IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 85 OF 2020

NICHOLAUS MGONJA@MAKAA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal against conviction and sentence form the Judgment of the High Court of Tanzania at Tanga)

(Mruma, J.)

Dated the 27th day of May, 2019
in
Criminal Sessions Case No. 22 of 2013

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JUDGMENT OF THE COURT

16th & 23rd Sept, 2020

KITUSI, JA.:

A woman known as Farida Michael @ Tindikali was killed on 24th September, 2012 within Lushoto District in Tanga Region. Her husband Nicholaus Mgonja @ Makaa, now the appellant, was charged under section 196 of the Penal Code [Cap 16 R.E 2002] allegedly for being the one who killed her. There was no dispute that on the material day in the morning, the appellant unexpectedly arrived home from his place of work, pushed open the unlocked door to his bedroom, only to find his wife, the deceased, in bed with another man, both naked.

What followed thereafter is basically told by none other than the appellant himself because the closest to an eye witness was a police officer (PW1) who arrived at the scene of crime minutes after the incident. PW1's brief account of how he got to know about the incident, though not direct on what the appellant did to the deceased, will later be relevant in determining the pertinent questions involved in this case.

On 24/9/2012 PW1 was a sentry guarding the late Ex-President Mkapa's residence at Lushoto District. From where he was, PW1 heard shouts of people and he walked towards the direction of the shouts which was very close to his post. As he was moving, he met the appellant coming from where he was heading. His clothes as well as the machete he was holding were bloody as he was heard shouting – "Nimeua! Nimeua, nendeni kwenye nyumba ile mtakuta mtu amelala!" PW1 ordered the appellant to put his machete down and he put him under arrest, took him back to the house of the late Ex-President and locked him in one of the rooms with his hands tied.

Thereafter, PW1 went to the scene where he found many people, presumably those whose shouts he had earlier heard before getting there. And they were still shouting as they showed PW1 the appellant's bedroom

where he found a woman lying on a bed with cut wounds on her head, ribs and both hands. There was blood all over the room, according to him, and those people told PW1 that the wounded woman was the wife of the man he had locked up in the house he was guarding. PW1 arranged for transport to take the woman to hospital via the police station where a PF3 was issued by D/Sgt Elisante David Tarimo (PW2). However, shortly later, PW1 was informed that the woman had died. Post mortem examination of the body was conducted by Dr. Jumanne Hassan Njiku (PW4). PW1 turned over the appellant to Lushoto Police station, where he was subsequently charged. Photographs taken by PW3, showing cut wounds on the head and arms of a human being were tendered as Exhibit P3 in a bid to establish the nature of the wounds.

The appellant made a sworn statement during defence. He stated that when he found his wife making love with another man on the matrimonial bed, the two reacted by quickly dressing up. Next, the man hit him by using his head and bolted out. When the appellant came by, he found his wife holding a machete and he sensed danger. A fight ensued between him and his wife over the machete and the appellant managed to disarm her but not before both had sustained some injuries in the process. After dispossessing

the deceased with the machete, the appellant said, he hit her on her head with the flaps, while blaming her by asking; "what have you done?" According to the appellant, the woman kept pleading; "don't divorce me, my husband."

It must have been at this point or immediately after, that the appellant went to the late Ex-President's residence to seek police assistance and disclosed to them that his wife had been wounded.

The three assessors who sat at the trial, unanimously returned a verdict of guilty of murder, and the learned trial Judge agreed with them. He convicted the appellant with the murder of his wife and sentenced him to the mandatory death penalty. This appeal is against both the conviction and sentence.

At the hearing of this appeal, the appellant took part from Prison through video link although he was also represented by Mr. Switbert Rwegasira, learned advocate, who was in Court. For the respondent Republic, there were Mr. Waziri Magumbo and Ms. Maisara Mkumba, both learned State Attorneys.

The memorandum of appeal lodged by the appellant consisted of 8 grounds of appeal, but Mr. Rwegasira abandoned some of them and argued only three grounds. These are grounds 1, 2 and 7 which in essence fault the trial High Court for not finding the killing to have been unintentional. We say so because the three grounds of appeal, when paraphrased, are:

1. The trial Judge erred in law and in fact by not concluding that the killing of Farida Michael was not done with malice aforethought.
2. The trial Judge erred in law and in fact by failing to analyze the circumstantial evidence which did not establish mens rea.
7. The trial Judge failed to appreciate that the appellant was not guilty of murder and should have found him guilty of a lesser offence of manslaughter.

The learned advocate moved us to find that there was absence of malice afore thought.

Mr. Rwegasira argued that there was no proof that the deceased suffered deep cut wounds. He submitted that the photographs (Exhibit P3) which the learned trial Judge placed much reliance on, were unreliable because the appellant said they were not of his deceased wife. The learned advocate submitted in addition, that since the photographs do not show the

face of the injured woman it cannot be concluded that they represented the deceased.

