THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

CRIMINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 42/2000.

THE REPUBLIC

VERSUS

EVARIST NGWIZYE @ HULICHINGH'A

(Dated: 05.02.2007
And
27.02.2007)

JUDGMENT

Before: B.M.Mmilla, J.

Evarist s/o Ngwizye @ Hulichingh'ha is charged of murder c/s 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. It is alleged that on or about 19th day of October, 1998 at Utinta village within Nkasi District in Rukwa Region he murdered one Halima d/o Ally. He pleaded not guilty to the charge.

It is not in dispute that a person by the name Halima d/o Ally is dead, and that she died a violent death. This is on the basis of the evidence of PW1 No. D 6863 D/Cpl. Mousa who, in the company of a doctor visited the scene of crime and medical examination in that regard was performed in his presence. The Post Mortem Examination Report

indicated that death was due to "(1) Shock, (2) Haemorrhage (External) and (3) Destruction of the Brains." That is also on the basis of the evidence of the accused himself who admits causing the death of the said Halima d/o Ally, though he contends that he did not intend to kill her.

The back ground facts of this case are not complicated. The accused purports to have been deceased's husband. It has been alleged that in 1998, they lived together for a period of about four (4) months before they separated. The accused said that during the period of separation rumour had it that the deceased had developed an intimate relation with another man. He decided to make a follow up.

On the night of 21.10.1998, Peter s/o Panta found the accused at a local pub where he was drinking local brew and told him that he had seen his wife and one man known as Hamisi s/o Kazila in a cassava farm. Suspecting that they were having an affair, the accused and his friend went to that place and surprised them. The man ran away leaving the woman behind. While Peter s/o Panta held the deceased, the accused chased the man. Unfortunately, he did not succeed to catch him. He went back to where Peter s/o Panta was holding the deceased, picked a stick and beat her thereby causing her instant death. Upon that, his friend advised him to run away, as a result of which he decided to go to Kirando where he boarded a bus bound for Sumbawanga via Namanyere.

During the attack, the deceased raised an alarm which was answered by her daughter one Fatuma d/o Khamis. It is stated in the latter's statement that on hearing her mother calling from a distance, she rushed in that direction. On arrival at a cassava farm, she saw Evarist Ngwizye, a person she had known before as her mother's paramour holding her. She added that on going closer to where they were, the said Evarist Ngwizye released her mother and ran away. Her mother fell down. On examining her, she found that she was dead. The evidence of this person was an eye opener and gave the police a lead that made it possible to know the killer. The accused was arrested on 21.10.1998 by policemen at Ufili area in Nkasi District when travelling in Lupila bus bound for Sumbawanga via Namanyere. He was taken to Nkasi Police station.

On 23.10.1998, the accused was sent before PW1 for interrogation. He made a cautioned statement which constitutes exhibit P4. The accused admitted in that statement that he was the one who caused the death of the deceased, but that that happened because of sudden loss of self control on finding her having an affair with another man. The accused told PW1 that he ran away on the advice of his friend Peter s/o Panta, and another implied reason is that he feared his fellow villagers would have killed him in revenge.

The accused was also taken before PW3 one Simon Kibona, a justice of the peace who recorded his extra judicial statement. This document was admitted in court and marked exhibit P6. Once again, he admitted

that he was the one who caused the death of the deceased, repeating the same reason that it happened so because of sudden loss of self control on finding her having an affair with another man.

It cannot be over emphasised that the duty of proving the charge of this nature against the accused person lies squarely on the shoulders of the prosecution, it never shifts. They are required to prove beyond reasonable doubt that the person charged is indeed the one who killed the deceased, also that the killing was actuated by malice. It must be pointed out that the accused person has no duty of proving his innocence. The case of **Mohamed Saidi Matula v. Republic (1995) T.L.R. 3** is amongst the many authorities on the point. In that case, the Court of Appeal held that:

> "Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

In an endeavour to discharge this duty, the prosecution side has called three witnesses to prove their case namely; PW1 No.D6863 D/Cpl. Mousa, PW2 No.D6813 D/Cpl.Abdalla and PW3 Simon Kibona. As already pointed out above, PW1 is the police officer who recorded the accused's cautioned statement while PW3 recorded the accused's extra judicial statement. In both instances he admitted commission of the charged offence. As aforesaid however, he contends that it was so

because of sudden loss of self control on finding her having an affair with another man. Initially, the accused made attempts to retract both these statements in the course of trial although he later on conceded in his defence that he freely offered to make them. The court had of necessity to conduct trials within trial in respect of both instances. At the end it ruled in both cases that the statements were voluntary.

In practice, a retracted confession cannot support a conviction unless it is corroborated by other evidence (see the case of **R v. Mela Melanyi (1971) HCD 398).** It must be pointed out however; that corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true. The position was best summarized by the Court of Appeal for East Africa in the case of **Tuwamoi v. Uganda (1964) E.A 84.** In that case their Lordships said that:-

> "We would summarize the position thus a trial court should accept any confession which; has been retracted...with caution, and must before founding a conviction on such confession be fully satisfied that in the circumstances of the case that the confession is true...usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession

alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

In our instant case, the cautioned and extra judicial statements which were made by the accused to PW1 and PW3 respectively were nothing but truthful. Better still; on a second thought he told this court on 31.10.2006 that he freely offered those statements to the witnesses mentioned above. In the circumstances, the confessions constituted in exhibits P2 and P6 respectively form reliable evidence.

On the other hand, PW2 No.D6813 D/Cpl.Abdalla recorded the additional statement of the deceased's daughter one Fatuma d/o Khamisi. The prosecution tried several times to trace her so that she could appear in court to testify but in vain. In view of that, the prosecution resorted to the provisions of section 34B (2) of the Evidence Act Cap. 6 of the Revised Edition, 2002 under which they asked this court to accept her statement as evidence in court. The defence side resisted its admissibility contending that the provision of section 34B of the Evidence Act was not strictly complied with. Section 34B (2) of the Evidence Act provides that:

"(2) A written statement may only be admissible under this section–

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a

witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

The import of section 34B (2) of the said Evidence Act was discussed in the case of **Republic v. Hassan Jumanne (1983) T.L.R.432** in which it was held that:

> " the provisions of s. 34B (2) of the Evidence Act are cumulative, therefore to admit a statement in evidence under s. 34 B (2) all the conditions set forth from paragraphs (a) to (f) must be satisfied."

As far as our present case is concerned, this court was satisfied that all the conditions set forth from paragraphs (a) to (f) had been satisfied; in consequence it ruled that it was proper to admit that document as evidence. This is the reason why it admitted that it through PW2 and was marked exht. P4.

It is imperative to point out at this stage that because the accused has admitted in his defence that he was responsible for the death of the deceased, the issue whether the he was the one who killed the deceased has automatically been resolved. The matters for consideration have therefore been narrowered down to whether the killing was premeditated.

As already pointed out, the accused has raised two legal defences: that of intoxication and provocation. I propose to start with the defence of intoxication.

This defence is grounded on accused's account that on the evening of 19.10.1998 Peter s/o Panta found him at their local pub at which he was drinking local brew. Mr. Kampakasa has submitted that in view of the fact that he had taken alcohol it was possible that he did not aim where to strike the blow, therefore that the question of malice aforethought does not arise. In other words the learned counsel seems to be saying that such a factor militate against a proof of **mens rea** which is an important element in a charge of murder.

To begin with, it must be stated here that intoxication is not a general defence. It can be a defence to a criminal charge under circumstances covered under section 14 (2) of the Penal Code Cap.16 of the Revised Edition, 2002. Subsection (2) of this section provides that:

> (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 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."

Under normal circumstances, it can be pleaded in case of involuntary intoxication or where the intoxication amounts to insanity or it

negatives mens rea. This means that it may not be a defence where one gets himself drunk in order to gain courage to enable him carry out some criminal purpose. Where so established, intoxication may have varying consequences depending on the degree of such state. This aspect is taken care of by the provisions of subsection (3) of section 14. Subsection (3) of this section provides that:

> "(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) of that subsection the accused shall be discharged and in a case falling under paragraph (b) of that subsection the provisions of this Code and of the Criminal Procedure Act relating to insanity shall apply."

In terms of subsection (4) of section 14 of this Act, intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. It follows therefore that where a person may be adjudged to have been incapable of forming the specific intent essential to constitute the crime (in this case killing) because of the effect of liquor, the charge of murder may be reduced to that of manslaughter **(see R. v. Damson s/o Simbakungile (1967) H.C.D. 71)**. However, where the evidence falls short of a proved incapacity in the accused to form the intent necessary to constitute the crime, but merely establishes that his mind was affected by drink so that he more

readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

As far as our present case is concerned, I hasten to say that this defence is not available to the accused person. I have two reasons; first that while the accused said in his defence that he had consumed alcohol, it is clear that he never suggested that he was drunk. There is no any other evidence capable of establishing that he was drunk. Besides, the accused has a very clear memory of all what transpired on that day, from the time when Peter s/o Panta laid information to him of having seen the deceased and her lover proceed to the rendezvous , their going to that place, what they encountered and subsequently what resulted and the decision to run away. This is not the memory of a person who can be said his mind could have been impaired by a drink. In the circumstances, I find that this defence lacks merits.

Next to be considered is the defence of provocation. This is on account of the accused's evidence in defence that he beat the deceased (his wife) on finding her having an affair with another man. The issue is whether the deceased's alleged conduct constituted provocation in the eyes of law.

Section 201 of the Penal Code provides that it is a defence if a person kills another while in a fit of anger. The term provocation is defined under section 202 of the same Act. Indeed, the aspect of anger is central, but that it must be in the heat of passion. By heat of passion is

meant a sudden happening without there being time for the accused to cool down. The case of **Eria Galikuwa v R. (1951) EACA 75** is to that effect. In this court's view, where there is evidence to establish that the act was provocative and that it came as a shock to render him instantaneously out of self control and then immediately killed the deceased, then the defence of legal provocation is available to him.

In our instant case however, evidence is there that the accused found the deceased having an affair with another man. He consistently related this to PW1 and PW3 as contained in exhibits P2 and P3. He repeated the same in his defence. At least, even the prosecution side has not shown doubts about his assertion. On the basis of the evidence on record, the court is satisfied that the accused found the deceased having an affair with another man as alleged by the accused.

The accused is maintaining that the deceased was his wife with whom he had stayed for nine months before they separated. Although it appears that there was no legal marriage, the defence of provocation can all the same be considered in his favour on the basis of the case of **R.v. Fita s/o Mihayo (1970) H.C.D. 58.** In that case, the respondent was charged of murder. It was alleged that he murdered a man whom he found committing adultery in a bush with a woman he had lived with for a period of about 4 to 8 months. He cut the man with a panga inflicting a deep wound on the head. The doctor was of the opinion that death was due to shock caused by the head injury. The accused said he met the couple in the act of sexual intercourse. He admitted attacking

the deceased. He raised the defence of provocation in view of what he said, the woman was his wife. The question for decision was whether the accused was married to the woman he claimed to be his wife. It was held that:-

> "The law is clear. If two people are living in concubinage for a considerable time they can be considered as being married and in the circumstances such as these the accused would be entitled to raise the defence of provocation...."

In that case, a period of 8 months was regarded as considerable time. The facts in the above cited case were similar to the facts in our present case. As already pointed out, there was no official marriage between the accused and the deceased, but it is alleged that they lived together for the period of 9 months.

As already stated above, the accused surprised the deceased committing adultery with another man. He has alleged in his defence that he was seized with sudden anger as a result of which he attacked her thereby causing her death. Guided by the decision in the case cited above, the accused is entitled to raise the defence of provocation.

The all important question is whether the accused, when he killed the deceased was acting in the heat of passion caused by sudden provocation as defined by section 202 of the Penal Code, that is to say by some wrongful act or insult likely to deprive an ordinary person of

his class of power of self-control and to induce him to assault the person who so provoked him.

The question whether or not an act constitutes provocation was best stated in the case of **Rex v. Hussein Mohamed (1942) IX EACA 52.** In that case, the appellant's wife wished to leave him and gravely abused and spat at him. This enraged the appellant. He immediately lost self-control and stabbed his wife a knife which was on a table nearby, inflicting a large number of savage injuries on her. The assessors found provocation in the grave abuse by the wife. Interpretation in respect of what provocation entailed was premised on the provisions of section 191 and 192 of the Tanganyika Penal Code which are replica of sections 201 and 202 respectively of the present day Penal Code Cap.16 of the Revised Edition, 2002. The court stated in that case that:-

> "We interpret the two sections referred to as meaning that before a charge of murder can be reduced to manslaughter on the ground of provocation the following conditions must be satisfied:
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> (1) the death must have been caused in the heat of passion;
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> (2) the provocation must be sudden;
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> (3) the provocation must be caused by a wrongful act or insult – and here we would observe that it has been held by this Court that mere vulgar abuse will not constitute an insult of any avail to an accused persons;

(4) the wrongful act or insult must be of such a nature as would be likely to deprive an ordinary person of the class to which the accused belongs of the power of self-control. It is obvious from this that any individual idiosyncrasy, such for instance as that the accused is a person who is more readily provoked to passion than the ordinary person, is of no avail;

(5) And finally the provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered. This condition has on different occasions exercised the minds of this Court. In our opinion the provision means exactly what it says, ... that [is] ... if the provocation is such as to be likely to induce an assault of any kind, then the accused should be found guilty of manslaughter and not murder and that irrespective of whether the assault be carried out with a deadly weapon or by other means calculated to kill."

As far as our present case is concerned, both assessors are of the view that taking into account the traditions of the members of the society in which the accused was living, where a man surprises his wife committing adultery with another man as was the case here; such an act is regarded as most offending and can lead to the taking by the husband of measures such as those which were taken by the accused

person in this case. They opined that the accused committed the alleged offence but in rage. With great respect, I share their views.

Before coming to the conclusion in this regard, there is one more aspect I have to address; it concerns the kind of weapon used by the accused in the attack. The Republic has asked this court to take into consideration the proposition of the Court of Appeal in the case of **Enock Kipela v. Rep. Criminal Appeal No. 150 of 1994 (CAT) (unreported).** In that case, the Court of Appeal stated that malice aforethought in a case could be established through several factors, including the type and size of the weapon used, the amount of force applied, the part of the body the blows were inflicted on, the kind of injury inflicted and the conduct of the attacker before and after the killing. Stress here is on the kind of weapon used and accused's conduct after the incident.

It will be recalled that the doctor's opinion regarding cause of death in present case was recorded to be (1) shock (2) hemorrhage (external) and (3) destruction of the brain. This implies that a light weapon must have been used in the attack. While there was evidence to show that he used a stick which he picked at the scene of crime, I find that there was none to establish that the accused used a club as submitted by the Republic. Because a small stick which was used cannot be said was lethal, which is a kind of weapon not normally associated with an intention to kill or cause grievous harm, the inference of malice aforethought is much less readily drawn than where a lethal weapon could have been used – (See the case of R. v. Nyadundo (1971) H.C.D. 279). There is also this aspect

of the accused's conduct after the incident. It has been submitted for the accused person that he away for two reasons; first on account of the advice of his friend Peter s/o Panta, and secondly he feared his fellow villagers would have killed him in revenge. In my opinion that is a plausible explanation. In view of this, I find that the case of **Enock Kipela** is distinguishable from the present case.

In conclusion, for reasons I have attempted to give, I find the accused not guilty of the charge of murder c/s 196 of the Penal Code for which he is acquitted. Instead however, I find him guilty of the offence of manslaughter c/s 195 of that same Act.

B.M.Mmilla,
Judge
27.02.2007.

Date: 27/2/2007.

Coram: Hon. B. M. Mmilla, J.

For Republic: Mr. Malata, Mwangamila & Mkizungo.

For Accused: Mr. Kampakasa, counsel for accused.

Accused: Present under custody.

Interpreter: Bertha E. Ngogo – English into Kiswahili and vice versa.

Court Assessor:

1. Odilia Katili.
2. Imelda Kamsweke } - Present.

Mr. Mwangamila: My Lord and ladies assessors, we have no previous record against the accused.

Mr. Kampakasa: My Lord, on behalf of the accused, we pray for lenience on the following grounds.

In the first place, the accused is a first offender. Secondly your Lordship, he is repentant for having killed his lover. Thirdly your Lordship, the accused has been in remand prison for a period of 8 years and 4 months. Besides your Lordship, the accused is an aged man, he being 42 years now. I pray for lenience.

ALLOCUTUR:

Accused: I have nothing to add my Lord.

SENTENCE:

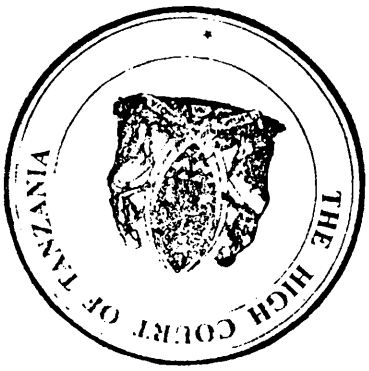
After taking into consideration the mitigating circumstances advanced by the learned defence counsel Mr. Kampakasa on behalf of the accused person, particularly that the accused is a first offender, and that he has been in remand prison for a period of 8 years and 4 months, the court sentences him to a custodial term of eight (8) years.

B.M.Mlinda,
Judge
27.02.2007.

Right of Appeal explained.

B.M.Mmilla,
Judge
27.02.2007.

Court: Ladies assessors are thanked and discharged.



B.M.Mmilla,
Judge
27.02.2007.