IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CRIMINAL APPEAL NO. 430 OF 2018

EGIDION BILEKEZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mallaba, J.)

dated the 30th day of October, 2018
in
Criminal Session Case No. 20 of 2014

.....

JUDGMENT OF THE COURT

25th November & 3rd December, 2019

MZIRAY, J.A.:

At the High Court of Tanzania sitting at Bukoba in Criminal Session Case No. 20 of 2014, the appellant, Egidion Bilekezi, was charged with the murder of Anchida Egidion, his wife, contrary to section 196 of the Penal Code, Cap 16 Revised Edition, 2002 (the Penal Code). It was alleged that on 7.5.2013 at Itoju Village within Muleba District in Kagera Region the

appellant murdered Anchida Egidion. The appellant protested his innocence.

The brief facts of the case leading to the indictment of the appellant for the charge of murder was that the late Anchida w/o Egidion (the deceased), and her husband Egidion Bilekezi (the appellant), were prior to 7.5.2013 residents of Kamashwa hamlet, Itoju village within Muleba District in the Region of Kagera. The couple had two children, Edison Egidion (PW4) and Elipidius Egidion. PW4 was the only eye witness who saw his father (the appellant), killing his mother (the deceased) on 7.5.2013. In fact, the appellant himself has all through been admitting that he was the one who caused the death of his wife, but that he killed her unintentionally. Given that position, upon his apprehension the appellant was charged with the serious offence of murder. After a full trial, he was found guilty of that offence, convicted and sentenced to suffer death by hanging. He felt aggrieved, hence this appeal to the Court.

On the fateful day, PW4 had planned to go to Izigo for circumcision. On the way, he saw his father around 10:00 am speedily running towards home. Sensing that it was unusual, he began running after him. On arrival

home, he found both the appellant and the deceased in their bedroom. On seeing him, his mother exclaimed that "*Edson baba yako ananiua*", meaning "*Edson your father is killing me.*" The deceased elaborated that "*Baba alitaka kuniua kwa sababu nilikuwa naongea na simu ya Jeradina Machume*", meaning "*Your father wanted to kill me because I was talking over the phone with Jeradina Machume.*" According to PW4, his father reacted by ordering him to immediately leave the room otherwise he would kill him, but he refused to succumb. Upon that, the appellant seized a machete intending to attack him. Wisely, PW4 ran away. The appellant unsuccessfully pursued him, but PW4 tricked him and hid at the fence. He stood at a strategic place where he could see what was going on in his parent's room by peeping through the open window to that room. That way, he was able to see the appellant cutting the deceased on the neck with the machete he was holding. PW4 observed his mother retreating into the sitting room, but she lost strength and fell down on the floor. The appellant trailed her; he once again struck her with the machete on the hand, and one more blow on the neck.

Unfortunately, the appellant realized that PW4 had been observing all what was going on through the window, a fact which infuriated him. Once

again, he pursued him. PW4 ran up to, and hid at the house of Elizabeth Binushu (PW5) who unluckily was not at home at the material time. After sometime, hoping that things had cooled down, PW4 returned home. He found the appellant with a rope in his neck, something which strongly suggested that he intended to commit suicide. Upon seeing his son coming however, the appellant ran away. PW4 entered into the house and found his mother lying on the floor in a pool of blood. Terrified, he hurriedly returned to the house of PW5. Fortunately, he found the latter and informed her of the tragic incident.

On getting that information, PW5 proceeded to the couple's house and found the deceased lying on the floor in a pool of blood as related to him by PW4. They raised alarm and several other people responded and flocked at the scene, including Silas Bilekezi (PW6) who was the appellant's younger brother and Richard Tingebwa (PW1) who was the Ward Executive Officer (WEO) of Izigo Ward. Both PW6 and PW7 said that they saw the deceased's body on the floor, and that it had injuries on the neck, and hand which hugely suggested that they were caused by a sharp object. They also said that the appellant was not at the scene. PW7

contacted the Office Commanding Station (the OCS) who immediately dispatched police to proceed to the scene of crime.

On 10.7.2013 around 9:30 pm, the appellant resurfaced at PW6's home. Unfortunately, he was seen by PW5 who quickly alerted the militia men. They went there, apprehended him and immediately informed the police that they were holding him. The police, among whom was No. E 5189 D/SSgt. James who straightaway went to PW6's home and formerly arrested him. They took him to the Police Station at which, after the usual preliminaries, charged him in court with the offence of murder as it were.

The appellant's defence was that, on 7.5.2013 around 8:00 am he left his home for Izigo Centre to buy fishing equipment. After accomplishing that task, he visited a certain "gongo" pombe shop and drank that stuff for an hour after which he left for his home at which he arrived around 10:00 am. He claimed that on arrival home, he found the front door closed, and had to go to the back door. He called his wife but she did not respond. He pushed that door, entered in the house and went straight to the bedroom in which he found his wife in bed with another man having sex. Unsurprisingly, he said, a quarrel ensued. In the course,

the intruder ganged up with his wife and attacked him. He seized a machete which was in the bedroom and threw it at that man. Unfortunately, it missed him and cut his wife. The intruder bolted away. His wife raised alarm, feeling insecure he ran away and disappeared for about two months. It was after coming back that he learnt that his wife died. He pleaded that he had not hatched the idea of killing his wife. In a way, he had raised three defences; **one** that, he was drunk; and **two** that, the fighting that ensued resulting into his wife's death was sparked by provocation on the basis of the facts he gave and **three**, self defence.

In his appeal to the Court the appellant filed two sets of memoranda of appeal, one which is the original, filed on 1.2.2019 and the other one which is a supplementary memorandum of appeal filed through the services of his advocate Mr. Joseph Bitakwate on 19.11.2019, who apparently represented him also during the hearing of the appeal. On the other hand the respondent Republic was represented by Mr. Shomari Haruna, learned State Attorney.

Mr. Bitakwate indicated to us that in arguing the appeal he will start with the first ground in the supplementary memorandum of appeal and

combine it with ground 1, 4 and 5 in the main memorandum of appeal. Then he will proceed to argue ground 2 in the supplementary memorandum of appeal and connect it with ground 2 in the main memorandum of appeal and further to that he prayed to abandon ground 3 in the main memorandum of appeal, a prayer which was acceded by the Court.

The thrust of the first set of the grounds of appeal is focused on the defence of provocation which the appellant advanced. Mr. Bitakwate took us straight to page 34-38 of the record of appeal particularly to page 35 and argued that the defence of provocation raised by the appellant to the effect that he caught the deceased *inflagrante delicto* in an act of sexual intercourse was blatantly ignored by the trial judge as reflected in the decision of the High Court. He linked this assertion with the evidence of PW7 to the effect that the deceased had only an underwear which according to him it infers that she was caught while having sexual intercourse with another man. He went on to submit that as the incident took five to six minutes, then such time was not sufficient for the appellant to settle his mind and cool his temper. Under such circumstances, it was appropriate for the trial judge to consider all these factors and find the

appellant guilty of a lesser offence of manslaughter, he argued. The learned advocate cited **John Ndunguru Rudowiki v. R** [1991] TLR 102; and **Lucas Ngalyogela v. R** [1994] TLR 29, where it was insisted that where there is provocation the offence should be reduced to manslaughter.

Submitting on the second ground in the supplementary memorandum of appeal, the learned advocate was of the view that the trial judge misdirected the assessors on the defences of provocation and intoxication by failing to address them properly on what circumstances the appellant caused the death of the deceased. On such failure, the trial judge breached the provisions of section 298 (1) of the Criminal Procedure Act, Cap. 20, R.E 2002, he submitted. To cement that argument, he cited to us the case of **Katemi Ndaki v. R** [1994] TLR 201.

As for ground 2 in the main memorandum of appeal, Mr. Bitakwate's major concern was on the evidence of PW4 and PW5. He criticised the evidence of the two witnesses and argued that it was doubtful, inconsistent and unreliable to ground a conviction of murder. He gave an example of the evidence of PW4 as it appears at page 20 of the record of appeal where he failed to tell the trial court the place he was exactly hiding

when the alleged murder was committed also he mentioned that he was with his two young brothers but they were not called as witnesses for the prosecution. It is his contention that the evidence of PW4 had gaps to the extent that the prosecution did not prove the charge of murder instead it established a lesser offence of manslaughter. Having stated that, he insisted that the appellant deserves a lesser offence of manslaughter. When the Court quizzed him a bit, he answered that the defence of provocation and intoxication were considered by the trial court but not satisfactorily.

In response, Mr. Haruna, learned State Attorney submitted that from the evidence on the record, there was no doubt that it was the appellant who killed his deceased wife and the only issue is whether the killing was with malice aforethought. In answer to the posed issue he submitted that based on the evidence of PW1, PW3, PW4, PW5, PW6, PW 7 and exhibit P3 (the postmortem report), there was no doubt that it was the appellant who murdered the deceased. Applying the principle enunciated in the case of **Enock Kipela v. R**, Criminal Appeal No. 150 of 1994 (unreported), which was followed in **Masudi Said Selemani v. R**, Criminal Appeal No. 162 of 2013 (unreported), issues calling for consideration in a case like the instant

one is the type of weapon used, the force applied, the part (s) of the body the injuries were inflicted, the number of blows, the type of injuries, the words uttered prior and after the incident and the conduct of the suspect. Applying the above principles in our case, the learned State Attorney submitted that the evidence of PW4 has clearly shown that the weapon used was a panga and the injuries were inflicted in vulnerable parts of the body and blows inflicted were severe to the extent that some part of the flesh had to be completely separated from the body. The seriousness of these injuries was supported by the evidence of PW7 who confirmed that the injuries were the source of the death of the deceased. From the above, it is the contention of the learned State Attorney that the appellant had intended to kill the deceased.

