IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 546 OF 2020

IBENDU HASHIMU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Kondoa)

(Siyani, J.)

dated the 21st day of October, 2020

in

Criminal Sessions Case No. 102 of 2016

.....

JUDGMENT OF THE COURT

25th April & 2nd May, 2022.

FIKIRINI, J.A.:

The appellant, Ibendu Hashimu was charged with an offence of murder contrary to section 196 and 197 of the Penal Code [Cap. 16 R.E. 2002; now R.E. 2019]. The allegation before the court was that on the 7th day of October, 2014 at or about 11:00 hours, at Kinkima village within Kondoa District in Dodoma Region, the appellant murdered Adina Juma. The appellant denied the charge and thus the trial commenced before the High Court sitting at Kondoa District in Dodoma Region in Criminal Sessions

Case No. 102 of 2016. After the trial, the appellant was found guilty, convicted, and sentenced to suffer death by hanging.

Brief facts leading to this appeal as narrated before the trial court, by six (6) prosecution witnesses and three admitted (3) exhibits, were that on 7th October, 2014 at about 11.00 hours Mustapha Iddi (PW3) while at his farm at Kinkima he met Adina Juma (the deceased), with blood flowing from her head. Upon inquiry, the deceased informed him that she was beaten by Ibendu (the appellant) who escaped after the beating. PW3 urged the deceased to go to the hospital and decided to escort her. On their way to the hospital and before they could go far, suddenly the deceased saw the appellant whom she pointed to PW3 as the one who beat her up, carrying a knife in his hand aiming to attack the deceased. PW3's efforts to stop the appellant from attacking the deceased, resulted in the appellant dropping the knife he was carrying in his hand. Undeterred he grabbed PW3's billhook ("hengo") a tool commonly in use in the area for pruning or looping branches, placed on the ground. Using the "hengo" the appellant slashed the deceased on her left hand and twice on the head and escaped.

The deceased who was carrying a child on her back fell. Rukia Hassan (PW4) who was nearby watching what was going on raised an alarm. Villagers responded to the alarm. Among them was Saidi Ramadhani (PW5). From the wounds inflicted on the deceased and upon hearing from PW3 that the appellant was the one who attacked the deceased, PW5, two (2) local militia, and other men decided to go after the appellant. The appellant was arrested at Busi village and taken to the Ward Executive Officer (WEO) at Busi. Meanwhile, the deceased who was seriously injured was taken to Hamai dispensary. She passed on before being transferred to Kondoa District Hospital. The deceased death was certified by Dr. Jumanne Mahamoud (PW6) of Kondoa District Hospital on 8th October, 2014. In the autopsy conducted, PW6 concluded that the deceased died due to severe cerebral bleeding caused by the cut wound of the skull on the frontal bone that exposed the brain leading to severe anemia and unconsciousness. The post-mortem report was tendered and admitted as exhibit P3 without the defense's objection.

After the chase and arrest the appellant was handed to Police officers, among them, D. 7347 D/C Kichonge (PW1) who interrogated the appellant. Later the appellant was taken to a Justice of Peace Rehema Olambo (PW2). From PW1 and PW2 the court was informed that the appellant confessed to attacking the deceased and causing her death. The cautioned and extra judicial statements were admitted after a trial within the trial as exhibits P1 and P2 respectively.

In his defence, the appellant admitted to attacking the deceased with a "hengo" he grabbed from PW3. He, however, declined to do so not accentuated with malice as he was not aware of what he was doing and out of anger left the scene of crime for Busi, after throwing away the "hengo" he used to attack the deceased with. The appellant explained more about his action, by telling the court that his irritation was caused by the deceased who opted to end their love relationship while he had already paid half of the dowry. The appellant declined to have intended to kill the deceased but was provoked after she refused to marry him, while they had been in a peaceful relationship, had a child, and had plans of getting married.

The trial Judge dismissed the defence of provocation reasoning that the appellant had sufficient time to cool off his anger. And considering the lethal weapon "hengo" used to attack the deceased on the sensitive parts such as the head death or serious bodily harm or injuries would have been the probable result. Satisfied that the prosecution side has proved its case to the required standard of proof beyond a reasonable doubt, he found the appellant guilty of unlawfully killing the deceased and consequently convicted him of murder contrary to section 196 of the Penal Code.

As intimated earlier, at the conclusion of the trial the appellant was convicted and accordingly sentenced to suffer death by hanging. Aggrieved the appellant preferred this appeal. Initially, he lodged a Memorandum of Appeal (substantive memorandum of appeal) comprising of seven (7) grounds lodged on 6th April, 2021. Later the learned counsel appointed to represent him lodged a Supplementary Memorandum of Appeal on the sole ground of appeal lodged on 19th April, 2022. At the hearing of the appeal, the appellant's counsel opted to argue the 4th and 6th grounds from the substantive Memorandum of Appeal and the sole ground from the supplementary Memorandum of Appeal.

The grounds argued were thus:

1. *That, your Lordships the trial Judge erred in fact and law when admitted exhibit P1-(cautioned statement) whilst its contents were not read out in court before its admission.*
2. *Your Lordships the learned trial Judge erred in fact and law when he failed to properly consider the defence raised by the appellant.*

And the sole ground of appeal from the supplementary memorandum of appeal was:

3. *That, the learned trial Judge erred in law and fact in convicting the appellant on the offence of murder which was not proved beyond a reasonable doubt.*

When the appeal was called on for hearing on 25th April, 2022, the appellant was represented by Mr. Leonard Mwanamonga Haule, learned counsel; whereas the respondent Republic had the services of Mr. Leonard Challo, learned Senior State Attorney.

Mr. Haule argued all three (3) grounds of appeal together. He started with the documentary evidence namely exhibits P1, P2, and P3. The learned counsel contended that exhibits P1-cautioned statement and P2-

the extra judicial statement were not listed in the committal proceedings as reflected on page 23 of the record of appeal. He thus urged for the two exhibits to be expunged from the record of appeal for contravening the provisions of section 246 (2) of the Criminal Procedure Act, [Cap. 20 R.E. 2002; now R.E. 2019]. In the same breath, he beseeched us to also expunge exhibit P1-a post mortem report as it was not read over in court.

Mr. Haule in furtherance of his submission argued that the appellant admitted to having killed the deceased unintentionally. And had the court directed itself in the evidence advanced before it would have convicted the appellant for a lesser offence of manslaughter instead of murder. With murder, he contended the case was not proved beyond doubt. The learned counsel had the following reasons for his stance: referring to defence case as shown at pages 90 -97 of the record of appeal, specifically at page 91 that the appellant and the deceased had agreed to go together to the witchdoctor on the 7th October, 2014, as their child was not well. It was while on the way the appellant inquired about their plan of getting married as the deceased had already taken half of the dowry. Instead of getting the answer he expected, the deceased informed the appellant that it was

over between them. The trip to the witch doctor ended there. Based on the account, Mr. Haule implored us to consider that the appellant was thus provoked by the deceased's utterances. He further argued that the level of heat of passion differed from one person to another and on how they become angry and for how long. Although the standard is usually that of a reasonable man, that also varies from one person to another, stressed the learned counsel.

He went on contending that the trip to the witch doctor was between the appellant, the deceased, and their child. Therefore, had the appellant intended to harm the deceased he would have done so before when they were only two of them. But what is on record is that after the utterances the trip was called off and they decided to go back to their homes taking separate ways. This was according to Mr. Haule a proof of innocence,that the appellant never intended to kill the deacesed, although at page 70 of the record of appeal PW3 stated seeing the deceased bleeding, meaning had he wanted, he would have killed the deceased with the knife he had then. Mr. Haule referred us to the case of **Ester Jofrey Lyimo v. R,** Criminal Appeal No. 123 of 2020, and **Ghati Kahuru @Obosi v. R,**

Criminal Appeal No. 221 of 2016 (both unreported), underscoring the appellant's admission all along of killing the deceased but without intention. According to the learned counsel, *actus reus* was proved but not *mens rea*.

Wrapping up his submission, the learned counsel prayed for the Court to quash the conviction and find the appellant guilty of a lesser offence of manslaughter. And upon considering and granting the prayer he urged the Court to consider the time the appellant spent in prison and proceed to release him.

On his part, Mr. Challo the learned Senior State Attorney opposed the appeal and supported the conviction and sentence meted. Picking from Mr. Haule's submission, he contended that the prosecution proved its case beyond a reasonable doubt. Expounding on this, he submitted that after the difference, the appellant and the deceased parted ways, meaning there was cool off time assuming the appellant was provoked as he alleged. However, after their second encounter, the appellant whose heat of passion must have cooled off once again attacked the deceased despite PW3's intervention. The appellant picked the "hengo" belonging to PW3 and cut the deceased on the hand and twice on the head leading to the

exposure of her brain. The act of attacking the deceased twice on the head showed the appellant wanted her dead and indeed that is what happened.

Concurring with the trial Judge's findings at pages 130, 131, and 132 of the record of appeal and the cases of **Nanjonjo Harriet and Another v. Uganda**, Criminal Appeal No. 24 of 2002, and **Enock Kipela v. R,** Criminal Appeal No. 150 of 1994 (unreported) he cited, Mr. Challo agreed that the Judge elaborated the legal position well hence he opposed the appeal and prayed for its dismissal and the High Court decision be upheld.

Briefly rejoining, Mr. Haule reiterated that cooling-off depends on one person to another. And had the appellant and the deceased not met again, what happened would not have happened. Even the doctor's evidence as indicated at page 82 of the record of appeal, the deceased had two cut wounds on the head meaning more would have been inflicted had the appellant intended to kill the deceased. Distinguishing **Enock Kipela's** case (supra) with the present case, Mr. Haule maintained that the appellant did not intend to kill the deceased only that he so reacted after being provoked. Had the trial court considered the evidence in that light, it would have convicted the appellant for a lesser offence of manslaughter.

Winding up his submission he reiterated his earlier plea that the murder conviction be quashed, the sentence meted set aside and instead the appellant be found guilty of manslaughter as he killed unintentionally.

In examining the appeal before us, we have dispassionately considered the learned counsel submissions, the record of appeal, cited references, and other things, among them the undisputed facts. We will start by pointing out the undisputed facts: **one,** that the deceased Adina Juma died of unnatural cause. Her death was due to acute cerebral bleeding caused by the cut wound of the skull on the frontal bone that exposed the brain leading to severe anemia and unconsciousness. **Two**, that the appellant caused the death of the deceased after he attacked her with "hengo" on her hand and twice on the head. **Three,** that the appellant and the deceased had a relationship from which they were blessed with a child namely Sanda Shafii born on 11th February, 2014. **Four,** on the material day the appellant and the deceased were on the way to the witch doctor, even though the trip was cut short after the two differed after the deceased informed the appellant that their love relationship was over. This came about after the appellant inquired as to

when they would be getting married as he had paid part of the demanded dowry. **Fifth,** the attack on the deceased took place in the broad daylight. **Sixth,** the deceased was taken to Hamai hospital and later transferred to Kondoa hospital where she died on the same day.

The point of departure of the two learned counsel for the parties is that, while Mr. Challo maintains that the killing of the deceased was with malice aforethought Mr. Haule contested the assertion contending the killing was out of the heat of passion after the deceased provoked the appellant.

The issue for our determination is thus whether the prosecution proved its case to the required standard and if the appellant's defence of provocation was rightly considered by the trial Judge. But before we dwell on that point, we find it apposite to first deal with exhibits P1, P2 and P3 tendered, incorrectly admitted, and processed. Exhibit P1 – the appellant's cautioned statement recorded by PC. NO. D.7347 Rtd D/C Kichonge, despite the trial Judge's conclusion that the statement was voluntary, we find it to have contravened the dictates of section 57 (2) (a) & (b) of the Criminal Procedure Act, [Cap.20 R.E 2002; now R.E. 2091]. Moreover, the

said cautioned statement as indicated at page 23 of the record of appeal, was neither listed nor read out during the committal proceedings contrary to the requirements under sections 246 (2) of the CPA. Moreover, no notice of additional witness was given which offends section 289 (1) of the CPA. Such a statement deserves expunging from the record of appeal. Our position on this is fortified by our previous decision in the case of **DPP v. Sharifu Mohamed @ Athuman and 6 Others**, Criminal Appeal No. 74 of 2016 (unreported) when the Court had an opportunity of interpreting the provision of section 246 (2) of the CPA thus:

> *"Our understanding of this provision is that, it is not enough for a witness to merely allude to a document in his witness statement, but that the contents of that document must also be made known to the accused person (s). If this is not complied with the witness cannot later produce that document as an exhibit in court. The issue is not on the authenticity of the document but on non-compliance with the law. We, therefore, agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage."*

Likewise, exhibit P2 – the extra judicial statement recorded by PW2 on 10th October, 2014 was equally not listed nor was a notice of additional witness in terms of section 289 (1) of the CPA filed by the prosecution. Exhibit P3 – a postmortem report, was listed and read out during the committal proceedings. However, this exhibit after being tendered through PW6 and admitted as exhibit P3 as reflected at page 84 of the record of appeal, was not read out in court to enable the appellant (then accused) to understand the contents thereof. We have on several occasions underscored the importance of reading out the admitted documents to allow the accused person to be conversant with the contents of the documents as well as give him/her room to mount his/her defence regarding the tendered document. This legal position has been stated by the Court in a number of our decisions such as the cases of **Robinson Mwanjisi and 3 Others v. R** [2003] T.L.R 218 and **Misango Shantiel v. R,** Criminal Appeal No. 250 of 2007 (Unreported). On the strength of our legal position we thus, expunge the three exhibits from the record of appeal. Whereas exhibits P1 and P2's situation is hopeless, it is however different from exhibit P3, since PW6, the doctor who conducted the

autopsy his oral account would under the circumstances salvage the situation.

We now turn to consider our main issue on whether the prosecution proved its case to the required standard and if the appellant's defence of provocation was rightly considered and dismissed by the trial Judge.

The defence of provocation can only sail through once the court has satisfied itself that the words uttered or conduct demonstrated by the deceased were provocative to an ordinary person of the community to which the appellant belonged. Both sections 201 and 202 of the Penal Code have illustrated what amounts to provocation. For ease of reference the provisions are provided below:

> "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."*

While section 202 provides as follows:-

"202. *The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult 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 care, or to whom he stands in a conjugal, parental, filial or fraternal relation, 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. When such an act or insult is done or offered.*

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for

committing an assault is not provocation that other person for an assault.

An arrest which is unlawful is not necessarily provocative for an assault, but it may be evidence of provocation to a person who knows of the illegality.

For the purposes of this section the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belongs."

The Court in expounding and illustrating on conditions to be met for the defence of provocation to apply as provided by the provision of section 202, had this to say in the case of **Georgina Venance v. R** [2005] T.L.R 84, that:-

"From the provision, it is clear that for an act or insult or conduct to constitute provocation in law at least the following conditions must be satisfied. ***First,*** *the act or insult must be wrongful, lawful act or conduct cannot provide provocation.* ***Second,*** *the person assaulted because of the provocation must be one who offered the provocative act, insult, or conduct.* ***Third,*** *the provocative act, insult, or conduct must have been directed to the person committing the assault or a*

person who stands to him in the relationship as explained in the section. ***Fourth,*** *the provocative act or insult must have been done or offered in the presence of the person committing the insult.* ***Fifth****, the test is the ordinary person in society. This is to say, peculiar or eccentric qualities of the person committing the assault are not relevant when considering whether a person would be provoked by the act or insult.* ***Sixth****, the person provoked must have been deprived of the power of self-control."*

Applying the conditions stated above, if they fit the scenario before us, we find they do not. We will give reasons for our position. **One,** the appellant's defence of provocation came about during his defence as shown at pages 90 to 95 of the record of appeal.

Two, from PW3's account, when he met the deceased she was bleeding on her head. Upon inquiry, the deceased informed PW3 that she had been beaten by a person named Ibendu (the appellant). PW3 convinced the deceased to go to the hospital and he offered to escort her. On their way, the appellant appeared. The deceased raised alarm which alerted villagers including PW4 who witnessed the attack as she was

walking about 50 paces behind the PW3 and the deceased. According to PW4 the appellant had a knife and wanted to stab the deceased but PW3 blocked the appellant from stabbing the deceased who was hiding behind PW3. The knife in the appellant's hand fell down and as a result, the appellant picked "hengo" which PW3 had put down while trying to protect the deceased. Using the "hengo" the appellant attacked the deceased by cutting her on the left hand and head. The deceased fell and the appellant fled.

Although the appellant denied having intended to kill the deceased, it is nonetheless, evident from the record that the appellant had initially beaten up the deceased, a fact which he never disclosed, even in his defence. This fact was gathered from PW3's account. We do not dispute the appellant being angered by the sudden ending of the relationship but has a problem with how he handled the rejection. The initial attack whilst not warranted but we give the appellant the benefit of doubt that probably he might have been provoked by the deceased's utterance. The record is silent on what transpired between the two at the scene, whether there was an exchange of words or not, or simply anything annoying adding up to the

utterance, if at all that is what happened. However, it is on record that after the initial attack they parted ways.

We have had difficulties agreeing with Mr. Haule that the utterance made by the deceased terminating the relationship between the two provoked the appellant and he continued being angry even after a lapse of time. *First and foremost*, the appellant denied having carried any weapon, whereas going by PW3's account he had a knife. This piece of evidence was never disputed by the appellant who had an opportunity to cross-examine PW3 on the fact. This piece of evidence is what Mr. Haule has banked on to persuade us to agree with his submission that had the appellant wanted to kill the deceased he would have done so then as he had a knife. With due respect to Mr. Haule, the fact he did not do that then did not mean he had no intention of killing the deceased.

Second, by the time the appellant met the deceased in the subsequent encounter half an hour had elapsed. This is gathered from the appellant's cross-examination at page 95 of the record of appeal. We will let the record speak:

> *"We were in a process of getting married. After our disagreement with Adina, I decided to take another road. I didn't want to go with her on the same road. It's true that I was angry. I grabbed "hengo" from Mzee Mustapha which I attacked Adina and caused her death.* ***Adina had no weapon****. I also had no weapon.* ***Adina had a child carried on her back. The child is called Sanda Shafii. It was approximately half an hour from where I left Adina to where I met her again.*** *I was still angry."*[Emphasis added]

Whilst we cannot weigh or measure how angry the appellant was but we equally do not agree with Mr. Haule that his killing of the deceased can be said to be without intention. The appellant met the deceased for the second time after almost half an hour has elapsed. We believe that was sufficient time for one's anger to cool off. We find the half an hour, taking separate ways was enough time for one to cool off, especially considering the nature of the alleged provocation.

Moreover, during the second encounter PW3 tried to stop the appellant from attacking the deceased but did not heed to the effort. His knife dropped down, yet he was not deterred. He instead picked PW3's

"hengo" which was placed on the ground and attacked the deceased, not once but thrice. Once on the hand and twice on the head. The "hengo" used is in our view lethal weapon as when used to attack the deceased the injuries caused speak volumes considering that the deceased was carrying a child on her back. According to PW6's oral account, the cut wounds were deep. This is what he stated in cross-examination, we let the record speak:

> *"The body had two wounds, one on the head and another on the hand. The wound on the head was so big to the extent brain could be seen (kichwa kilifumuka). Possible the deceased was cut twice in the head because of the nature of the wound."*

The force used to attack the deceased was enormous and the sensitive areas struck could by and large cause the injuries sustained that inevitably lead to the deceased death.

After attacking the deceased the appellant fled to Busi and on the way discarded the "hengo" he used to attack the deceased. We had failed to comprehend the provocation the first time around but the second time even baffled us more.

In the case of **Salum Abdallah Kihonyile v. R** [1992] T. L. R. 349 quoted in the case **Hamis Chuma @ Hando Mhoja v. R**, Criminal Appeal No. 36 of 2018 (unreported), the Court was able to illustrate circumstances whereby the defence of provocation can be accepted by stating that:-

> *"Having in mind all the background incidents, the continuous almost deliberate trespassing of their farms by the Masai cattle, the aggressive approach by the Masai and the subsequent attack on the appellant which resulted in his being injured on the forehead, convince us that at the time the appellant speared the deceased, he was still affected by this provocation;"*

It is our considered view that even the uttered words by the deceased that their love relationship was to come to an end, we find were not provocative by the standard of an ordinary man of the community to which both the appellant and the deceased belonged. In support of the submission that the appellant was provoked Mr. Haule cited to us the case of **Ester Jofrey Lyimo** (supra). We find the case distinguished. In the cited case there were some incidents, which was not the case in the present appeal.

After rejecting the defence of provocation held by the appellant our next question is whether the prosecution proved malice aforethought as defined under section 200 of the Penal Code, which provides as follows: -

> *"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-*
>
> *(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not."*

Aside from the provision defining what amounts to manslaughter, malice aforethought can as well be deduced from a range of things. The trial Judge in citing the case of **Enock Kipela** (supra) pointed out the guiding factors in determining malice. In our case we say the appellant's attack on the deceased vulnerable and sensitive part of her body as vouched by PW6 and witnessed by PW3 and PW4, cannot be interpreted in any other way except that he wanted the deceased to die. And indeed she died from the blow in her arm and a cut wound on the head which exposed the brain leading to severe cerebral bleeding and ultimately the death of the deceased. We are in agreement with Mr. Challo that the trial Judge

properly rejected the defence of provocation. The trial Judge at page 130 of the record of appeal, held:-

> *"With much respect, I share the opinion of the majority of the assessors who found that the alleged provocation was unjustifiable not only because being rejected by a woman who is not even one's wife cannot be a cause of anger to a reasonable man but indeed, the assault itself which led to the killing of Adina, took place almost thirty minutes after their conversation. In my considered opinion, therefore, Adina's killing by the accused person was not in the heat of passion as the later had sufficient time to cool his anger down."*

Based on what we have explained above, we thus rule out that there was no provocation proved to the required standard. We are satisfied that the appellant killed the deceased with malice aforethought, the second time he attacked with PW3's "hengo" which he picked from the ground. In this regard, we find that the trial court correctly convicted the appellant of the offence of murder and accordingly sentenced him to suffer death by hanging.

For the reasons stated, we are of the firm view that the defence of provocation was properly rejected; it was not tenable. The appeal is therefore dismissed entirely for lack of merit.

It is so ordered.

DATED at **DODOMA** this 2nd day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of May, 2022 in the presence of Mr. Fred Peter Kalonga, learned counsel holding brief for Mr. Leonard M. Haule, learned counsel for the Appellant and Ms. Benadetha Thomas, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL