IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 120 OF 2013

MANYUSI KIHONGOSI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Mkuye, J.)

Dated 26th day of October, 2011
in
Criminal Session Case No. 35 of 2008

JUDGMENT OF THE COURT

31st July & 5th August, 2013

LUANDA, J.A.:

The appellant Manyusi s/o Kihongozi was convicted of the murder of his wife one Asia d/o Mhina. The High Court (Mkuye, J.) sentenced him to suffer death by hanging. The appellant has come to this Court on appeal in a bid to have the conviction altered to one of manslaughter.

From the evidence on the record and the finding of the trial High Court it is not disputed that Asia d/o Mhina is dead and she died an unnatural death. Further that the appellant is the one who caused her

death. What fell for consideration and determination, therefore, was whether the killing constituted murder or manslaughter. The High Court as earlier said, found out that the appellant killed the deceased with the necessary intent that is, malice aforethought.

The prosecution called five witnesses. The prosecution case was built on the cautioned statement (Exht. P2) produced by Ex-Police Officer Onesmo s/o Oswald (PW1), Extra Judicial statement (Exht. P3) produced by the Primary Court Magistrate one Mwinyiheri Kondo (PW2) and two eye witnesses namely Asha Mbilo (PW3) and Bernard Mgidanye (PW4).

According to the cautioned statement, the Extra Judicial statement produced, and those two eye witnesses, the prosecution case was to the following effect:- On the fateful day around 6:00 p.m. the appellant left his homestead and went to a pombe shop to conduct business of selling French fry (chips), and small items like soap and cigarettes leaving the deceased behind. On arrival, the appellant started preparing chips by peeling potatoes. Later the deceased joined him.

When his wife arrived, he went to the kitchen to fry the potatoes and the deceased took over. Shortly thereafter, a young man going by the

name of Wiski s/o Kagine arrived. The appellant had long suspected him to have a love affair with his wife (the deceased) and he also suspected him to have stolen his bicycles some days back. Wiski talked to the deceased of which he eavesdropped. Wiski was telling the deceased that he will way lay the appellant and hit him with an iron bar because he was circulating information that he was the one who stole his bicycle. On hearing that the appellant went to where the two were. Wiski took to his heels. The appellant asked the deceased what they were talking about, the deceased did not reply. Instead she took that day's proceeds while holding a knife she used in peeling potatoes and started leaving. The appellant followed her so that she gave him the money; the deceased refused. Then the deceased threw a baby she was carrying on her back and started running. The appellant pursued her. He managed to snatch the knife she was holding. It is at this juncture where PW3 and PW4 saw the appellant chasing the deceased while holding a knife and stabbed the deceased. The deceased fell down and eventually she passed away.

With that evidence, the High Court convicted the appellant as aforesaid and sentenced him to death.

In this appeal, Mr. Rwezaula Kaijage learned advocate appeared for the appellant. Mr. Okoka Mgavilenzi learned State Attorney appeared for the respondet/Republic.

Mr. Rwezaula raised two grounds of appeal, namely:-

1) The trial court greatly erred in law for not properly considering the defence of insanity that aroused a scintilla of doubt and that could have benefited the accused.
2) That the Hon. trial court greatly erred in law by misinterpreting the issue of provocation.

However, in the course of hearing the appeal, Mr. Rwezaula dropped the first ground of appeal.

Mr. Rwezaula was focus and to the point. He said the defence of provocation was available to the appellant. The acts of Wiski's arrival; talking to his wife; the deceased act of taking the money, throwing away the infant and started running before she was stabbed amounted to provocation. The High Court did not properly assess the facts of the case. He referred us to **Said Hemed v. R.,** [1987] TLR 117. He did not adduce facts of the case and what he wanted to underscore. Be that as it may, he

accordingly urged us to find the appellant not guilty of murder but manslaughter.

Mr. Mgavilenzi on the other hand at first opposed the appeal saying the defence of provocation is not available to the appellant. But on reflection, he changed position and supported the appeal.

In convicting the appellant, the learned judge heavily relied on one of the holding in the case of **Damian Ferdinard Kiula & Charles v. R.,** [1992] TLR 16 which reads, we quote:-

> *"The words and actions of the deceased did not amount to legal provocation."*

It is clear that the Court was making reference to the facts of that case where the appellant killed his wife because his wife wanted to leave him because of drunkenness and quarrelsome behavior. This Court said that the killing of the deceased under those circumstances do not come within the purview of legal provocation. The circumstances and reasons for the attack are quite different with our case. We wish to point out that the learned trial judge, in our case, appeared to have not grasped the facts properly. We say so because at page 123 in her judgment she said;-

"The accused's other claim is that he was provoked by the exchange of insults between Wiski and his wife. He also claimed to have been provoked by the deceased's act of talking with WISKI who talked about their plan to ambush and hit the accused with iron rod for suspecting him to have stolen his bicycle."

With due respect to the learned judge, she was wrong. On reading the evidence on record, the following features taking them together are the basis of the appellant's case. First and foremost, the appellant suspected WISKI to have stolen his bicycle and having an affair with the deceased. By going to the place where the appellant was doing business and talk about attacking the appellant to the deceased while knowing the deceased was the wife of the appellant appeared to have confirmed his suspicion. And a husband who loves his wife would not like such conduct. Naturally he would be angry. Not only that the keeping silence of the deceased when she was asked by the appellant what they had talked aggravated the situation. The situation worsened when the deceased took the money and

then she ran away.

The sequence of events narrated above which were done in a short span of time made the appellant loose control of his faculties.

In **Herman Nyigo v. R.,** [1995] TLR 178 this Court said:-

> *"...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 of some act which provokes the accused."*

The killing was done in the heat of passion before he cooled down. The defence of provocation is available to the appellant.

We allow the appeal, set aside the conviction of murder and substitute that of manslaughter. We sentence the appellant to imprisonment for a term of five years effective from the date of the conviction in the High Court.

Order accordingly.

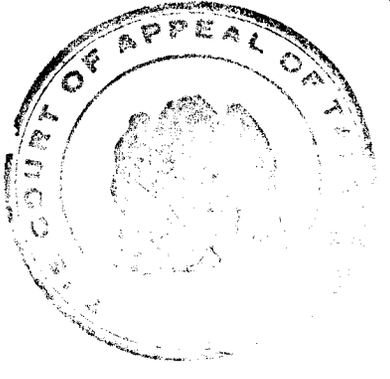
DATED at **IRINGA** this 2nd day of August, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL