IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NSEKELA, J.A., MASSATI, J.A And MANDIA, J.A.)

CRIMINAL APPEAL NO. 210 OF 2010

GOBETH CLEOPHACE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania, at Bukoba)

(Mzuna, J.)

dated the 20th day of July, 2010
in
Criminal Session Case No. 34 of 2008

JUDGMENT OF THE COURT

14th & 18th November, 2011

NSEKELA, J.A.:

The appellant, Gobeth s/o Cleophace was charged with an offence of murder under section 196 of the Penal Code Cap. 16 R.E. 2002, in the High Court (Mzuna, J.) sitting at Bukoba. He was found guilty and upon his conviction, the mandatory death penalty was imposed. He has now appealed to this Court.

The appellant was the husband of the deceased, Zephrina Gobeth who was found dead in their matrimonial home which had been gutted by fire. The appellant's neighbours, PW1 Revenary Leornard and PW2 Reticia Revenary, managed to forcibly open the appellant's house which apparently had been locked from inside. On their gaining entry into the house, they saw the appellant coming out of a room and inside saw the deceased lying prostrate. She had cut wounds on the head and shoulder. The post-mortem examination conducted by PW4 Dr. Fidelis Nyanda Mabula, showed that the deceased died as a result of "severe haemorrhage/burns."

At the hearing of the appeal Mr. Constance Mutalemwa, learned advocate, represented the appellant and Mr. Pius Hilla, learned State Attorney, appeared on behalf of the respondent Republic. Mr. Mutalemwa abandoned the memorandum of appeal filed on the 2.11.2011, but with leave of the Court, he preferred a single ground of appeal in which he invited the Court to find that there was a fight between the appellant and the deceased spouse. With this finding, Mr. Mutalemwa contended, the

trial court should have convicted the appellant with the offence of manslaughter and not murder as was the case.

The anchor of Mr. Mutalemwa's submission was the appellant's cautioned statement, exhibit P2. He contended that the appellant stated that there was a fight between the appellant and the deceased, and the trial court made a finding to the effect that that was good evidence. In support of this was submission, the learned advocate referred to the case of **Republic v Cheka Anthony** [1985] TLR 75 (HC) which held that when death occurs as a result of a fight, unless there are exceptional circumstances, persons who cause death are guilty of manslaughter and not murder. The learned advocate added that the appellant had not planned to kill his spouse.

On his part, the learned State Attorney, grounded his submissions on section 200 (a) and (b) of the Penal Code, Cap. 16 R.E. 2002. He submitted that the appellant intended to cause grievous bodily harm. The deceased was cut with a panga on the head and shoulder. The use of a sharp instrument was uncalled for. In addition the conduct of the

appellant was highly suspect. He set the house on fire, and did not raise an alarm. This was indicative of bad motive citing **Moses Michael @ Tall v Republic** [1994] TLR 5.

Section 196 of the Penal Code which the appellant was alleged to have contravened provides that:-

> "196. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder"

Indeed, the appellant has not appealed against the finding of the trial court that it was the appellant who killed the deceased. The next issue to consider is whether he killed the deceased of malice aforethought. "Malice aforethought" is defined in section 200 of the Penal Code. The relevant paragraphs (a) and (b) of the section state:-

"200. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

(a) An intention to cause the death of, or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;"

The post-mortem examination conducted by PW4 Dr. Fidelis Nyanda Mabula, on the body of the deceased showed that the deceased died as result of "severe haemorrhage/burn. (exhibit P3). In his sworn evidence, he stated as follows:-

"According to my report, I said cause of death was due to "severe haemorrhage/burn." When a person undergoes severe haemorrhage that can contribute to the large extent on the death of a person. Although I said burn contributed to her death but it was secondary to the major one which was severe haemorrhage."

In addition, PW4 testified that there was deep cut wound on her (deceased's) back between the neck and head and also a cut wound on the shoulder. These were the severe injuries sustained by the deceased leading to severe haemorrhage. By inflicting these wounds, the appellant must be deemed to have known and by inference knew that his act was likely to cause the death of the deceased, but was at that moment indifferent as to whether death ensued or not. We therefore find that the appellant in terms of paragraph (b) of section 200 of the Penal Code, killed the deceased of malice aforethought.

The learned advocate made a valiant effort to convince us that before the appellant killed the deceased there was some sort of fight between them. With due respect to the learned advocate, we are not persuaded with this submission. In his cautioned statement, which was admitted in evidence as exhibit P2, the appellant stated in part as follows:-

> "Ninakumbuka siku za nyuma kama mwezi mmoja hivi nyuma kulitokea ugomvi kati yangu na yeye na ugomvi huo ulikuwa haujaisha. Kisa cha ugomvi huo ni kwamba mimi nilimwachia samaki auze na baada ya kumaliza kuuza yeye alikataa kunipa fedha hizo na ndiyo ugomvi uliendelea hadi jana 18.9.2005. hivyo muda huo wa 18.9.2005 saa 11.30 hrs niliona mtu anamkata mke wangu panga kichwani/kisogoni na kwenye mabega. Mimi sikupiga kelele ndipo mimi nilipoona mke wangu ameanguka na kufariki ndipo niliamua nichome nyumba hiyo moto ili sote tufe humo ndani."

This extract form the appellant's cautioned statement shows a couple of things. First, there is no evidence that there was any physical confrontation/encounter between the deceased and the appellant, only verbal exchanges. These verbal exchanges must be followed up by physical confrontation in order to lead to a fight worth of consideration to reduce a charge of murder to manslaughter. A fight should trigger some defence known under the law such as provocation, self-defence. A fight *perse* is not enough. Apart from this, the appellant in his sworn evidence said:-

> "I had no quarrels with my wife."

With respect, we have been unable to trace on the record any scintilla of evidence to establish that there was indeed a fight. There is another piece of evidence that points to the contrary. In his cautioned statement, the appellant also stated that he saw an unnamed person who slashed the deceased on the head and neck with a panga. This is obviously an exculpatory statement intended to let him off the hook. He was passing the buck to an unnamed person as being responsible for killing

his wife. Surely, this is inconsistent with the earlier version that there was a fight between him and the deceased.

We therefore unhesitatingly decline the invitation from Mr. Mutalemwa, learned advocate for the appellant, that there was a fight. With this conclusion, the appellant's sole ground of appeal, crumbles.

In the result, we dismiss the appeal in its entirety. It is so ordered.

DATED at MWANZA this 16th day of November, 2011

H. R. NSEKELA

JUSTICE OF APPEAL

S. A. MASSATI

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