Still on the depth of the wounds, the learned advocate submitted that the Post Mortem Report (PMR) tendered as Exhibit P2, was of no assistance either, because it did not describe the size of the wounds inflicted on the deceased woman. He urged us to follow our earlier decision in the case of **Ali Abdallah Kavai v. Republic,** Criminal Appeal no. 159 of 2016 (unreported).

Lastly, Mr. Rwegasira submitted that the conduct of the appellant after the incident by going to the police to seek their assistance, is indicative of the fact that he had no ill intention. He prayed that we find the killing to have been free of malice afore thought.

On the respondent's side it was Ms. Mkumba who submitted in apposition of the appeal. She also argued grounds 1, 2 and 7 generally as did the appellant's counsel. Submitting, the learned State Attorney referred to section 200 of the Penal Code which defines malice aforethought, then citing our decision in the unreported case of **Charles Bode v. Republic**, Criminal Appeal No. 505 of 2016, she submitted that an intention to cause death or grievous harm should be deduced from seven factors. She listed

the factors as; The type and size of the weapon used in the attack, the amount of force used by the attacker, the parts of the body aimed by the attacker, the number of blows, the kind of injuries inflicted, utterances made by the attacker before or after the attack and lastly the conduct of the attacker before or after the incident.

Ms. Mkumba submitted that the seven factors for establishing malice aforethought as listed above were all met in this case, and elaborated by pointing out that the weapon used, a machete, is dangerous, the part of the body, the head, is vulnerable, the number of blows were three and the nature of injuries were cut wounds. She submitted that the photographs are relevant in establishing that the cut wounds were deep and that the reason PW3 did not focus his camera on the injured woman's face is that he was instructed not to.

This being a first appeal, we shall conduct what is in a form of a rehearing as it is usually the case. In performing that duty, we shall consider the evidence for both the prosecution and for the defence, mindful however, that the only evidence as to what took place at the scene, is that of the appellant himself. That is not a novel situation though. It has happened in

other scenarios such as in the case of **Felix Lucas Kisinyila v. Republic**, Criminal Appeal No. 129 of 2002 (unreported).

In our deliberations, we have resolved to ignore the photographs (Exhibit P3) because of the doubt introduced by the appellant suggesting that they are not of his wife. After all, not in every case in which the nature of wounds has to be proved, such proof has to come in a form of the victim's photographs. There is evidence from other witnesses for us to consider regarding the injuries. There is the evidence of PW1 who said he saw the appellant's blood-stained clothes when he went to his post and also the blood that was all over the room at the scene in which he found the injured woman lying. There is also the evidence of D/sgt Elisante David Tarimo (PW2) the police officer who issued a PF3 for the wounded woman's medical examination before she died. He testified that he saw big cut wounds on her head as well as on her hands. There is also the evidence of Dr. Jumanne Hassan Njiku (PW4) who, while performing post mortem examination on the deceased, he saw deep cut wounds on her head and hands. Even without making reference to the report on Post Mortem his evidence as to the nature of the wounds deserves credence. Nowhere were these witnesses impeached on those narrations.

On the other hand, the appellant's account of the incident was, in our opinion, grotesque. First, he said that the weapon used against the deceased had been in her possession before he dispossessed it from her. His story is utterly implausible as we shall demonstrate from the record. At page 42 he said:

> *"I was puzzled – I found darkness. I closed my eyes – they quickly dressed themselves and the man hit me with head. I fell down unconsciously. When I woke up, I saw my wife holding a machete. I caught her and we started to fight. I wanted to take the machete from her. She wanted to run away from me. In the struggle I managed to take the machete from her. We were all wounded. ... I hit her by the side of that machete on her head ..."*

That story suggests things that are highly improbable in that, if all the woman had wanted to do was to run away from him, which we think would have been the natural thing for her to do, why didn't she do it when he was still lying unconscious? Or, if she had intended to attack him by the machete she was allegedly holding, which sounds to us to be odd considering she was the guilty one, why again didn't she do it while the appellant was still lying unconscious?

There is yet another fable. Both in his main testimony and when responding to questions put to him, the appellant maintained that he did not cut his wife. When answering questions put to him by the third assessor, for instance, he stated:

> *"I did not cut her, I hit her by the side of that machete I didn't (sic) gave a first aid. I went to the police to seek assistance. I didn't know that she was seriously injured. She was just pleading with me to pardon her and I told her "hayawezi kwishia hapa."*

Now that story raises eyebrows too. PW1's testimony that the appellant had blood splashed all over his body and that at the scene there was blood all over the surrounding, has not been challenged. One wonders then, that if the appellant did not know that he had caused serious injuries on his wife as he said in the above excerpt, why did he go frantically enlisting assistance of the police telling them his wife had been wounded? We take the evidence of PW1 on this as being sufficient to negate the appellant's assertion that he did not inflict cut wounds.

The last suggestion, though not in clear terms, is that the appellant acted in self defence. We say so because otherwise we would not have been referred to the case of **Ally Abdallah Kavai** (supra). In that case the

deceased died as a result of cut wounds inflicted by the appellant using a machete which he had snatched from him during a struggle. The deceased had intended to use the weapon against the appellant and did in fact use it to cut him. The Court was satisfied that the appellant acted in self defence. The appellant would want us to find that if he had not outsmarted the deceased and dispossessed her with the machete, she would have attacked him.

In our view, that case is not relevant to our case except in showing that the appellant had no known theme of his defence. If the deceased had posed danger to the appellant, which we find hard to go by, she had enough time to execute her attack on him when he was lying unconscious. Even assuming, just for the sake of it, that the deceased intended to attack the appellant, there is evidence from the appellant himself that he started hitting her after dispossessing the machete from her and when she was just begging for forgiveness. One of the assessors, as we shall later see, even asked, why, after dispossessing her with the machete, didn't the appellant stop there? However, in his own testimony, the appellant told the woman who was begging for forgiveness that matters would not end there. Therefore, at the time the appellant was beating the deceased, whether by using the flap of

the machete or by using the sharp edge to cut her, he was not in any danger, so he could not be said to have been acting in self defence.

We agree with the learned State Attorney that the issue of malice aforethought may be deduced from the factors she listed down. It is our conclusion that the circumstances as stated in the testimonies of PW1, PW2, and PW4 lead to no hypothesis other than that the deceased suffered deep cut wounds inflicted by the appellant at the time when she did not pose any danger to him. In the case of **Felix Lucas Kisinyila** (supra), the Court had the following to say with regard to a situation where the evidence implicating the accused comes from the accused himself:

> *"For avoidance of doubt, we must state here that we are not putting the burden of proof on the appellant. But this is one of the cases where a person has been killed, and there is no question about it, and the only witnesses are the accused persons. All that the prosecution can do is to bring witnesses who would tell the court that the accused persons have made confessions before them. The court would then have to scrutinize those confessions very closely".*

By analogy, the appellant admitted hitting the deceased on her head, but disputed doing so as to cause deep cut wounds. On the authority of the

case of **Felix Lucas Kisinyila** (supra), this is the evidence we are going to scrutinize closely too. It is as if, in our view, the appellant is saying he went to the police and said; 'I caused injury to my wife, please come help me'. Then within the same breath he is saying; 'No, I only hit her by using the flap of the machete so I did not cause her cut wounds'. However, since our finding based on the testimonies of PW1, PW2, and PW4 is that the deceased had cut wounds as a result of which she was bleeding profusely, and since these witnesses were not contradicted on that, we find the appellant's denial that he did not inflict those wounds to be a ridiculous lie. The assessors unanimously found the killing to have been premeditated and if we may reproduce excerpts from two of them, they provide interesting insights in their own right. One assessor opined:

> *"They fought and he managed to dispossess his wife of the machete.* ***He ought to stop there. Why did he proceed to cut her?*** *The killing was intended. Why didn't he run away after seeing the wife was holding a machete? So, I opine that the accused is guilty of murder as charged". (emphasis ours)*

And then another assessor said:

"It is not true that the deceased was injured in the process of dispossessing her of the machete. If that was the case (sic) he would not sustain injuries like she did. How comes that she was cut on the head. There is evidence that the accused went to the police who were guarding the house of the retired president while shouting ***nimeua, nimeua.*** *This indicates that he knew what he had done. The accused is guilty of murder".*

We entirely agree with the views expressed by the assessors on the matter. With respect, we also agree with Ms. Mkumba learned State Attorney, and the trial court that the appellant must have intended to kill his wife or cause her grievous harm. From the type of the weapon he used, the machete, to the parts of the body he attacked being on the head, the nature of the injury caused and the number of blows, three blows, there cannot be room for saying he had no guilty intent as defined under section 200 of the Penal Code. It is not in the ordinary cause of things and human behaviour for a man who attacks another to declare that his intention was to kill even if such was his intention. This was said in the case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported), cited in the case of **Charles Bode** (supra):

the appellant's conduct or utterances before or after the incident. It is our conclusion that the appellant killed the deceased with malice aforethought. Consequently, we find no merit in the appeal and we dismiss it in its entirety.

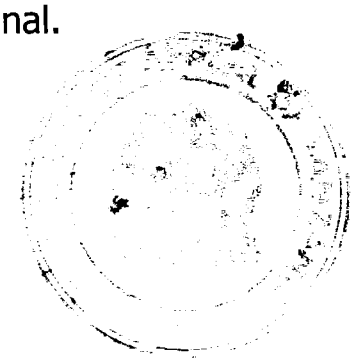
DATED at **TANGA** this 22nd day of September, 2020.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of September, 2020 in the presence of the appellant in person via Video link and Ms. Donata Kazungu State Attorney for the respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL