

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(BUKOB A DISTRICT REGISTRY)**

**AT BUKOBA**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSIONS CASE No. 58 OF 2017**

**THE REPUBLIC**

Versus

**GODFREY FRANCIS @ MWESIGE**

**JUDGMENT**

21/04/2021 & 29/04/2021

**Mtulya, J.:**

This is one of the cases which was filed in this court to display one of the Swahili sayings: *mapenzi yanaua*. This court after receipt of the case and invitation of the parties to explain on what transpired, the parties registered facts and evidences that depicted an issue whether words: *wewe ni mwanaume gani nakulisha kila siku. Sasa nina mwanaume mwingine anataka kunioa*, are powerful dynamite sufficient to blow off the faculty of reasoning and cause a heat of passion in human person of Haya Tribe, Mr. Godfrey Francis @ Mwesige (the accused) to enjoy the defence of provocation of killing his girlfriend Ms. Neema Abdul (the deceased) who had lived together under one roof for nine-years and were blessed with a child.

In order to appreciate the above identified issue which this court is asked to reply, I will briefly explain the facts and evidences registered in

this case: in early September 2016, the accused and deceased had arrived at their climax in matrimonial quarrels hence the deceased had left the accused's residence in favor of her brother residence at Kasharu- Nyabihokwe Village within Missenyi District of Kagera Region (the scene of the crime). After a lapse of week, the accused had followed the deceased to persuade her to return to their residence without any success.

On 25<sup>th</sup> of September 2016, the accused visited again at the scene of the crime and had conversation with the deceased outside the house and the accused was told by the deceased that she has to leave her alone as she wanted to be married with another man and a cell-phone picture of the intended spouse was shown to the accused. The picture shown in the cell-phone had depicted Mr. Nelson Anastazi (PW2), who was relative of the accused from the same family and before the picture was displayed, the words: *wewe ni mwanaume gani nakulisha kila siku. Sasa nina mwanaume mwingine anataka kunioa* were pronounced by the deceased. It is from the picture and words that the accused decided to attack the deceased to death, PW2 to grievously bodily harm and himself to serious neck injuries trying to leave this world.

Following the incident, the accused was arrested and brought in this court to reply the charge of murder of the deceased contrary to

section 196 of the **Penal Code** [Cap. 16 R.E. 2019] (the Code). The accused had admitted the attack and killing of the deceased from the arrest to this court, but claim he was provoked by the deceased's words. His interpretation of the events and attacks leading to the death of the deceased was protested by the prosecution. In order to establish malice aforethought, the prosecution summoned a total of four (4) witnesses and tendered four (3) exhibits. On the other hand, the defence, called one (1) witness, the accused himself and did not tender any exhibits in this court.

The prosecution summoned Ms. Sharifa Mbaraka as prosecution witness number one (PW1) to testify that she saw the accused at their home residence in Kasharu-Nyabihokwe at night hours of 25<sup>th</sup> September 2016. According to PW1, on that fateful day she opened door from the knocking emanated from the accused who was interested on presence of the deceased. The knocking and question received a positive reply hence the dual, accused and deceased had left the door in favour of sitting in the nearby unfinished house foundation for matrimonial conversations. However, after a lapse of thirty (30) minutes time, PW1 heard a voice of *Panga* banging down on land to a place where the dual sat. PW1 then heard Ms. Naima saying the accused has attacked the deceased with *Panga*. It is from that Ms. Naima's voice,

PW1 was afraid and opted to close house doors in search of protection from the attacks of accused.

According to PW1, she went outside the house to see the deceased after arrival of her father Mr. Mbaraka Abdul and found the deceased already dead with wounds cuts at the neck, face and head. However, PW1 stated that she did not see the accused carrying anything when he knocked the house door and after the attack, she went out, but could not find either the accused or the *Panga* used in the attack. With relations between the accused and the deceased, PW1 stated that they were living as wife and husband for more than six (6) years and were blessed with one baby girl called Ms. Careen. On coming to their residence, PW1 stated that it was a second time for the accused to show up in their residence and had all signs of normal person without any evil signs and the accused went for usual family conversation in trying to settle their differences.

PW2 was also attacked in the series of attack events of the accused. PW2 testified that in the series of events and attacks occurred on 25<sup>th</sup> September 2016, he was also connected by the deceased. According to PW2 he was attacked when he was at Bwekera Centre because the accused had suspected him of interfering his matrimonial home and to have conjugal relations with the deceased. PW2 testified

further that the accused is relative from the same family, but he had not seen the accused killing the deceased.

A Police officer, numbered E.4072 D/sgnt. Moris and Justice of Peace Nelson Bagenda who recorded Cautioned Statement and Extra Judicial Statement on 26<sup>th</sup> September 2016 and 30<sup>th</sup> September 2016 respectively, were summoned to testify on the admission of the commission of the alleged offence against the accused. The Cautioned Statement and Extra Judicial Statement were registered in the case as exhibit P. 4 and P.3 respectively.

P.3 and P.4 show that the accused committed the alleged offence. In P.3 the accused stated that: *baada ya kuwa ameondoka na kubeba vitu vyote ilibidi nimfuate nyumbani kwao. Nikamkuta na tukaanza kuzozana na ndio nikamkata na panga.* Facts in P.3 are silent on where the *Panga* came from and where it went after the attacks. It is also silent on the number of attacks which were landed to the deceased. However, there is a statement that: *ndipo nilimkata na Panga sehemu mbalimbali za mwili.* Finally, the accused recorded a statement that: *sikufahamu kama amekufa.* On the other hand, P.4 shows that the accused and deceased had a hot conversations before the attacks. He stated that: *ninafahamu hapa nilipo ni hospitali ya mgana na nimelazwa. Sababu ya kulazwa **nimegombana** na mpenzi wangu Neema Abdul.*

*Nikamjeruhi kwa panga uko kwao.* P.4 also shows that the accused attacked the deceased out of anger and wanted to take his own life. He stated at page 4 and 5 of P.4 that: *tulishindwa kuelewana na Neema Abdul. Nikapandwa na hasira. Kisha nikajikuta namkata kwa panga bila kutegemea. Kisha akakaa chini. Nami nikaondoka... baada ya kuona kwamba nimemjeruhi mpenzi wangu na ndugu yangu ndipo nikaamua kujichoma mwenyewe kwa kisu shingoni upande wa kulia ili name nife, lakini bahati mbaya sikufanikiwa kufa.*

When the accused was marshalled in this court to give his evidence in defence of murder case against him, he admitted the killing and briefly testified that on night hours of 25<sup>th</sup> September 2016, he went to the deceased residence at the scene of the event for matrimonial dispute settlement and was the second attempt in to revert the deceased back to his home residence. According to the accused, during conversations to persuade her return, the deceased had informed him that: *wewe ni mwanaume gani nakulisha kila siku. Sasa nina mwanaume mwingine anataka kunioa.* To the accused, the deceased substantiated her assertion by showing the pictures of the intended husband in a cell-phone photo album. For the accused, words and picture in the cell-phone album provoked him to lose control and attack

the deceased. According to the accused, he acted under provocation and regret of what has transpired to his wife and himself.

Finally, the parties in this case agreed to fine-tune the registered facts and evidences in final submissions. However, this court had noted that the parties do not dispute on the death of deceased or involvement of the accused in the attacks and killing of the deceased, but whether there was malice aforethought in the killing. According to learned counsel Mr. Danstan Mujaki for the defence, there was no malice aforethought on the part of the accused. To substantiate his submission, Mr. Mujaki stated that the accused attacked the accused under the heat of passion or provocation caused by words of the deceased that: *wewe ni mwanaume gani nakulisha kila siku. Sasa nina mwanaume mwingine anataka kunioa.*

To bolster his submission, Mr. Mujaki cited the precedent in **Said Hemed v. Republic** [1987] TLR 117 which stated that that where a killing is done in the heat of passion, the defence of provocation applies and the killing is not murder, but manslaughter. According to Mr. Mujaki the words: *wewe bwana achana na mimi. Sina habari na wewe* spoken by the deceased in the case of **Benjamin Mwangi v. Republic** [1992] TLR 85 are relatively similar words to: *wewe ni mwanaume gani nakulisha kila siku. Sasa nina mwanaume mwingine anataka kunioa.*

However the Court of Appeal in the cited precedent stated that: *those words in themselves appear innocent. But if they are looked at with the hindsight of what had transpired they are powerful dynamite sufficient to blow off the faculty of reasoning of the appellant.*

To Mr. Mujaki's opinions, the defence of provocation to be availed to accused persons, two (2) factors must be considered, namely: first, that a relationship between the accused and deceased must be existing and secondly, the accused must admit to the killing of the deceased, as per decision of the Court of Appeal in **Shabani Rashid v. Republic** [1995] TLR 259. According to Mr. Mujaki, the present accused and deceased were wife and husband who stayed together in more than nine (9) years blessed with one children and that the accused admitted the killing of the deceased. With regard to events before the attack, Mr. Mujaki submitted that PW1 testified that the accused showed up at the deceased's residence without any weapon and after the events of attacks, he regretted the events through an attempt to kill himself as the story of Yudah Iscariote in the Holy Bible and also admitted the killing in P.3 and P.4 with the words of regret.

However, the interpretation employed by Mr, Mujaki on the facts registered in this case and cited precedents, were protested by Mr. Mahona. According to Mr. Mahona, the accused killed the deceased with



malice aforethought as he called the deceased outside the house in preparation of the killing and used *Panga* in the attacks. According to Mr. Mahona, after the attacks, the accused escaped the scene of the crime and left the deceased without any assistance and attack another person, PW2 in the course.

Mr. Mahona submitted further that, the words such as: *wewe ni mwanaume gani nakulisha kila siku. Sasa nina mwanaume mwingine anataka kunioa* or *seeing pictures of PW.2 in the deceased's cell-phone album* cannot be provocative instances in ordinary person of the community to which the accused belongs as per requirement in section 202 (2) of the Code. To Mr. Mahona, the accused was not taking care of his children and it was proper to be called so by his wife. To substantiate his claims, Mr. Mahona cited the authority in **Damiana Ferdinand Kiula & Charles v. Republic** [1992] TLR 16, where the Court stated that an ordinary reasonable educated Chaga would not have been provoked by the deceased's action of refusing to hand over money and dirty words towards the accused and held that for the defence of provocation to stick, it must pass the objective test of whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances.

Mr. Mahona also distinguished the decision in **Benjamin Mwangi v. Republic** (supra) arguing that the parties in the dispute agreed to marry and the deceased had found the deceased inside the room of Idi Kazimoto sitting on bed and when the deceased was asked by the accused, she replied: *Wewe bwana achana na mimi. Sina habari na wewe*, which are provocative words, whereas in the present case, the accused stated in P.3 that before the attack they fought with the deceased. To Mr. Mahona the accused had malice aforethought and fits well in section 200 of the Code and the decision of the Court of Appeal in **Jacob Asegelile Kakune v. D.P.P**, Criminal Appeal No. 178 of 2017.

In the present case, the parties are disputing on malice aforethought as to whether it was established nor not. The law in section 200 of the Code and practice of this court and Court of Appeal, malice aforethought is established when an attack is directed at sensitive and vulnerable part of the body. In the present case there is a death caused by *Panga* directed to vulnerable parts of the body, including head and neck. This type of killing may be within the provision in section 200 of the Code and precedents in **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 and **Bujigwa John @ Juma Kyriako v. Republic**, Criminal Appeal no 427 of 2018. In **Enock Kipela's** decision (supra) it was stated at page 6.

*...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing*

However, their lordship in that case gave two exceptions at page 5 and 7, that is each case must be decided on its own facts and if there is doubt of two views on the intention of the accused, the doubt is to be resolved in favour of the accused. In the present case, both exceptions may be invited. This may be depicted from the interpretation of lay persons, Hon. Assessors. I sat with three, and two opined that there is no malice aforethought established to convict the accused with the offence of manslaughter. They interpreted the culture and tradition of the people in Missenyi District on the words: *wewe ni mwanaume gani nakulisha kila*

*siku. Sasa nina mwanaume mwingine anataka kunioa.* These words must be interpreted in context of the people, culture and tradition of where the event occurred.

It is fortunate that I had an opportunity to peruse the judgments in **Said Hemed v. Republic** (supra), **Benjamin Mwangi v. Republic** (supra) and **Shabani Rashid v. Republic** (supra). For appreciation of what transpired, I will briefly explain the facts and holding of the cases. In **Said Hemed v. Republic** (supra), the accused was prosecuted for murder of in this court and sentenced to death. It was not in dispute that the appellant intended to harm an adulterer, but killed his own wife. He admitted from the beginning that he wounded the deceased by inflicting a *Panga* blow on her face. The deceased subsequently contracted tetanus and consequently died. It was also proved that the assault was preceded by a matrimonial squabble between the appellant and the deceased and further that at the time of the incident the appellant and deceased who were originally wife and husband, were living separately. On the fateful night, the appellant contended, the deceased was surprised committing adultery with another man, her former husband and alleged that the killing was prompted by provocation. This plea was refused by this court, but the Court of Appeal held where a killing is done in the heat of passion, the defence of provocation applies and the killing is not murder, but manslaughter.

Five (5) years on, the decision of **Benjamin Mwangi v. Republic** (supra) was delivered by the same Court of Appeal. This time their lordship held that the words: *wewe bwana achana na mimi. Sina habari na wewe* are provocative. To their opinions, the Justices of Appeal, is that: *the words in themselves appear innocent. But if they are looked at with the hindsight of what had transpired they are powerful dynamite sufficient to blow off the faculty of reasoning of the appellant.* The facts were that: The accused in this court confessed killing of his fiancée. In his defence he said he was provoked by the words of the deceased whom he found in the bed of her new lover. Upon being asked the deceased replied: *wewe bwana achana na mimi. Sina habari na wewe.* The issue was whether these seemingly innocent words could provoke a person to killing. This court replied that they were not provocative.

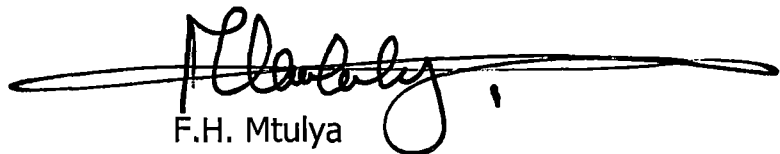
Three (3) years later, after the decision in **Benjamin Mwangi v. Republic** (supra), the precedent in **Shabani Rashid v. Republic** (supra) was set. In this case the defence of provocation was not received well by the Justices of Appeal as there was no existed nexus of a relationship between the accused and deceased and that the accused did not admit the killing of the deceased. The facts registered in the present case shows that the accused admitted the commission of the offence since his arrest to this court and had nexus with the deceased.

I understand Mr. Mahona distinguished the precedent in **Benjamin Mwangi v. Republic** (supra) arguing that the parties in the dispute agreed to marry and the deceased had found the deceased inside the room of another person, Idi Kazimoto sitting on bed. To his opinion, in the present case the accused found the accused at her resident and called him outside in the unfinished house foundation for the purposes of killing with malice aforethought. However, Mr. Mahona forgets that in criminal cases the standard of proof is beyond reasonable doubt and where the onus shifts to the accused it is on a balance of probabilities (see: **Said Hemed v. Republic** (supra)).

In any case, the level of heat of passion differs in every individual persons and tribes he belongs. That is why the Court of Appeal in the precedent of **Damiana Ferdinand Kiula & Charles v. Republic** (supra) employed the test of an ordinary reasonable persons in Chaga tribe of Kilimanjaro. The words and level of anger inserted to the accused by the deceased is to be tested on whether an ordinary man in the haya community to which the accused belongs would have been provoked in the circumstances. In the present case, the prosecution side failed to prove malice aforethought beyond any reasonable doubt as per requirement of the law in **Said Hemed v. Republic** [1987] TLR 117, **Mohamed Matula v.**

**Republic** [1995] TLR 3, and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005.

Having said so and considering there are precedents of the Court of Appeal and I sat with three Hon, assessors of haya community in this court and two (2) opined that the words directed to the accused and picture of the potential husband was shown to the deceased, may cause provocation in the circumstances of the present case, I need not be detained searching for any other interpolations. I therefore hold that the accused killed with provocation and found the accused guilty of manslaughter.



F.H. Mtulya

**Judge**

29. 04.2021

### **ANTECEDENTS**

**Mwakasege:** My Lord, we have previous criminal record of this accused. The accused was prosecuted in **Criminal Case No. 71 of 2017 in the District Court of Bukoba at Bukoba** before Hon. Mwakihaba. My Lord, this accused was sentenced to five (5) years for attacking PW2 in this case. My Lord, the offence committed by the accused attract life imprisonment under section 198 of the Penal Code [Cap. 16 R.E. 2002].

My Lord, this accused went to the scene of the crime twice and this shows that he had something in his heart. My Lord, to be told the wife will be married to another man cannot be a good base. He was supposed to follow the laws regulating matrimonial disputes.

My Lord, this accused attacked the deceased at vulnerable parts of the body. He must receive serious penalty to be a lesson to other accused persons who are doing the same thing. My Lord, the accused left his family of wife and child without any care and he is displaying bad behavior of men in this country. That is all my Lord.

F.H. Mtulya

**Judge**

29.04.2021

### **MITIGATIONS**

**Mujaki:** My Lord, we pray for lenient penalty. There are reasons:

- i. This accused person was prosecuted in Criminal Case No. 71 of 2017 in Bukoba District Court which was in the same transaction with this case;
- ii. My Lord, this accused admitted the offence to show regret on the commission of the offence. My Lord, this shows he really regret;



iii. My Lord, the deceased contributed to her own death. She pronounced bad words against the accused;

iv. Both deceased and accused had left a child. This child has no one to call father or mother. This court may think of that;

v. My Lord, the accused went twice at the scene of the crime to persuade his wife. This shows good behavior; and

vi. My Lord, this accused is my client and told me that all those years in custody he learnt a lesson and when released he will be a good citizen of this state. That is all my Lord.

F.H. Mtulya

**Judge**

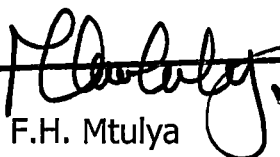
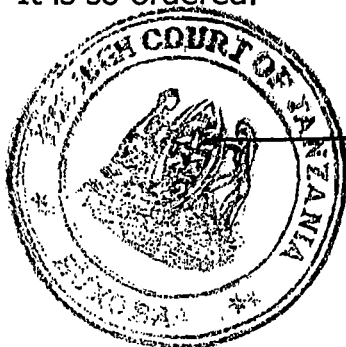
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**SENTENCE**

**Court:** I have gone through the antecedents registered by Mr. Mwakasege and mitigations filed by Mr. Mujaki, and considered the nature of this case, and regarded the words of the deceased and attacks landed by use of *Panga* on the deceased's face, and noted the law in provision of section 198 of the **Penal Code** [Cap. 16 R.E 2002] which provides up to life imprisonment in cases like the present one and practice of this court which was confirmed by the Court of Appeal in **Ramadhani Omari V. Republic**, Criminal Appeal No. 83 of 2018, which had considered twelve (12) years reasonable in cases, like the

present one, I have formed an opinion to sentence the accused person to ten (10) years imprisonment from the date of this order.

It is so ordered.

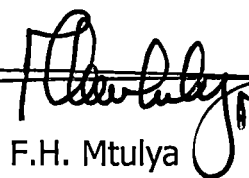


F.H. Mtulya

**Judge**

29.04.2021

**Court:** This order was pronounced in open court in the presence of the accused person, Godfrey Francis @ Mwesige, and his learned defence counsel Mr. Danstan Mujaki and in the presence of learned State Attorney, Mr. Joseph Mwakasege.



F.H. Mtulya

**Judge**

29.04.2021