Submitting on the conduct of the appellant, the learned State Attorney took us back to the evidence of PW4 on which he was chased twice with a panga to leave the scene so that he could not witness the deceased being assaulted. Such conduct according to him imputes malice. He went on to submit that the appellant disappeared from his home for two months without explanation something showing that he was evading the arms of justice. It is his view that a reasonable inference to be drawn

in the above explained conduct of the appellant is that he was responsible for the murder of the deceased. To fortify his argument, he referred us to the case of **Amie Mohamed v. R** [1994] TLR 138. He asked the Court to reject the defence advanced by the appellant that he disappeared fearing to be killed by the people in the community surrounding him.

Reacting on the issue that PW4 siblings were not called as prosecution witnesses, the learned State Attorney submitted that they were still minors and what they would have told the trial court was already explained by their brother, PW4. In addition, he brought to our attention the provisions of section 143 of Tanzania Evidence Act, (cap 6 R.E. 2002), which insist on credibility of witness rather than the number of witnesses required to prove a fact in a case.

With regard to the complaint that the defences of provocation and intoxication were not considered by the trial court, the learned State Attorney referred us to page 72 – 73 of the record of appeal on which the trial judge dwelt much on the two defences raised and according to him the two defences were considered but were found to be untenable. On provocation he cited the case of **Joseph Kamiliango v. R** [1983] TLR 185

in which it held that in a situation where the accused did not act suddenly and he was able to calculate his acts, that does not amount to provocation. He rested his submission by supporting the findings of the trial judge and invited this Court to dismiss this appeal.

In a short rejoinder, Mr. Bitakwate reiterated his earlier position and maintained that the appellant was provoked to find his wife in bed with another man and for what he did there was no time to cool his temper and the prosecution did not establish malice aforethought in the evidence tendered. He was still of the view that the appellant deserved a punishment for a lesser offence of manslaughter.

Having dispassionately considered and weighed the rival arguments from either side, we think that there are two major issues calling for our determination. These are; **one**, whether the prosecution had proved the case beyond all reasonable doubt; **two**, whether the defence case was considered and given the weight it deserved.

We start with the first posed issue. The appellant was charged with the offence of murder under section 196 of the Penal Code. For this offence to stand the prosecution had to establish that there was death

caused by unlawful act, the accused being the one who did it and with malice aforethought. In the case at hand there was no dispute that the deceased faced unnatural death and the only person who was responsible was the appellant. The only contentious issue is whether there was malice aforethought. In the case of **Elias Paul v. R**, Criminal Appeal No. 7 of 2014 (unreported), this Court said thus:-

> *"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case a stone was used and was hit on the head, chest and abdomen which are vulnerable parts of a human body."*

(See also **Said Ally Matola @ Chumila v. R**, Criminal Appeal No. 129 of 2005 and **Bamboo Amma and Another v. R**, Criminal Appeal No. 320 of 2016 (both unreported).

From the evidence at the trial court, PW4, the son of the appellant, who was the sole eye witness to the incident, saw the appellant cutting his mother in the neck using a panga. The trial court observed this witness while testifying on oath and was impressed that he was indeed at the

scene of crime, also that he was a credible witness. In **Ali Abdallah Rajabu v. Saada Abdallah Rajabu and Others** [1994] TLR 132, this Court held, *inter alia*:-

> *"that where the decision of a case is wholly based on the credibility of the witness, then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

On our part, we do not have reason to fault the finding of the trial court that PW4 was a credible witness as his evidence was materially corroborated by PW5 who stated that the neck of the deceased had been cut by a sharp object as a panga. Such evidence is more fortified by the evidence of PW7 who in the postmortem examination he conducted was emphatic that the body of the deceased had a wound on the neck measuring 5 centimeters in width and 8 centimeters long, and another wound at the back of the neck, with the jugular vein totally cut. Considering the nature of the injuries inflicted, we are in full agreement with the learned State Attorney that the killing of the deceased was with malice aforethought as such those injuries fall squarely within the ratio in the case of **Enock Kipela** (supra). We did not see any contradiction in the

evidence of PW4 and PW5 as alleged by the appellant's counsel because the two witnesses were firm that the body of the deceased had a cut wound in the neck.

The appellant attempted to put three types of defences to exonerate himself from liability. These are provocation, intoxication and self defence.

To start with provocation, this type of defence has been stated under section 201 and 202 of the Penal Code, which states that:-

> *"201. When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only."*

Section 202 defines the term "provocation." It reads as follows:-

> *"202. The term "provocation" means and includes, except as hereunder stated, any wrongful act or assault of such a nature as to be likely, when done to an ordinary person, or in the*

presence of an ordinary person to another person who is under his immediate case, or to whom he stands in a conjugal, parental, filial or fraternal relations or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered."

In the instant appeal, in determining whether the appellant's defence of provocation could properly be entertained, we have carefully considered the evidence on record, together with the circumstances surrounding the case like the events which occurred before the incident, the appellant's conduct before and after the event, and we fail to detect any act which would raise a reasonable doubt to establish that the appellant was provoked. In the case of **Kenga v. R** (1991) I EA 145, the Court of Appeal of Kenya sitting at Mombasa held:-

"That the accused does not have to prove provocation, but only to raise a reasonable doubt as to its existence."

The above position is highly persuasive hence we take inspiration to that position.

In the case at hand, when we revisit the defence of the appellant at page 35 up to page 36 of the record of appeal, he alleged to have seen the deceased with another man. With respect, we think this is concoction and an afterthought. Had she been with another man, PW4 his son, would have seen that and testify on this serious allegation before the trial court. Even assuming that he was provoked, something which does not feature anywhere, still he would have time to settle his mind when chasing PW4 twice to prevent him from witnessing the incident. There is nowhere in the testimony of the appellant to show that when the incident happened he was under heat of passion hence lost his self-control. We tend to agree with the trial judge and the learned State Attorney that there was nothing to suggest even at slightest that the appellant was provoked. There is therefore no doubt whatsoever in our minds that there were no provocative acts done by the deceased to justify the murder. In the case of **Saidi Kigodi @ Side v. R**, Criminal Appeal No. 281 of 2009 (unreported), this Court held that:-

"We are of the firm view that the defence of provocation is available to a suspect who kills at a spur of the moment, in the heat of passion before he has time to cool down."

To conclude on this subject, we fully support the finding of the trial judge that the appellant was not provoked when he committed the murder.

We now move to the defence of intoxication. As a general rule intoxication is not a defence of murder as stated in the case of **Republic v. Michael Chibing'ati** [1983] TLR 441. However, section 14 (2) of the Penal Code provides that:-

"Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not understand what he was doing."

The appellant has alleged in his defence that prior to the incident he had consumed a local illicit brew called gongo. He wants now this Court to believe that the killing of his wife was associated with his drunkardness. The case of **Chibing'ati** (supra) has interpreted correctly section 14 (2) of the Penal Code and has explained well under what circumstances the

defence of intoxication can be entertained by the court. The relevant portion reads:-

> *"In a murder charge, intoxication would serve as a defence in three circumstances, namely; where the person charged did not at the time of the act or omission complained of, know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person; where such person is by reason of intoxication insane, temporarily or otherwise or where it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm."*

As rightly pointed by the learned trial Judge, going by the appellant's story, the principles established in the cited case have not been attained. If the appellant's story would have been true, the intoxication must have been self-induced. He did not state anywhere in his defence that the alleged intoxication had put him in a state of temporary insanity. Gathering from the sequence of events in the killing of the deceased, we are wholly convinced that the appellant was alert of what was happening and we are satisfied that he had formed the intention to kill the deceased.

In the circumstances, we consider this defence as a package of lies and dismiss it.

In his submissions, Mr. Bitakwate alleged that the assessors were not properly addressed on the defence of intoxication. That is not true. The record is very clear at page 46 of the record of appeal that the assessors were properly and adequately addressed on the position of the law in respect of the defence of intoxication.

The last defence raised by the appellant is that of self-defence. We think that this area should not detain us. We say so because from the appellant's own version when testifying, throughout the said episode it was the appellant who was pursuing the deceased. There is nowhere in his evidence to show that the deceased was also armed or retaliated anyhow. The version which he gave in his evidence at the trial would not therefore give rise to a defence of self-defence. We therefore agree with the trial court that self defence does not apply in the circumstances of this case.

Lastly, we think that the appellant's decision to abscond draws an irresistably adverse inference against him that he was aware of what he did and he was trying to escape his criminal liability.

From what we have discussed herein above, we find no merit in this appeal. It is accordingly dismissed in its entirety.

DATED at **BUKOBA** this 2nd day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2019 in the presence of Mr. Joseph Bitakwate, learned counsel for the Appellant and Mr. Shomari Haruna, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL