

**IN THE COURT OF APPEAL OF TANZANIA  
AT MOSHI**

**(CORAM: JUMA, C.J., NDIKA, J.A. And KITUSI, J.A.)**

**CRIMINAL APPEAL NO. 165 OF 2019**

**MODEST WILBARD @SHAYO.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from Judgment of the High Court of Tanzania at Moshi)**

**(Hon. Fikirini, J.)**

**dated the 15<sup>th</sup> day of May, 2019**

**in**

**Criminal Sessions Case No. 28 of 2018**

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**JUDGMENT OF THE COURT**

**19<sup>th</sup> & 23<sup>rd</sup> September, 2022**

**JUMA, C.J.:**

The appellant, Modest Wilbard @ Shayo was in the High Court of Tanzania at Moshi charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002 (now R.E. 2019). The particulars of the offence alleged that on 14<sup>th</sup> February, 2017 at Tela Magula village in Moshi District of Kilimanjaro Region he murdered Yasinta Ladislaus (the deceased). Six witnesses, Stephen Ladislaus Ndanu (PW1), Rachel Adolf Lyimo (PW2), Ladislaus Peter Ndanu (PW3), Benedict Ladislaus Ndanu

(PW4), Dr. Godlisten Samwel Kawishe (PW5) and Hamidu Hamza Nkya (PW6) testified for the prosecution. The appellant testified in his own defence as DW1.

The flow of events leading up to the High Court convicting the appellant and sentencing him to death was as follows.

The appellant and Yasinta Ladislaus are brother and sister. Around 8:00 pm on the evening of 14/02/2017, Yasinta Ladislaus' son Stephen Ladislaus Ndanu (PW1) was in the family house with his eighteen-month-old sibling Emmanuel. PW1 was reading to prepare for school the following day. Yasinta Ladislaus was in the outside kitchen with her sons, Benedict Ladislaus Ndanu (PW4) and Peter preparing a family dinner. From the main house, PW1 heard a voice from outside asking twice to come in, to which he shouted: "*Karibu*" (come on in). At almost the same time, PW1 heard his siblings PW4 and Peter yelling outside the kitchen, calling out for help.

PW1 did not see anybody when he walked out of the main house to find out. Moments later, he saw his other siblings running away towards the neighbours' houses. PW1 heard his mother's voice imploring, "Modest, let her go." At this moment, PW1 saw the appellant, his maternal uncle Modest, slashing his mother with a machete. PW1 picked up a bottle and threw it at

his uncle, who ceased his assault and came after PW1 with a machete. PW1 ran away to hide as his uncle fled away from the scene. PW1 returned to pick up Emmanuel who was crying. He took the baby to their neighbour, Rachel Adolf Lyimo (PW2), where PW1 found his distraught and traumatized siblings, PW4 and Peter.

After the skirmishes, PW1 and his siblings did not know where their mother was. They joined their neighbour PW2 to follow a trail of blood in search of their mother, who they found severely wounded in a store. After raising the alarm, villagers arrived, and one Benedict Masha provided transport to take the deceased to Kilema Hospital.

The night the deceased died, PW2 heard the alarm from the deceased and her children. She narrated how the deceased's children followed up on the trail of blood to where they found badly wounded Yasinta Ladislaus. According to PW2, the deceased spoke with difficulty as she read her husband's mobile phone number. PW2 and the deceased's husband, Ladislaus Ndanu, are neighbours, seven paces separated their houses. PW2 knew the appellant as the deceased's brother.

The deceased's husband, Ladislaus Peter Ndanu (PW3), was not at home when the tragedy struck that night. He was away at his work at Himo,

where he rented a room. He usually left home at Kirua Vunjo on Sundays to Himo to be ready for work at Himo the following Monday morning. He was at Himo when he received a phone call about his badly injured wife.

PW4 recalled the evening his mother died. They were together in the kitchen when his mother fell ill while preparing a family dinner. She decided to walk to the main house to rest. PW4 escorted her, walking about five paces ahead of his mother. Suddenly from behind, PW4 heard her mother cry out for help. Turning his head back, PW4 saw the appellant slashing his mother with a machete. PW4 recalled how the commotion attracted PW1's attention and threw a bottle at the appellant. According to PW4, the appellant chased after PW1 as their injured mother seized the opportunity to escape from the appellant.

PW5 Dr. Godlisten Samwel Kavishe conducted a post-mortem examination on the body of the deceased and tendered a post-mortem report (exhibit P1). He testified that the deceased's body suffered from many cut injuries on the head, mouth, hands, and shoulders and missed three fingers.

After his arrest, the police took the appellant to Hamidu Hamza Nkya (PW6), a Primary Court Magistrate based at Himo Primary Court and a Justice

of the Peace. After ordering the police officer out of the room, the Justice of the Peace remained alone with the appellant. After assuring the appellant of his rights to give a voluntary statement, PW6 recorded the appellant's extra-judicial statement (exhibit P2), whose admission as evidence the appellant did not object.

In his defence evidence, the appellant described the deceased Yasinta Ladislaus Ndanu as his biological sister, a firstborn to their parents. The appellant said he did not know who beat his sister to death. The appellant traced his misunderstandings with her sister back in 2016, when she visited his house, created chaos, and took away his properties without consent. He narrated several incidents of conflicts within their extended family. He did not get along well with his brother Remy Wilbard Shayo, who attacked and promised to fix him in one incident. He blamed his sister for interfering and wrecking his two marriages.

The appellant testified that he went to her sister's house on the day she died. He arrived at around 08:00 pm. He knocked on the front door, but there was no response. It was when he went to the lower side of the house and knocked when his sister shouted back, insulting what had taken him, a prostitute, to her home.

He told his sister that all he wanted was his cow, his wife, and his mother. According to the appellant, her sister hit him first with what appeared like a machete. He blocked her, took the weapon, and angrily threw it back at her sister. The appellant claimed he did not know where the knife he snatched from his sister landed. At this time, his sister cried out, "Modest, you are killing me." Then, from the direction of the main house, someone began to throw stones at him. As alarms rang through the air, the appellant left the scene away from the incoming hail of rocks.

At the conclusion of the trial, the trial judge Fikirini, J. (as she then was) weighed and evaluated the evidence of three prosecution witnesses (PW1, PW2 and PW4) and the extra-judicial confession (exhibit P2), which the appellant made before the Justice of the Peace (PW6). The trial Judge rejected the appellant's defence of provocation from his sister. She did not also believe the appellant's defence that the deceased insulted him. She concluded that the appellant decided to kill his sister unlawfully. The trial Judge convicted the appellant and sentenced him to death.

Dissatisfied with his conviction and sentence by the trial court, he has come to this Court on appeal. Through the Officer in Charge of Karanga

Prison in Moshi, he filed a Memorandum of Appeal containing three grounds of grievances. He also filed a supplementary memorandum of appeal with twelve complaints and written submissions to elaborate on his complaints.

At the hearing of this appeal, Mr. Modestus Njau, learned counsel, appeared for the appellant. Mr. Tumaini Kweka learned Principal State Attorney; Ms. Verediana Mlenza learned Senior State Attorney; and Ms. Sabitina Mcharo, learned State Attorney, represented the respondent Republic.

Counsel for the appellant, Mr. Njau, informed us that from the memorandum of appeal and supplementary memorandum of appeal which the appellant filed, he would submit only on two grounds in the Memorandum of Appeal of 9/8/2019. These two grounds are to the effect first that the trial Judge should have convicted the appellant of manslaughter because there was no malice aforethought to constitute the offence of murder. Secondly, that the trial Judge erred in concluding that the weapon used to kill the deceased belonged to the appellant.

Mr. Njau faulted the trial court for failing to convict the appellant of manslaughter because there was no malice aforethought to constitute the offence of murder. Mr. Njau referred to the appellant's written submissions

and argued that prosecution evidence failed to prove that the appellant harboured the intention to cause the death of his sister Yasinta. He pointed out that the quarrel which the appellant and his sister had that day would not have resulted in death to conclude that there was any intention to kill. He blamed the trial Judge for failing to conclude that his defence evidence proves that he had no intention to kill the deceased. He pointed out that he was not carrying any weapon when he went to see his sister. That the way the deceased used harsh language when he asked the whereabouts of the cow, and the way she described him as a man of no means and tried to hit him with a machete-like weapon negates any intention to kill. That what the appellant did in the heat of passion was to stop the deceased from slashing him and throwing the weapon back at the deceased.

The learned counsel for the appellant concluded his submissions on the first ground by reiterating the appellant killed his sister in the heat of passion provoked by his sister's insults, disparaging remarks, and attempts to use a knife against him. The learned counsel argued that the deceased's insulting words against the appellant were as annoying and provocative, just as they would provoke anyone else in the heat of passion. He urged us to find that



the appellant has successfully raised the defence of provocation, which should reduce his conviction from murder to manslaughter.

Mr. Njau's submission on the second ground of appeal raised the issue of the trial Judge failing to address whether the weapon used to kill the deceased belonged to the appellant. He faulted the trial court for failing to consider his evidence of how, after insulting him, his sister went to the kitchen, returned with a machete-like knife, and aimed it at him. This evidence proved that the weapon that killed his sister came from her kitchen. He argued that the trial court failed to consider the entire picture, from when he arrived at her sister's house until she provoked him into causing her death under the heat of passion.

The trial court, he concluded, should have considered that when he visited his sister, he did not have the intention to kill. He was tracing his wife and cow at his sister's house.

Ms. Verediana Mlenza, learned Senior State Attorney, supported the appellant's conviction for murder and the death sentence by hanging. She confined her replying submissions to the two grounds of appeal that Mr. Njau confined himself. She began by highlighting that the appellant does not deny

causing the death of his sister. He only insists that he had no intention to kill and should be convicted of manslaughter and not murder.

Ms. Mlenza provided reasons why she supported the trial Judge for convicting the appellant of murder and not manslaughter. She referred to what the appellant's defence evidence regards as cumulative provocation where the appellant blames his sister for breaking his first marriage and taking his wife and cow away from his house. Ms. Mlenza referred us to section 201 of the Penal Code, Cap. 16, and argued that the appellant's acts that caused the death of his sister were not in the heat of passion caused by sudden provocation without time to cool off. She urged us to find that there was no legal provocation.

Ms. Mlenza also wondered why the appellant raised the claim that the deceased insulted him at his defence but did not raise it during the cross-examination of prosecution witnesses, PW1, PW2, and PW4, who did not in the evidence mention anything about those provocative insults. Ms. Mlenza asked us to conclude that the claim that the deceased provocatively insulted the appellant was anything but an afterthought. She referred us to the case of **MASHAKA MBEZI VS REPUBLIC** [2018] TZCA 56 TANZLII in which the appellant blamed the trial court for failing to entertain his defence of

provocative insults. On evaluation, the Court rejected this defence, pointing out that *"insults allegedly uttered by the deceased were not put to the witnesses in the course of cross-examination and only came much later in the appellant's defence."*

Ms. Mlenza also argued that at the trial, the appellant's learned counsel did not cross-examine prosecution witnesses about the appellant's cow, his wife, and his mother at his sister's house. The learned State Attorney urged us to disregard the appellant's claim of going to her sister to look for his cow, wife, and mother. He went to kill or cause grievous harm to his sister.

Ms. Mlenza further argued that the appellant had the earliest opportunity to either raise his defence or to complain about his sister's provocative insults when the Justice of the Peace (PW6) recorded his extra-judicial statement (exhibit P2) a day after his sister died. But he did not mention these defences to PW6 because they were belated afterthoughts. If anything, Ms. Mlenza added, the extra-judicial confessional statement to the Justice of the Peace, manifests the appellant's malice aforethought. He used a lethal weapon directed at the vulnerable parts of her sister's body. And when PW1 tried to intervene by throwing a bottle, the appellant chased after PW1 intending to cause grievous harm to him too.

Regarding the second ground of appeal relating to whether the appellant snatched the weapon from her sister, Ms. Mlenza urged us to dismiss this ground. She argued that apart from the three prosecution witnesses, PW1, PW2, and PW4, who saw the appellant slashing the deceased with a machete, the appellant, in his extra-judicial statement (exhibit P2), confessed using a machete to kill his sister. So severe were his attacks, she added, that he severed the deceased's fingers.

Ms. Mlenza concluded her submissions by urging us to confirm the conviction of the appellant and his sentence.

We considered the submissions the learned counsel made before us and re-evaluated the evidence regarding the central issue of whether the appellant had the intention to kill his sister or to cause her grievous harm when he visited her house that tragic evening.

There is no dispute that on the evening of 14/2/2017, the appellant caused the death of his sister, YASINTA LADISLAUS. The main argument is whether he had malice aforethought, that is, he intended to cause the death of his sister or cause grievous harm to her.

The evidence from both sides is clear to us that the appellant had malice aforethought when he caused the deceased's death. We believe the evidence

of PW1 and PW4, who saw the appellant slashing his sister with a machete, and that he was unprovoked. There is also the appellant's extra-judicial confession he made before the Justice of the Peace (exhibit P2) that proved murder and not manslaughter. The appellant had the earliest opportunity to present a defence of provocation when he recorded his extra-judicial confession a day following the death of his sister, but he did not. We agree with Ms. Mlenza that the extra-judicial confessional statement the appellant made to the Justice of the Peace (PW6) manifests the appellant's actual frame of mind showing his intention to kill his sister or to cause her grievous harm. The appellant said:

*"...Yesterday 14/02/2017, around 19:30, I used a machete (Panga) and slashed one Yasinta Modest. I cut her on the face and arm. I sliced her to death because the deceased was creating misunderstandings in my family. "*

In his extra-judicial confession, the appellant did not emotionally attach to his sister, the victim. The appellant was detached when he told PW6, *"I used a machete (Panga) and slashed one Yasinta Modest."* His statement manifests his intention to kill his sister, which he did.

Mr. Modestus Njau, the appellant's learned counsel, attempted to paint the deceased as the person who provocatively insulted the appellant and attacked the appellant with a knife-like weapon which the appellant snatched and threw it back at his sister, causing her death! The argument of grabbing the knife and throwing it at his sister is inconsistent with many wounds uncovered in the post-mortem report. Dr. Godlisten Samwel Kavishe (PW5), who performed an autopsy on the deceased's body, described the extent of the injuries. The body had multiple cut wounds. She had a cut of about 6 centimetres on the head and right cheek. She had cut injuries in the teeth, and the teeth and the tongue were visible. On the right arm, she had a cut behind the shoulder. The wound was about 12 centimetres. The assailant severed three fingers from the right hand. On the right hand, there was an injury of about 20 centimetres. There were also injuries on the right leg around the thigh. Extensive injuries put paid to the argument that the appellant snatched the knife from the deceased before throwing it at the deceased, causing the death.

We agree with both the trial Judge and Ms. Mlenza's submissions before us that reading the extra-judicial confession (exhibit P2), it is apparent the appellant visited his sister to kill her. We cannot fault the learned trial Judge's

conclusion that the appellant assaulted and wounded his sister on the face, which is an exposed part of the body carrying the eyes, mouth, ears, nose, and close to the head, which is a vulnerable part. In his confession, he clearly stated he used a machete, so the argument by Mr. Njau that the appellant took away a knife-like machete and that the deceased intended to attack him is a belated afterthought.

In the upshot, we dismiss the appeal in its entirety.

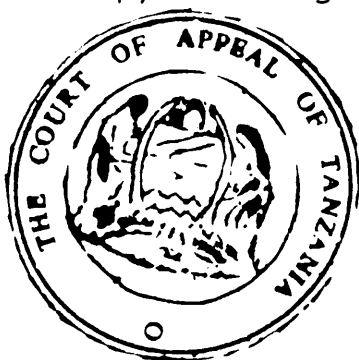
**DATED** at **MOSHI** this 22<sup>nd</sup> day of September, 2022.

I. H. JUMA  
**CHIEF JUSTICE**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

This Judgment delivered this 23<sup>rd</sup> day of September, 2022 in the presence of Mr. Modest A. Njau, learned counsel for the Appellant and Ms. Verediana Mlenza, learned Senior State Attorney; and Ms. Sabitina Mcharo, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**