payment of dowry, and also for not maintaining her. According to PW1, the appellant impregnated Vivian after completion of her primary school education. Vivian was a daughter of her brother and he lived with her for nine years. She left to live with the appellant when she was pregnant. The appellant did not pay dowry for her. The response from PW1 in that meeting was that the appellant could continue living with Vivian so long as they loved each other. He was not of the opinion that the appellant really intended to pay any dowry for her. As for the late Vivian, she did not make any comments.

Another eye witness to the killings was No. 988 Sergeant Asha Bakari. She was also working at the Wazo Hill Prison. Her testimony was that on the date of the incident, as she heard the gun shots, she rushed to

the scene of crime with the late Cpl.Janeth Hamis and Cpl. Veronica Kalungula. They found Vivian and Happiness lying on the ground and the appellant standing nearby. When he saw them, he picked up the gun. In the process of saving their lives, they all ran away. However, it was only herself who managed to escape death. Cpl. Janeth and Cpl. Veronica were shot by the appellant. Janeth died on the spot but Veronica died two days later.

It was from these facts that the appellant was charged with the four counts of murder alleging that he intentionally killed VIVIAN ZEPHANIA MWANJA, in the first count, 1099 CPL JANETH HAMIS in the second count, HAPPINESS CHUNDU @ CHAUSIKU in the third count and lastly, 1104 CPL VERONIKA KALUNGULA in the last count.

During the preliminary hearing, the appellant did not dispute the killings. The proceedings of the trial court state categorically to the following effect:

> "That it is the accused who shot each of the
>
> deceased person. The above facts have
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> been agreed to as not being disputed".

In his defence the appellant said he killed Vivian because Eliza went to his place of work with Eilen, his daughter. As his daughter approached the appellant to greet him, Eliza prevented her from greeting him. This conduct, according to the appellant, greatly disappointed him, and that is why he followed Vivian, her mother, to explain what Eliza did to him. It

was in the process of that discussion that Vivian uttered abusive words to him. In terms of the appellant's testimony, Vivian said the following words to him:

> *"Do I consider myself to be a man among men? If at all I am a man, my daughter Eilen has no father."*

As the appellant inquired from the deceased why she made those remarks, she replied that:

> *"What she had stated was sufficient and I should not bring any nonsense to her. Vivian continued talking and said that I am a fool. She continued saying that I am a fool and that I am as poor as my father. I got annoyed and I shot her with a gun. "*

The gentlemen assessors who sat with the learned trial judge were of the unanimous opinion that the appellant killed with malice aforethought. Regarding the defence of provocation, their opinion was that there was no evidence that the late Vivian spoke those words. In convicting the appellant, the learned trial judge agreed with the gentlemen assessors that there was no evidence that the late Vivian spoke those words, otherwise PW3 and Pw4 would have heard her. His considered opinion was that human experience reveals that words uttered in anger are normally spoken loudly. Furthermore, the learned trial judge observed, the words were simple and were not capable of depriving him of self control. The learned

trial judge said even if the appellant was to be believed that he killed Vivian because of provocation, the question he paused was what about the other three killings committed by the appellant where the victims never uttered any word to him? The learned trial judge rejected the defence of provocation that was raised by the appellant. Regarding the case of **Benjamin Mwasi Vs Republic** [1992] T.L.R.85 which was relied upon by the defence, the learned trial judge said the facts of the case could be distinguished from this case because in the case of **Benjamin** (supra), the appellant killed only one person who provoked him. The learned trial judge was satisfied that the prosecution evidence proved the offence of murder beyond reasonable doubt. He entered convictions for all counts and sentenced the appellant to death.

The learned advocate for the appellant made a brief submission in support of the appeal. He opted to combine both memoranda, but his submission concentrated on the defence of provocation that the words uttered by Vivian to the appellant were provocative and that even when the appellant shot the other persons, he was still provoked. He prayed that the convictions for murder be quashed and the sentence be set aside and be substituted thereto with convictions for manslaughter.

The respondent /Republic supported the convictions and the sentence. On their side, both Mr. Hyera and Mr. Kongola learned State Attorneys said that the defence of provocation could only be availed to the appellant if the killing was limited to Vivian. But as long as it extended to other persons who never spoke a word to the appellant, that defence could not be relied upon by the appellant. They were of the view that the

evidence that was on record proved that the appellant killed with malice aforethought because at the time he shot the other persons he had time to cool his passion.

From the evidence on record and the submission made by the learned advocate for the appellant and the learned State Attorneys for the respondent /Republic the only issue in this appeal is whether the defence of provocation is available to the appellant.

In the case of **Damian Ferdinand Kiula & Charles Vs R** [1992] T.L.R.16 the Court held that for the defence of provocation to stick, it must pass the objective test of whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances. The trial court in this case made a finding that there was no evidence that the late Vivian uttered the words the appellant claimed were spoken by her. We agree with him. The killing was done in the presence of witnesses. Both PW2 and PW3 were present at the scene of crime when the appellant shot Vivian and none of them heard her saying those words. We also share the views expressed by the learned trial judge that, normally, words uttered in anger are spoken loudly. Even assuming that the late Vivian said those words, we do not consider them to be provocative to the person of the standard of appellant who was a Prison Warder because they were simple words which would not make a person pick up a gun and shoot at another person. As a matter of fact, the behaviour of the appellant from the time he followed Vivian leaves a lot to be desired and proves that he had a bad motive. He left his place of employment with a gun without permission from his employer to make a

follow up of a matter, which, for a responsible person, was not urgent. If the problem was that of Eliza preventing Elien from greeting him, that was not an urgent matter to prompt the appellant to abandon the work he was assigned to do and follow Vivian. That matter was trivial and could be sorted out at his free time. This also means that from the time he left his place of employment to the time he arrived at the "shamba" where Vivian was working, he had time to cool down and there was no reason for shooting Vivian in the first place even if she had uttered the words. The totality of the evidence proved a bad malice formed against Vivian on the part of the appellant.

Suppose we were to accept that the appellant was provoked by Vivian, which we do not anyway, what about the rest of the other persons he shot? What did Happiness, the next to be shot by him, say, which provoked him? What about Janeth and Veronica whom the appellant, without any explanation, shot them while they were running away from him? The evidence on record shows that none of them spoke to the appellant before he shot them. In the case of **Herman Nyigo Vs R** [1995] T.L.R. 178 the Court held that, normally the defence of provocation is available in circumstances which would otherwise constitute murder **except for the sudden loss of control of oneself as a result some act which provokes the accused person**. The evidence considered in totality, shows that even if the appellant was disappointed by the behaviour of Vivian, he had time to cool down and he would not have any reason for shooting the rest of the persons he shot.

From the submissions made by the learned advocate for the appellant and the learned State Attorneys for the Respondent, we do not agree with the learned advocate for the appellant that the appellant killed the deceased persons because of provocation. The defence of provocation is not available under the circumstances in which the appellant killed the deceased persons. The killing of Vivian was premeditated. In fact even the decision to shoot himself goes on further to show that he had formed an intention to kill Vivian and then kill himself. That is in itself is corroborative evidence to the murder. As for the rest of the deceased, we are also of the opinion that he desired the consequences of his actions. He shot all the deceased with a gun, a deadly weapon. We find that the appeal is devoid of merit. It is dismissed in its entirety.

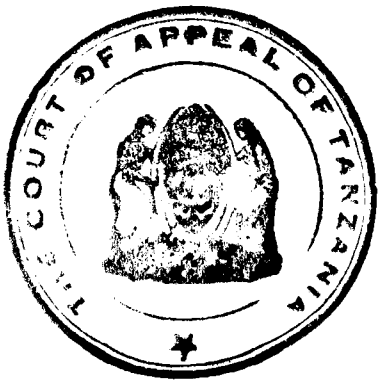
DATED at DAR ES SALAAM this 23rd day of December, 2009.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



N.N. CHUSI
DEPUTY REGISTRAR