

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MUNUO, J.A., NSEKELA, J.A. AND MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 179 OF 2009**

**JENESIA PHILEMON .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Application for Conviction of the High court of Tanzania at Bukoba)**

**( Lyimo J.)**

**dated 8<sup>th</sup> day of June, 2009**

**in**

**Criminal Session No. 50 of 2004**

**.....**

**JUDGEMENT IN THE COURT**

8<sup>th</sup> & 16<sup>th</sup> November, 2011

**MANDIA, J.A.:**

The appellant, JENESIA PHILEMON, was convicted of murder contrary to Section 196 of the Penal Code by the High Court of Tanzania sitting at Bukoba, where Hon. Lyimo, J, sentenced her to death by hanging. She felt aggrieved by the conviction and sentence and has appealed to this court. At the hearing of the appeal she was represented by Mr. Sylveri Byabusha, learned advocate, and the respondent Republic was represented by Mr. David Z. Kakwaya, learned State Attorney.

The memorandum of appeal which Mr. Byabusha filed in this Court has three grounds of appeal which go thus:-

- "1. That the trial High Court of Tanzania sitting at Bukoba erred in admitting the evidence of bad character of the appellant.*
- 2. That the trial Court erred in not obtaining consent of PW2 Philemon Kazimoto to testify against the appellant who is his spouse.*
- 3. That the trial Court failed to consider the defence of diminished responsibility which borders that of insanity."*

Mr. Sylveri Byabusha, learned advocate, started by abandoning ground one of the memorandum of appeal. As for ground two the learned advocate drew our attention to Section 130 subsections (1) and (2) of the Evidence Act, Chapter 6 R.E 2002 of the Laws which is couched in the following terms:-

*"130 – (1) where a person charged with an offence is the husband or the wife of another person that other person shall be a competent but not a compellable witness on behalf of the prosecution, subject to the following provisions of this section.*

*(2) Any wife or husband, whether or not of a monogamous marriage shall be a competent and compellable witness for the prosecution.*

*(a) in any case where the person charged is charged with an offence under Chapter XV of the Penal Code or under the Law of Marriage Act;*

*(b) in any case where the person charged is charged in respect of any act or omission affecting the person or property of the wife or husband, or any of the wives of a polygamous marriage of that person or the children of either or any of them.*

Mr. Byabusha, learned advocate, referred us to the authority of **MATEI JOSEPH v REPUBLIC** (1993) TLR 152 where it was held that the evidence of a spouse in a criminal case contrary to the provisions of S.130 of the Evidence Act, 1967, is inadmissible and of no effect. He also drew our attention to page 13 to 21 of the record which is a transcript of the evidence of PW2 Philemon Kazimoto, the husband of the appellant, where he testified for the prosecution against his wife who is the appellant. There is no record that the court has complied with sub-section (3) of Section 130 which goes thus:-

" 130 (1).....  
.....

(2) .....  
.....

(3) *Where a person whom the court has reason to believe is the husband or wife or, in a polygamous marriage, one of the wives of a person charged with an offence is called as a witness for the prosecution the court shall, except in the cases specified in subsection (2), ensure that person is made aware,*

*before giving evidence, of the provisions of subsection (1) and the evidence of that person shall not be admissible unless the court has recorded in the proceedings that this subsection has been complied with"*

The information filed against the appellant was not under chapter XV of the Penal Code which means the trial court should have complied with the mandatory provisions of subsection (3) of Section 130. Compliance under subsection (3) means the court making the witness aware that he/she is not compelled to testify against his/her spouse, and then putting it on record that the court has made the witness aware of that fact. This has not been done in the present case so the evidence of PW2 Philemon Kazimoto is declared inadmissible and expunged from the record. Fortunately Mr. Kakwaya, learned State Attorney representing the respondent Republic conceded that Section 130 has been observed in default. We accordingly allow the second ground.

To be able to appreciate ground three in the Memorandum of Appeal we feel there is need to give a short resume of the case against and for the appellant.

PW3 Olive Kazimoto is a sister to Philemon Kazimoto, the husband of the appellant. PW4 Johansen Simeon who now lives at Kakanja village in Kimuli ward, Karagwe District was a neighbour of Philemon Kazimoto and the appellant, and he (PW4) testified that his house and that of Philemon Kazimoto were one hundred paces apart as neighbours, and, they used to visit each other frequently. Both PW3 Oliva Kazimoto and PW4 Johansen Simeon testified that Philemon Kazimoto and the appellant had a stormy marital relationship and they used to quarrel every now and then. PW3 Oliva Kazimoto testified that during one of the quarrels the appellant ran away from the matrimonial home and stayed away for one year. In the absence of the appellant, Philemon Kazimoto got married to the deceased. When the appellant received news that Philemon Kazimoto had got married to the deceased she left the home of her parents where she had run away to, and returned to the matrimonial home. It is the evidence of PW3 Olive Kazimoto that her brother Philemon Kazimoto built two separate houses for

each of his two wives, and used to spend two nights with each of them in turn, but the appellant always pestered Philemon Kazimoto to throw away the deceased from the matrimonial home. PW3 Oliva Kazimoto deposed that the threats increased and a reconciliatory meeting had to be called by the street chairperson where the appellant threatened to set the deceased's house on fire if the deceased did not leave the matrimonial home, as she accused the deceased of taking over her property. Both PW3 Oliva Kazimoto and PW4 Johansen Simeon testified that on 28/9/2001 Philemon Kazimoto left home for Kakuleijo village where he had gone to pay dowry on behalf of his stepfather. Round about 9 p.m on the late evening of 28/9/2001 PW4 Johansen Simeon heard noise and drumbeats from the house of Philemon Kazimoto. He went over to see what was happening, and found the appellant with her two brothers playing drums and drinking, though he did not inquire on what kind of drink they were taking. At around midnight PW3 Oliva Kazimoto and PW4 Johansen Simeon were woken up by alarms about fire. On going out they found the deceased's house on fire. The two witnesses testified that the deceased came out of the house alive but all her clothes except the underskirt had been burnt and her body had been burnt too. The deceased kept

repeating that it was the appellant who had set her house on fire. PW4 Johansen Simeon took the deceased to Kamagambo Dispensary on his bicycle where she died. On the morning of the following day 29/9/2001 the appellant was arrested and taken to the police.

On 3/10/2001 PW5 C1555 Detective Station Sergeant Abel recorded a cautioned statement from the appellant which he tendered in court as Exhibit P4 and on 5/10/2001 PW Jane Andrew, a Principal Primary Court recorded an extra-judicial statement from the appellant which she tendered in court as Exhibit P5.

In her defence, given under oath, the appellant testified that he got married to the appellant in 1985 and they got five issues together. The appellant alleged that her marital quarrels started in 1989 when their fourth child died and the cause was over the raising of their children. She left her matrimonial home and went to stay with her parents for one year because of the quarrels, and in her absence her husband married the deceased. Her husband then went to ask her back and she agreed to go back, only to find the deceased occupying the matrimonial home. Her



husband then moved the deceased to another house but when she moved the deceased took away everything including beddings. The appellant asserted that the deceased's house was built on the family shamba, and the deceased used to harvest and keep all the beans and coffee harvested from the shamba, and that this went on for two years. The appellant contended that on the fateful day i.e. 28/9/2001 at about 11 a.m she went to cultivate her shamba. She met the deceased who was also working in her shamba. The deceased addressed her thus:-

*" Wewe utaendelea kukaa uchi pamoja na familia  
yako kwa kuwa maharage unayopanda nitakula  
mimi."*

The appellant testified that what the deceased told her made her feel bad, and she left her shamba and went home where she packed up ready to go back to her parents. When she found her first born, a girl crying over her intention to leave, she (appellant) changed her decision and resolved to set the deceased's house on fire so that she makes the deceased as desperate as herself. The appellant also told the trial court that the deceased's house had only one door, and when she set fire to it she knew the deceased was inside.

While submitting at the end of the trial, Mr. Katabalwa, learned advocate representing the appellant during the trial, raised the defence of provocation. His line of defence is that the acts of the husband in depriving the appellant of matrimonial support in the form of the necessities of life put the appellant under extreme pressure, incited and provoked the appellant. The gentlemen assessors rejected the defence of provocation and returned a unanimous verdict of guilty. The trial court considered the defence of provocation and dismissed it. The trial court found, as a matter of fact, that the appellant made repeated threats to set the deceased's house on fire before the fateful incident. The trial court also discussed the legal definition of provocation as it applies to the facts of this case. The trial court found as a fact that the deceased's house was torched at about midnight, and that two hours before at about 9 p.m. the appellant was found to be in a celebratory mood, drinking and playing drums with her brothers. The trial court also found it as a fact that the appellant harboured a belief that the deceased had encroached on her matrimonial reserve and planned to eliminate her. To this effect the appellant went over to the deceased's grass thatched house when the deceased was asleep at midnight, and while knowing that grass is highly

had no intention to kill and read malice in the appellant's actions and convicted her for murder.

We have dealt with two grounds of appeal- the first ground which the learned advocate for the appellant has abandoned, and the second one which we have allowed. There remains the third ground in which the appellant is raising diminished responsibility as a ground of appeal. The first comment we want to make is that at no point during the trial did the defence raise the defence of diminished responsibility. In the High Court what was raised as a defence was provocation, and this is the defence upon which the judgment of the trial court is based.

In the third ground the appellant is railing the trial court for failing to consider the defence of diminished responsibility. The record however shows clearly that the appellant did not put up a defence of diminished responsibility in the trial court. Rather, she put up a defence of provocation which failed to hold in the trial court, and she did not prefer an appeal against the decision of the trial court which dismissed provocation

as a defence to criminal liability which the appellant raised. Our mind is drawn to Rule 72 (2) of the Court of Appeal Rules, 2009, which states:-

"72. (1) .....

.....

(2) *The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, **which are alleged to have been wrongly decided** (emphasis added).*

(3).....

(4).....

(5).....

The basis of a memorandum of appeal is, in the case of the Court of appeal, the decision made in the High Court. If it is a first appeal the

grounds of objection should specify the points of fact/law which have been wrongly decided, and if it is a second appeal only the points of law which have been wrongly decided. In introducing a ground of appeal which has not been the subject of discussion during the trial in the High Court, the appellant is in offence of Rule 72(2) of the Court of Appeal Rules. On the other hand the appellant did not challenge the holding of the trial High Court that the defence failed to establish the defence of provocation in the High Court. On our part we decline to entertain the defence of diminished responsibility for the reasons we have given. Having gone through the proceedings of trial in the High Court we are satisfied that the trial High Court was justified in its conclusion. We are satisfied that the appeal has no merit and we dismiss it in its entirety.

**DATED** at **MWANZA** this 11<sup>th</sup> day of November, 2011.

E. N. MUNUO  
**JUSTICE OF APPEAL**

H. R. NSEKELA  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original



P.W. BAMPIKYA

**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**