IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 410 OF 2017

MGONCHORI (BONCHORI) MWITA GESINE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated the 26th day of May, 2017
in
Criminal Sessions Case No. 84 of 2013

.....

JUDGMENT OF THE COURT

28th April, & 5th May, 2021

MKUYE, J.A.:

The appellant, Mgonchori (Bonchori) Mwita Gesine was charged with and convicted of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002 and sentenced to suffer death by hanging.

The brief facts leading to this appeal are as follows: -

The appellant and Nchota Nyansuma Nyamahemba (the deceased) were lovers. the deceased was employed as a bar attendant by the appellant's brother, one Antony Gesine (PW1). It was the prosecution case that on 19th October, 2011, a date before the deceased's death, the

appellant and the deceased were together at the bar where the appellant was having some drinks. At around 21:40 hrs, PW1 closed the bar leaving behind the appellant with the deceased in the room within the premises that was occupied by the deceased.

According to PW1, in the following morning on 20th October, 2011 when he went back to the bar, he found the back door open which, to him, was unusual. He proceeded further to the room occupied by the deceased and found it locked by a padlock. It is then that he became worried and out of curiosity, peeped inside and saw a wick lamp still burning and this prompted him to report the matter to the police.

The police arrived at the scene of crime and broke the door. Upon entry, the dead body of the deceased was found lying in a pool of blood on the bed with an injury on the neck. Postmortem examination was conducted on the deceased's body and it was discovered that her death was due to severe bleeding and asphyxia rubra. The appellant was arrested on 13th October, 2011 and arraigned before the High Court.

In his defence, the appellant did not deny killing the deceased. However, he maintained that he did not kill her intentionally as there erupted a fight that led to her death. He raised the defence of provocation and intoxication being factors which influenced him to kill.

It is noteworthy that, during the preliminary hearing that was conducted on 16th March, 2016, the Postmortem Examination Report of the deceased, the cautioned statement and the extrajudicial statement of the appellant were tendered before the trial court and since there was no objection from the advocate who represented the appellant, the three documents were admitted as Exhibits P1, P2 and P3 respectively.

Upon a full trial, the appellant was found guilty, convicted and sentenced accordingly.

Aggrieved with the High Court's decision, the appellant has appealed to this Court. He initially lodged a memorandum of appeal (substantive memorandum of appeal) comprising of four (4) grounds of appeal. Then, the learned counsel appointed to represent him also lodged another memorandum of appeal (supplementary memorandum of appeal) on only one ground of appeal. At the hearing of the appeal, the appellant's counsel opted to drop grounds Nos. 2 and 3 of the substantive memorandum of appeal and submitted on grounds Nos. 1 and 4 together with the one in the supplementary memorandum of appeal lodged on 22nd April, 2021.

The grounds of appeal which remain in the substantive memorandum of appeal are as follows: -

1. *That, the learned trial judge erred both in law and facts for failure to note that the defence of provocation and intoxication made by the appellant renders the offence of manslaughter.*

2. *That, the evidence of PW1 corroborate the evidence of the appellant that he killed Nchota Nyansuma Nyamahemba unintentionally and also the appellant had a "panga" but it does not imply ill motive.*

The lone ground of appeal in the supplementary memorandum of appeal reads as follows: -

> *1) That, the trial of the case and conviction of the appellant was faulty as the evidence, to wit, exhibits P1, P2, P3 and P4 were tendered and admitted in court in the absence of assessors.*

When the appeal was called on for hearing on 28th April, 2021, the appellant was represented by Mr. Constantine Mutalemwa, learned advocate; whereas the respondent Republic had the services of Mr. Juma Sarige, learned Senior State Attorney.

Submitting in respect of the lone ground of appeal in the supplementary memorandum of appeal, Mr. Mutalemwa contended that, section 265 of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA)

requires the High Court to sit with assessors; and that according to section 298 (1) of the same Act, the trial judge is required to sum up the evidence to the assessors. However, he said, the cautioned statement and the extrajudicial statement were admitted during preliminary hearing in terms of section 192 of the CPA in the absence of the assessors but the same were not read over in court. It was his argument that as the content of the said statements was not read over in court, the assessors did not know the gist of their evidence. He added that, although it may be inferred that their substance was explained in the summing up, that was not sufficient. In the premises, he argued that this was prejudicial to the appellant as the assessors were not informed of the substance of the said documents to enable them give a well-informed opinion. He was of the view that, this anomaly vitiated the whole trial and that it is sufficient to nullify the proceedings, quash the conviction and judgment, set aside the sentence and order a retrial.

As regards ground No. 1 of the substantive memorandum of appeal which was argued in the alternative that the defence of provocation and intoxication of the appellant reduced the offence of murder to manslaughter, it was Mr. Mutalemwa's argument that that defence was not considered by the High Court and urged the Court to re-evaluate the evidence and convict the appellant of the lesser offence

of manslaughter. The learned counsel, then took us to page 58 of the record of appeal where the trial judge observed among others that "*if the defence anticipated raising intoxication or provocation as a defence it would have indicated at the stage of preliminary hearing*". After having done so, he said, this shows the defence was not properly dealt with and hence, misled the assessors on a vital point of law. On that bases he invited us to see it as a ground for nullifying the proceedings of the trial court and ordering a retrial.

With regard to ground No. 4 of the substantive memorandum of appeal which was also argued in the alternative that the appellant killed unintentionally, Mr. Mutalemwa urged the Court to consider the evidence of the appellant that he killed without intention and find him guilty of a lesser offence of manslaughter.

In the end he implored the Court that in the event that it does not agree with him, then in view of the irregularities in the trial, the Court should nullify the proceedings of the trial court and order a retrial before the same judge and the same set of assessors, if they are still available.

In reply, Mr. Sarige took off by declaring that he supported both the conviction and sentence.

With regard to the ground of appeal in the supplementary memorandum of appeal that the assessors did not know the substance of exhibits P1, P2, P3 and P4 which were admitted during the preliminary hearing in their absence, the learned Senior State Attorney submitted that the gist of those exhibits was explained during the summing up to assessors. He pointed out that in summing up to assessors it was explained that apart from the evidence of PW1 which was circumstantial, the remaining evidence was from the cautioned and extrajudicial statements. He further explained that, in the summing up the defence of provocation and intoxication was also made clear to the assessors. He was of the view that the order for a retrial prayed by the learned counsel for the appellant is not tenable as the case was proved beyond reasonable doubt.

He elaborated that, as to who killed the deceased was not an issue as the appellant admitted killing the deceased. His defence was that the killing was not intentional as he was under the influence of provocation and intoxication.

Mr. Sarige submitted further that the issue of intoxication was clearly dealt with by the trial judge as per section 14 of the Penal Code, that the appellant was required to prove the extent of intoxication and

that he did not know what he was doing, which he failed to prove. In this regard, he was firm that the appellant knew what he was doing looking at the manner he explained the sequence of events on that date in Exhibits P2 and P3.

On provocation, the learned Senior State Attorney equally contended that it had no basis. Relying on the case of **Nyankua Orondo v. Republic,** Criminal Appeal No. 141 of 2002 (unreported) where the case of **Robert Owiti Obiero v. Rex** (1949) 16 EACA 139 was cited with approval, he contended that the deceased's purported provoking words "*Mapenzi yaishe*" and "*mjinga mahusiano yaishe*" did not amount to provocation in the standard of the ordinary person of the community to which the appellant belonged. In any case, the learned Senior State Attorney added, the deceased was a mere paramour and not his wife. As to the trial judge's observation that the defence of provocation and intoxication ought to have been raised at the earliest opportune time, he submitted that it was not correct.

Mr. Sarige also submitted that the evidence incriminating the appellant is the circumstantial evidence from PW1. He pointed out that this witness gave evidence showing that the appellant was the last

person to be seen with the deceased. He said, PW1's evidence was corroborated by the appellant's confession in Exh. P2 and P3.

In rejoinder, Mr. Mutalemwa reiterated that substance of Exh. P2, P3, and P4 was not explained to the assessors. That, the summing up to assessors being not evidence, explanation of vital points of law and applicable law was not sufficient for the assessors to understand the gist of evidence. He insisted that the said Exh. P2, P3 and P4 ought to have been read over to assessors so as to ensure a fair trial. Also, the learned counsel stressed that the defence of intoxication and provocation was not properly considered.

From the submissions of the learned advocate and the learned Senior State Attorney, we think, the issues for our determination are two: **One,** whether the admission of Exh. P1, P2, P3 and P4 during preliminary hearing denied the assessors right to know the substance of those documents. **Two,** whether the case against the appellant was proved beyond reasonable doubt.

Regarding the first issue, it is common ground that Exh. P1, P2, P3 and P4 were admitted in the trial court in the absence of the assessors. Those exhibits are the Postmortem Examination Report, cautioned statement, extra judicial statement and still pictures of the deceased's

body. The said exhibits were tendered and admitted in evidence as Exhibits P1, P2, P3 and P4 without any objection from the learned counsel for the appellant. At pages 6 -7 of the record of the appeal it is indicated that when the learned State Attorney prayed to tender them in the trial court, the learned advocate for the appellant, one Mr. Rugaimukamu, stated as follows: -

> *"I have talked with my client. He admitted to have made both the two confession statements. He has no problem if all 3 documents are admitted".*

Then the trial Court said: -

> *"Postmortem Examination Report dated 20th October, 2011, cautioned statement dated 24th October, 2011 and Extrajudicial Statement dated 25th October, 2011 are admitted as Exh. P1, P2 and P3 respectively".*

Perhaps, we need to refresh ourselves with regard to the purpose of conducting preliminary hearing. Preliminary hearing is conducted under Section 192 of the CPA. The main purpose of such proceedings is to promote expeditious and cost-effective disposal of criminal cases. In the case of **Jackson Daudi v. Republic,** Criminal Appeal No. 11 of

2002 (unreported), the Court emphasized the purpose of conducting preliminary hearing and stated that: -

> *"The main purpose of preliminary hearing under section 192 of the Criminal Procedure Act, 1985 and of the Rules - GN No. 192 of 1988 made under it, is to speed up the trial; and an ancillary purpose is to reduce the costs of a criminal trial.* ***Both purposes are served by ascertaining at the earliest stage in the proceedings the matters which are not in dispute. Once those are ascertained then only the evidence on the disputed matters will be called at the trial.*** *There would be no need to call witnesses or other evidence to prove that which is agreed to be undisputed".* [Emphasis added]

As was rightly contended by Mr. Mutalemwa, the exhibits P1, P2, P3, and P4 were admitted during preliminary hearing when the trial court does not sit with assessors. He went a further milestone arguing that the said documents ought to have been read over to the assessors or even proved under section 192 (4) of the CPA which states that: -

> *"Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a*

memorandum filed under this section shall be deemed to have been duly proved; *save if, during the course of the trial, the court is of the opinion that the interest of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved."* [Emphasis added]

In the first place, we think, this provision supports the position that, once the document is filed in the memorandum under that section (section 192), it is deemed to have been duly proved. The exception is that if the court is of the opinion that in the interest of justice that the document filed under the said section need to be proved, it may direct so.

In this case, the Exhibits P1, P2, P3 and P4 were properly admitted under section 192 of the CPA. According to **Jackson Daudi's** case (supra) and section 192 (4) such documents were taken to have been proved and/or ascertained and as such they did not require further proof. And, in our view, this is augurs well with the spirit of the provision of achieving expeditious trials and reducing the costs of criminal trials. In this regard, we do not agree with Mr. Mutalemwa's proposition that

they needed to be formally proved as the trial court did not form an opinion to that effect.

On the other hand, we agree with Mr. Mutalemwa that in terms of section 265 of the CPA, the High Court in conducting trials is required to sit with assessors. Logically, the documents which were admitted before the trial, ought to be read over to assessors after having been admitted in evidence during preliminary hearing. The importance of doing so could be enhanced by the fact that preliminary hearing is not an integral part of the trial (see **Salehe Mashenene v. Republic,** Criminal Appeal No. 134 of 2005 (unreported)).

In this case, as the record of appeal bears out, exhibits P1, P2, P3, and P4 were not read over in court. Nevertheless, we cannot say that it was wrong for not reading them since there is no law that requires the documents admitted in evidence during preliminary hearing to be read over in court. Perhaps, this is so, for a reason that on being admitted at that stage they are deemed to have been ascertained or proved.

We are aware that, under section 298 of the CPA, the trial judge is required to sum up to assessors the evidence for the prosecution and the defence before requiring each of the assessors to give his/her

opinion orally as to the case generally or to specific question of fact addressed to them by the judge.

We have perused the summing up to assessors found on pages 28 to 38 of the record of appeal and we are certain that the contents of the cautioned and extra judicial statements were explained. In particular, it was explained that the appellant in both the cautioned statement and extra judicial statement had admitted stabbing the deceased three times on her neck for the reason that the deceased told him to stop seeing her. It was also explained on how the appellant stated that the deceased told him *"mapenzi na yaishe"* over the alleged scuffle he had with the deceased. As the essential portion of the substance of the cautioned and extra judicial statements was explained, we are satisfied that the assessors understood the nature of the evidence against the appellant as contained in those statements. This can be clearly reflected in opinion of the 3rd assessor, Ms. Veronica Chacha, when she said the appellant killed the deceased and that being called a fool was not enough to provoke and kill a person.

In this regard, we entertain no doubt that the assessors were not denied the right to know the substance of the cautioned and extra judicial statements which were admitted during the preliminary hearing.

Thus, we decline the invitation by the learned counsel for the appellant to nullify the proceedings and judgment of the trial court, quash the conviction, set aside the sentence and order a retrial in this case.

We now turn to consider the issue whether or not the case against the appellant was proved beyond reasonable doubt. In the foremost, we agree with both counsel that it is not in dispute that the appellant killed the deceased. The parties are at variance as to whether the appellant killed with malice aforethought or not. Mr. Mutalemwa argued that the defence of provocation and intoxication raised by the appellant was not properly considered by the trial court. According to the record of appeal, the appellant made two attempts to convince the trial court to reduce the offence of murder to a lesser offence of manslaughter. He attempted to do so during the plea taking and, in his defence, when he raised the defence of provocation and intoxication but both attempts were declined by the trial court.

We have considered the prosecution evidence being the circumstantial evidence from PW1 and the appellant's cautioned and extra judicial statements (exhibit P2 and P3). We agree with the learned Senior State Attorney that the appellant killed the deceased having regard to irresistible circumstantial evidence by PW1 who proved that

the appellant was the last person to be seen with the deceased. Moreover, PW1 explained the circumstances he had encountered at the deceased's room which suggested the appellant's involvement. Apart from that, PW1's evidence was corroborated by the appellant's defence and confession in Exh. P2 and P3 that he killed the deceased.

In order to mitigate malice afterthought, the appellant raised the defence of provocation and intoxication. We should state at once that we do not intend to make our determination on the issue raised by Mr. Mutalemwa that the trial judge misled the assessors when she said that such defence ought to have been brought or indicated at the stage of preliminary hearing. We have taken that position because, although it may not have been correct by the trial judge to say so because such position is not premised on principles of law, we do not think, it misled the assessors as it was an observation which was made by the trial judge in the judgment and not during the summing up to the assessors. This being the situation, it cannot be said that the assessors were influenced by the observation by the trial judge.

As regards the defence of provocation and intoxication, we agree with Mr. Sarige they were sufficiently dealt with by the trial court.

Section 202 of the Penal Code defines the term provocation as any wrongful act or insult of such a nature that is likely when done to an ordinary person or in the presence of an ordinary person who is under immediate care or to whom he stands in a conjugal, paternal, filial or fraternal relation to deprive him the power of self-control and to induce him to commit an assault to the person whom the assault is committed. In the case of **Nyankua Orondo** (supra) the Court cited with approval the case of **Robert Owiti Obiero** (supra) in which the East African Court dealt with the issue of provocation. In the cited case, it was held that:

> *"The mode of resentment adopted by the person provoked must bear some proper and reasonable relationship to the sort of provocation given; in the present case the conduct on the part of the deceased could not justify the violent assault made upon her so as to reduce the offence to manslaughter."*

Guided by the above authority, we agree with the learned Senior State Attorney that the defence of provocation cannot stand. This is so because, the words *"mapenzi yaishe"* or *mjinga mahusiano yaishe"* allegedly uttered by the deceased could not be adjudged provocative by the standard of an ordinary person of the community which the

appellant belonged. In fact, even the 3rd assessor, Veronica Chacha, was categorical that to be called a fool was not enough to provoke him to kill a person. In any case, as was correctly argued by the learned Senior State Attorney that defence could not stand as the deceased was a mere paramour not covered under section 202 of the Penal Code.

As regards the defence of intoxication, the trial judge dealt with it extensively on the basis of the provisions of section 14 (1), (2) (a) and (b) of the Penal Code which state as follows:

> *"(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.*
>
> *(2) 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, he did not understand what he was doing and:*
>
> *(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
>
> *(b) the person charged was by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission."*

In this case, we do not agree with the learned advocate for the appellant that the defence was not properly considered by the trial

judge. To the contrary, we agree with Mr. Sarige that it was properly dealt with when the trial judge said that the appellant ought to prove that he did not know what he was doing. The evidence on record bears out that the appellant failed to establish the extent of his intoxication. PW1 testified that the appellant started drinking at about 13:00 hrs. During cross examination, the appellant at page 20 of the record of appeal said that at about 18:00hrs he went to search for a lost cow and returned to the bar at about 19:00hrs. This clearly indicates that the appellant was not that drunk as he was able to embark on search for a lost cow. We are certain that had he been that much drunk he would not have taken part in the said search.

Apart from that, although he said he was at the bar from that time (19:00hrs) to 21:40hrs when the bar was closed, it was not explained as to how drunk he was. Like the High Court, we find that under such circumstances, the defence of intoxication cannot stand.

As regards the issue of malice aforethought, we are certain that it was well established. This was proved by the weapon (panga), a lethal weapon that was used to inflict an injury to the deceased; the part of the body (the neck) where such wound was inflicted and the number of blows as he cut the deceased three times on the neck which was a vulnerable part of the body. Apart from that, the appellant's conduct of

escaping while locking the door of the deceased's room from outside proves malice aforethought. (See **Enock Kipela v. Republic,** Criminal Appeal No. 150 of 1994 (unreported).

Consequently, we are satisfied that the prosecution proved the case beyond reasonable doubt that the appellant killed the deceased with malice aforethought. The defence of provocation and intoxication cannot stand.

In the event, we find that the appeal is devoid of merit and dismiss it in its entirety.

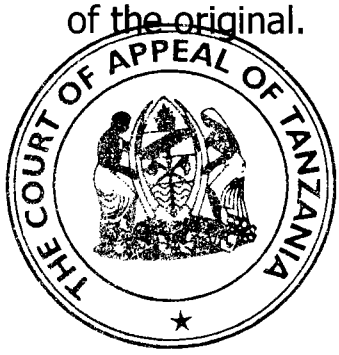
DATED at **MWANZA** this 4th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 5th day of May, 2021 in the presence of the appellant in person and Ms. Gisela Alex, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL