

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J.A., MASSATI, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 219 OF 2013

JITEGEMEO GERVAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Songoro, J.)

dated the 25th day of March, 2013

in

Criminal Sessions Case No.127 of 2011

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JUDGMENT OF THE COURT

2nd & 12th October, 2015

KIMARO, J.A.:

The 3rd of February, 2011 was a bad day for Hamida wife of Swalehe. Her right to life was brutally terminated. She was slushed by a “panga” on several parts of her body. Because of excessive bleeding, (haemorrhage) Hamida died. It is alleged in the information for murder that was preferred against one Jitegemeo Gervas, that he, (the accused/appellant) intentionally caused the death of the deceased.

Detailed facts on how the deceased met the brutal death are well explained by the prosecution witnesses. The testimony of D 1175 D/Sgt

Lawrence Mseya (PW7) the Officer Commanding Station (OCS) at Muhange Police Post was that on the date the appellant was alleged to have brutally killed the appellant. Prior to the commission of the offence one Fortunatus Abel, who was the Chairman of Mugambezi suburb went to the police post at about 12.00 p.m., in the company of about thirty villagers. Among the group of the villagers were Hamida w/o Swalehe, (the deceased), Zubeda Lumembe and Astarua Muhoza. The complaint to the OCS was that the three women were arrested with a piece of cloth commonly known as a "sanda" which is used for burying people. On such possession the trio were suspected to have been practicing witchcraft.

PW7 summoned Muhange Masabile, the Village Executive Officer. In the presence of the Village Executive officer, PW7 was assured by the Chairman of the suburb that there was no grave which was dug and the "sanda" removed therefrom. According to PW7 the deceased Hamida w/o Swalehe reported that she found a piece of cloth in the forest but it was not a "sanda". It was that piece of cloth which made her to be summoned by the Chairman of the suburb and they eventually ended up by the matter being reported to the police post. With that information, PW7 warned the villagers to obey the laws and avoid beliefs in superstitions. He found the women who were accused of practicing witchcraft innocent. He required the Village

Executive Officer to protect the three women. PW7 said the appellant was one of the persons who was present at the police station but he did not make any complaint.

After the group of the villagers left the police post, at about 2.00 p.m., one Zubeda Lumembe one of the women being accused of practicing witchcraft in the company of Mussa, the son of Swalehe reported at the police post at about 4.30 p.m. that the deceased, Hamida w/o Swalehe was being attacked by Jitegemee at a place known as Muhange Centre.

In the company of G.2448 D C Ally (PW1), PW7 went to the scene of crime. PW1 who was armed managed to arrest the appellant who had a "panga" and people were following him. He ordered the appellant to surrender and he complied and threw away the "panga" which he had. The deceased, according to the testimony of the two prosecution witnesses was found with cut wounds on the head, cheek, both hands and the right leg. The deceased was taken to a Muhange Dispensary and she died there.

Dr. Thomas Bakuface (PW2) confirmed the death of the deceased. His evidence corroborated that of PW1 and PW2 that the deceased had cut wounds on the head, neck, hands and both legs. His medical opinion was that the deceased died because of massive cut wounds and hemorrhage.

The eye witnesses to the commission of the offence were Eugene Kijeri (PW3), Swalehe Nkulikiye (PW4) the husband of the deceased, Mahita Jonas (PW5) and Zubeda Lumembe (PW6) who was the mother of the deceased and she was also among the persons who were accused with the deceased for involvement in witchcraft practices. The evidence of the witnesses is similar. Except for PW5, the rest said after leaving the police station they went to the place where PW5 used to sell a local brew known as "kwete." PW4 sat at a distance from the rest of the witnesses. As they were drinking their beer, the appellant emerged and walked slowly to the place where the deceased was seated and took a "panga" which was hidden in his clothes and started to cut the deceased with it. Describing how the brutal act took place, PW4 said the appellant without saying a word, took the "panga" he had hidden in his clothes and started cutting the deceased on her head. The deceased tried in vain to protect her head by putting her arms on her head, but the hands were equally cut. She fell down and the appellant mercilessly continued to cut her legs. Eugene Kijeri (PW3) was bold enough to approach the appellant and questioned him why he was cutting a human being like that. The appellant retaliated by following him. Fearing that he would face the same attacks, the witness ran away. Zubeda Lumenda (PW6) also confirmed the attacks on the deceased by the appellant. Elaborating on how

the whole episode took place, the witness said that on the morning of that day, following the finding of that cloth which the villagers thought that it was "sanda," Mussa, complained to the Village Chairman that the deceased, herself and another woman were witches. The complaint was reported to the police post and they were found not to be involved in witchcraft practices. As they were drinking "kwete" at the place where PW5 used to sell the same, the appellant appeared, walked slowly to the deceased and cut her with the "panga" he was hiding in his clothes. As the appellant followed (PW6) to attack her, she ran to the police post and reported the attack.

Malita Jonas (PW5) corroborated the evidence of the eye witnesses to the commission of the offence that they were all seated at the place where he used to sell local brew commonly known as "kwete." The appellant who was not among the persons who were drinking the "kwete" emerged, walked slowly to the place where the deceased was sitting and attacked her with a "panga" which he was hiding in his clothes.

In short that is the summary of the evidence which led the appellant to be charged.

The appellant in his defence did not dispute cutting the deceased with a "panga". He said he did that because he was suffering from a disease known

in his tribal language as "Akabonge." He said he lost his loved ones (his child and wife) three days and seven days respectively, after birth. That affected him seriously particularly on the day that "sanda" was found. He said the sickness was aggravated by the fact that he visited the grave of his wife and found it to have sunk down. He admitted being at the Chairman of the village where the deceased was accused of witchcraft practice but he did not complain that he was a victim of the witchcraft practice from Hamida, the deceased.

Giving his version on why he attacked the deceased, the appellant said as he passed at the place where PW5 was selling alcohol, he heard the deceased boasting that the appellant could not do anything. Instead, it will be the appellant's time to be taken to the police. He said the words uttered by the deceased made him more confused. He went to a person who was selling sugarcane and picked a "panga" and cut the deceased.

On evaluating the evidence given during the trial by the prosecution and the defence, the learned trial judge was satisfied that the appellant killed the deceased with malice aforethought. The learned trial judge convicted the appellant and sentenced him to the sole punishment for murder, which is death by hanging.

Aggrieved by the conviction and the sentence, the appellant filed his own grounds of appeal, which are five. In all the grounds of appeal filed by the appellant his complaint is that there was no proper evaluation of evidence that was given in the trial. That has resulted in a miscarriage of justice on the appellant. In a supplementary memorandum of appeal filed by Mr. Jacob Somi, the learned advocate who represented him at the trial, the complaint is that the learned trial judge failed to consider the defence of the appellant that he committed the offence in a state of confusion. Another supplementary memorandum of appeal was filed by Mr. M.K. Mtaki. It is contended that the learned trial judge failed to consider the defence of provocation that was raised by the appellant.

When the appeal came for hearing, Mr. Mgaya Mtaki, learned advocate represented the appellant. The respondent/Republic was represented by Mr. Ildephonse Mukandara, learned State Attorney. In his submission the learned advocate for the appellant chose to argue grounds two and four of the appellant's memorandum of appeal and the supplementary ground of appeal he filed. He abandoned the one which was filed by Mr. Somi, learned advocate.

Making his submission in support of the second ground of appeal, the learned advocate faulted the first appellate court for failing to consider the

appellant's defence of insanity at the time of the commission of the offence. He said the appellant admitted cutting the deceased but he said he was suffering from a mental disease known as "akabonge." He said although the learned State Attorney said the defence had to be brought to the attention of the Court at the time of preliminary hearing, the learned judge had the obligation to consider that defence and not to ignore it. The learned advocate said that the learned judge was required to send the appellant to a mental institution, under section 220, in order to have the mental status of the appellant examined. Failure to do that, said the learned advocate, amounted to a miscarriage of justice to the appellant.

In ground four, the learned advocate faulted the learned judge for not addressing the defence of provocation. He said from the evidence of the defence, the appellant said he killed the deceased because of the pain and suffering he endured because of losing his wife and child. He said had the learned trial judge considered the defence of the appellant he would have convicted the appellant with the offence of manslaughter and not murder. He cited the case of **Magdalena Sanga V R** [1980] T.L.R.305 to augment his submission. He prayed that the conviction for murder be quashed and sentence of death be set aside and a conviction of manslaughter be substituted thereof.

Counter submission from the learned State Attorney was that the conviction for murder and the penalty which followed consequent to the conviction was proper. In his considered opinion the defence of insanity which the appellant raised at the defence stage was an after- thought. His reasoning was that since the appellant was ably represented by an advocate, if the defence of insanity was a genuine one the appellant would have raised it at the earliest possible time before the trial started. He said his reasoning is supported by the record of appeal at page 11. He said the proceedings of 18th March, 2013 shows that on that day there was a plea bargain. The appellant had, through his advocate, offered to plead guilty to the lesser offence of manslaughter which the prosecution refused to accept. He said if the appellant was desirous of raising the defence of insanity, that was the ideal time for informing the Court about the defence and the prosecution would have been prepared to answer the same in a suitable way. He said the learned trial judge rightly held that the appellant was in a good mental state when he committed the offence and he did so intentionally. He prayed that this ground of appeal be dismissed.

Regarding the ground of appeal on the defence of provocation, the learned State Attorney urged the Court to dismiss the same as there is no evidence to show that the appellant committed the offence because of

provocation. He said the appellant was not heard complaining to anyone that the deceased had bewitched his wife and child. On the date of the incident he was not the one who complained that the deceased was a witch. He added further that the evidence of PW4 was that the grave of the appellant's wife was not tampered with in any way and the "sanda" used to bury his wife taken out of the tomb. He prayed that the appeal be dismissed.

In his brief rejoinder, the learned advocate reiterated that there is evidence at page 71 of the record of appeal that the deceased insulted the appellant and he urged the Court to accept that the words uttered by the appellant showed that he was provoked and that is why he cut the deceased but the attack was not in any way associated with an intention to kill the deceased. He prayed that the appeal against conviction for murder be allowed, the conviction be quashed and the sentence of death be set aside. In its place the appellant should be convicted of manslaughter and sentenced accordingly.

It is apparent from the evidence on record that the fact of the death of the deceased Hamida w/o Swalehe is not disputed. All the prosecution witnesses testified to have seen the deceased dying from injuries of cut wounds inflicted on her body by the appellant. The appellant equally admitted being the one who caused the death of the deceased because of

cutting the deceased with a “panga” on several parts of his body. The Post mortem examination report (exhibit P1) shows that the deceased died from cut wounds.

The only issue before the Court is whether the appellant can benefit from the defences of insanity and provocation which he has raised in his grounds of appeal. Mr. Mtaki said that although the defence of insanity was raised at the defence stage, the learned trial judge had the discretion to consider that defence under section 220 (1) of the Criminal Procedure Act [CAP.20 R.E.2002]. The section provides:-

“When any act or omission is charged against any person as an offence and if it appears to the court during the trial of such person for that offence that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission made, a court may, notwithstanding that no evidence has been adduced or given of such insanity, adjourn the proceedings and order the accused person to be detained in a mental hospital for medical examination.”

The record of appeal shows that the learned trial judge did consider the defence of insanity after considering section 12 of the Penal Code which presumes the sound mind of every person. He made the following finding.

"I revisited the conduct of the accused and the state of mind on the day which he attacked the deceased bearing the presented evidence. To start with, I visited the testimony of PW4 who said he saw the accused at the meeting which took place at the Chairman of the suburb during the morning hours of 3/12/2011. PW4 said he saw the accused attending the meeting, and even the accused in his testimony admitted to have attended the meeting. Then the meeting was closed and people who gathered there went to Muhange Police Station. The accused went to the police station with others. Again at the police Station there was meeting between a group of people who went there and the OCS and PW4 and PW7 said the accused, attentively participated in the meeting by just listening. From the testimony of PW4 and even other witnesses like PW7, the court finds that the accused did not demonstrate any unusual behavior which suggested that he was in a state of mental confusion on that day. It is clear from PW4 and PW7 that in the two meetings which the accused attended, he was in normal behavior and that suggest he was not in a state of mental confusion. In short there is nothing which the court may be convinced that there was something wrong with his mental status on the day he attacked the deceased. In the next step, the court also revisited the conduct of the

accused immediately before the attack by examining the testimonies of PW4, PW5 and PW6 who saw the accused at Muhange Centre before he carried the attack. In short, the above mentioned witnesses briefed the court that the accused was in normal condition.”

The learned trial judge who conducted the trial had an opportunity to observe the conduct of the appellant. After a close scrutiny of the evidence of the witnesses at the two meetings prior to the commission of the offence and at the time of the commission of the offence, we do not think that we have any reason to doubt the rationality of his finding on the mental status of the appellant.

Our finding is supported by the record of appeal at page 11 of the proceedings that took place on 18th March 2013. That is the date when the trial started. Before the trial, there was plea taking. On that day the appellant was represented by Mr. J. M. Somi, learned advocate. There was plea bargain. The appellant through his advocate offered to plead guilty to the offence of manslaughter. The respondent/Republic did not accept that plea. They preferred to proceed with the offence of murder. If the appellant was serious that he wanted to raise the defence of insanity, that was the

opportunity to raise the same. He should have raised that defence under section 219(1) of the Criminal Procedure Act. That section provides that:-

"Where any act or omission is charged against any person as an offence and it is intended at the trial of that person to raise the defence of insanity, that defence shall be raised at the time when the person is called upon to plead."

The rationale for raising the defence of insanity at the stage of plea taking is to give the Court time to comply with section 219(2) and 219(3)(b) of the Criminal Procedure Act. In the case of **Mathias Tamgawizi @Lushinge V R** Criminal Appeal No. 203 of 2014 (unreported) the Court held that:-

"Where it is intended to raise the defence of insanity the most appropriate stage for raising such a defence is when the accused person is called upon to plead. As a general rule, evidence as to an accused state of mind should be called by the defence and not the prosecution but where the accused is unrepresented, the interest of justice may require that the prosecution should call evidence as to the accused's state of mind."

In this case the appellant was defended and he had an opportunity to raise the defence of insanity at the time his plea was taken. See the case of

Phillip Musivi Musele V The Republic (1956) 23 E.A.C.A. 622. The fact that he failed to do so, we are inclined to agree with the learned State Attorney that by raising that defence at the defence stage, that was an afterthought. The evaluation of the evidence of the prosecution witnesses given by the learned trial judge and the conclusion he reached when considering the defence of insanity that was given by the appellant convinces us that no injustice was occasioned to the appellant. This defence was properly considered. We see no reason for faulting the learned trial judge on his finding. The ground of appeal has no merit.

With respect to the learned advocate for the appellant we do not think that the case of **Magdalena Sanga V R** [1980] T.L.R.305 is of any assistance in this case. The Court said that when a defence of provocation is raised by an accused person the trial court must consider that defence.

In the case of **Damian Ferdinand Kiula & Charles V R** [1992] T.L.R.16 the Court held that:-

"For the defence of provocation to stick, it must pass the objective test of an ordinary man in the community to which the accused belongs would have been provoked under the circumstances."

All the three assessors who assisted the learned trial judge were of the opinion that the evidence showed that the appellant had intended to kill the deceased. They opined that had he been suffering from a mental illness he would have shown signs of such suffering. Regarding the cloth which was purported to be a "sanda," the first assessor said it is just a cloth which is normally sold in the shops.

In the case of **Georgina Venance V R** [1992] T.L.R. 84 the Court held:-

"For the plea of provocation to succeed the insult or act complained of must be wrongful, said, done by the person assaulted in the presence of, and directly to the person committing the offence charged."

The learned trial judge revisited the defence that was given by the appellant before he committed the offence and the evidence of the eye witnesses during the commission of the offence and said:-

"Then, the court examined the accused testimony as to why he carried the attack and find from his statement in court that he properly remembers how he carried the attack. To start the accused told the court that he began with going to the person who was selling sugar cane, then picked a panga from him and went to the place where the deceased was sitting

and attached him. Sincerely, the court finds the accused's action of concealing a panga into his clothes as explained by PW3, PW4, PW5 who were present at the scene of crime, indicates a pre-determined preparation of the attack and was intended to prevent the people including the deceased from knowing if the accused had a deadly weapon. I find such made concealment of panga was indicative of a planned attack which always may be carried by a sane person."

Although the learned trial judge said so while still considering the defence of insanity, the observation made also covered the defence of provocation.

In the case of **Georgina Venance** (*supra*) the Court further held that:-

"The conduct of the appellant prior to the killing of the deceased of taking with her a bottle of vermicide in order to kill herself and hiding the panga behind her back before hacking the deceased showed that she had premeditated the death of the deceased and her act was not caused by loss of self-control."

Similar circumstances are found in this case. The appellant attended the two meetings that were held before the killing. He was not the complainant but he was listening attentively. The evaluation of the evidence

on how the attack took place showed that he had time to prepare for the attack. The defence of provocation under the circumstances was not available for him.

Eventually we find the appeal by the appellant having no merit and we dismiss it in its entirety.

DATED at TABORA this 9th day of October, 2015.

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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


Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL