

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 284 OF 2009

ALOYCE KITOSIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Judgment of the High Court
of Tanzania at Iringa)**

(Mkuye, J.)

dated the 21st day of August , 2009

in

Criminal Sessions Case No. 23 of 2007

JUDGMENT OF THE COURT

4th & 6th December, 2012

KILEO, J. A.

The appellant was convicted of the charge of murder in the High Court of Tanzania sitting at Iringa. Through the services of his learned advocate, Mr. Alfred Kingwe he has preferred this appeal on the following two grounds:

That the trial judge erred in law and fact in convicting and sentencing the appellant as she did while the prosecution had failed to prove the case beyond reasonable doubt and;

That the trial judge erred in law and in fact in not considering the appellant's evidence and therefore convicting and sentencing him to a lesser offence of manslaughter.

The deceased and the appellant were husband and wife. The fact that the appellant caused the death of his wife was not disputed. The question to be resolved is whether the killing was with malice aforethought so as to make the killing murder.

In advancing the case for the appellant, Mr. Kingwe submitted that the death of the appellant's wife had its source from a quarrel and a fight between the deceased and the appellant. It was Mr. Kingwe's contention that this set of circumstances negated malice aforethought on the part of the appellant as no evidence was led to show that the appellant predetermined to kill the deceased. Mr. Maurice Mwamwenda, learned Senior State Attorney who appeared for the Republic did not support the conviction for murder. He conceded that the fact that there was a quarrel

and a fight which preceded the killing and the fact that both the deceased and the appellant had been drinking prior to the incident raised doubt on the question of malice aforethought which ought to have been resolved in favour of the appellant.

On our part, after having carefully studied and evaluated the evidence that was tendered at the trial we agree with both learned counsel that malice aforethought which is an essential element in a charge of murder was not proved beyond reasonable doubt.

As submitted by both counsel, there was evidence which was not seriously challenged that there was a quarrel and a fight between the deceased and the appellant which culminated in the death of the deceased at the hands of the appellant. According to the appellant, the deceased had quarrelled with another lady at a pombe shop earlier on in the day. He had tried to resolve the quarrel but instead the deceased turned on him and a quarrel ensued between them. He went home and when the deceased returned at around 20:00 hrs he asked her why she had been quarrelling at the pombe shop. The appellant stated at the trial that upon querying her about the quarrel the deceased started beating him using her fists. He fell down and

it happened that there was an iron rod which he picked up and used it to hit the deceased.

The only eye witness at the trial was the couple's child whose evidence did not rule out the fact of a quarrel and a fight between the deceased and the appellant. Moreover she could not have the details of what was taking place between her parents as she was inside while the incident was taking place outside.

It has been stated by this Court that where death occurs as a result of a fight or on account of provocation the killing is manslaughter and not murder. - See for example, **Juma Kilimo v Republic** - Criminal Appeal No. 70 of 2012 (unreported).

Since the killing in this case was a result of a fight the element of malice aforethought was negated.

In the circumstances we allow the appeal. The conviction for murder is quashed and the sentence of death imposed is set aside. We replace the murder conviction with conviction for manslaughter. We will give the sentence for manslaughter after hearing the parties on the same.

DATED at IRINGA this 5th Day of December 2012i

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL