IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MBAROUK, J.A. MASSATI, J.A., And ORIYO, J.A.

CRIMINAL APPEAL NO. 16 OF 2010

CHARLES WANKUMBA @KASANDA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment/decision of the Resident Magistrates Court of Sumbawanga at Mpanda)

(W.P. Ndyansobera, PRM, EJ)

dated 11th day of December,2009
In
PRM Criminal Sessions Case No. 54 of 2006

JUDGMENT OF THE COURT

Date 23 & 30 June, 2011
ORIYO, J.A.:

The appellant, Charles Wankumba @Kasanda was condemned to death by Mr. W.P. Ndyansobera, Principal Resident Magistrate exercising Extended Jurisdiction (PRM, EJ) at Mpanda, Sumbawanga on 11 December, 2009. The appellant had been charged with and convicted of the offence of murder of one Ndaboroheye @ Ndabo s/o Josam on 30 April 2005 at Usevya Village within Mpanda District, Rukwa Region. Dissatisfied, the appellant has come to this Court appealing against the conviction and sentence. The Memorandum of Appeal filed by Mr. Mika Mbise, learned

advocate on behalf of the appellant contains only two grounds of appeal, namely:-

1. The trial court erred on its failure to consider the defence of provocation which was clearly found in the evidence brought by both the prosecution and the defence.
2. The trial court erred in convicting the appellant with murder when the evidence available on record is to the effect that the death of the deceased resulted from a fight, hence manslaughter.

The facts at the trial briefly stated are that a quarrel ensued between the deceased and the accused over a debt of Tshs 50/= which the deceased owed the appellant on account of sugar cane the accused had sold to the deceased. When the appellant insisted on being paid, the deceased refused and slapped the appellant. Apparently in reaction to the slap received, the appellant stabbed the deceased once in the chest using a knife. Thereafter the appellant fled from the scene. The deceased collapsed and subsequently died of haemorrhagic shock. So the fact of killing the deceased was not in dispute after the appellant admitted in his cautioned statement to have stabbed the deceased with a knife. The controversy at the trial was whether the act of the accused amounted to

the offence of murder. The learned trial Principal Resident Magistrate, (Extended Jurisdiction), answered the controversy in the affirmative.

Submitting on the first ground of appeal, Mr. Mbise, learned advocate, made some elaboration thereon but did not have much to tell us as the ground of appeal appeared to be straight forward. In support thereof, he referred us to the decision of this Court in the case of **Katemi Ndaki vs Republic** [1992] TLR 297, where the trial court had failed to address itself on the issue of provocation raised in the trial. The assessors were not addressed on the question of provocation, either, the same situation as it happened in this case.

On the second ground of appeal, Mr. Mbise submitted that as death occurred as a result of a fight, which the trial court accepted, the appellant should have been found guilty of manslaughter and not murder.

Mr. Prosper Rwegerera, learned State Attorney who represented the Republic did not resist the appeal. Since the Republic declined to support the conviction for murder; Mr. Rwegerera agreed with the submissions made by Mr. Mbise. He stated that the incident took place in a quarrel-

some atmosphere whereby the deceased slapped the appellant for the latter's demand of shs 50/= from the former being the price of sugar cane the deceased had bought from the appellant, but the deceased refused to pay. On this, Mr. Rwegerera referred us to the testimonies of PW5, Alex Oscar Chenchela and the appellant's own defence. In support, the learned State Attorney referred us to the case of **Moses Mungasiani Laizer @ Chichi vs Republic** [1994] TLR 222. Just like Mr. Mbise, Mr. Rwegerera urged us to convict the appellant on the lesser offence of manslaughter.

The issue for our determination here is whether the defence of provocation is available to the appellant in the circumstances of this case. Fortunately, this is not a virgin ground as this Court has pronounced itself on the defence of provocation a number of times. For instance, in the case of **Damian Ferdinand Kiula & Charles vs Republic** [1992] TLR 16 this Court reiterated the principle to be followed, as hereunder:-

> "For the **defence of provocation to stick,** it must pass the objective test of **whether an ordinary man in the community in which the**

accused belongs would have been provoked in the circumstances" [Emphasis added]

The same principle was echoed in **Katemi's case** (supra) where the Court held:-

> "the omission to address the issue of provocation raises doubts as to whether an ordinary person of the community to which the appellant lived would not have been provoked by the deceased's outlandish behavior. The doubt is resolved in favour of the appellant."

In the instant case, apparently, neither in the judgment nor in the summing up to assessors did the learned trial Principal Resident Magistrate, (Extended Jurisdiction), mention the possibility that the appellant may have been provoked by the deceased's unexpected behavior. In our view, given the circumstances of the case, we think that had the trial court, in the course of summing up to the assessors, addressed them on the question of whether the deceased's abrupt behavior of slapping the appellant when the

latter was demanding his rightful pay of Tshs 50/= could have provoked an ordinary person within the appellant's community of Usevya Village, Mpanda District, the situation would have been different. This omission by the trial court has left us to venture in speculation, to say the least. This is so as we are not in a position to say what would have been the opinion of the assessors on the question of provocation, if the fact had been put to them.

As for the second ground of appeal on the defence of the death having occurred in the course of a **fight** and the appellant accidentally stabbed the deceased, the learned trial Principal Resident Magistrate, (Extended Jurisdiction) properly addressed the assessors. However in the judgment, the trial court sated as follows:-

> ".... in the present case however, there was no evidence that there was any fight between the accused and the deceased. This is clear from the evidence of PW5, the accused's cautioned statement (Exh. P3) and his sworn defence. The

evidence is to the effect that there was no fight but a quarrel"

Here, the learned Principal Resident Magistrate Magistrate, (Extended Jurisdiction) was prepared to accept that there was a quarrel between the appellant and the deceased on Tshs 50/= the latter owed the former. But he did not go further to infer from the obtaining circumstances that the act of the deceased to slap the appellant in the course of the quarrel; a fight could have ensued in the process and the appellant fatally stabbed the deceased with a knife.

In **Moses Mungasian Laizer alias Chichi v. R** (supra) the Court stated:-

"... it has been said times without number, and we would like to reiterate, that where death is caused as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder."

We are inclined to think, as already stated, that had the trial court properly directed its mind to the defences of provocation and that the incident occurred in the course of a fight, it would have come to a different conclusion. We say so as we are convinced that the omission by the trial court to particularly address the assessors on the objective test of provocation, may have occasioned a failure of justice to the appellant as he was deprived of the benefit of the defence.

We are of the considered opinion that, as the omission creates doubts as to what the assessors opinion would have been, such doubt must be resolved in favour of the appellant.

Accordingly, we find the appellant not guilty of murder but guilty of the lesser offence of manslaughter contrary to section 195 of the Penal Code Cap 16, RE 2002. The conviction of murder is quashed and the sentence of death is set aside.

As for the sentence to be imposed, we have taken into account the fact that the appellant has been incarcerated since his arrest on 2 May, 2006. We sentence the accused to seven (7) years imprisonment to

commence from the date he was convicted and sentenced on 11 December, 2009.

DATED at **MBEYA** 28th day of June, 2011.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL