THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

ORIGIONAL JURISDICTION

(BUKOBA DISTRICT REGISTRY)

AT BIHARAMULO

THE REPUBLIC v. MASUMBUKO FREDRICK

CRIMINAL SESSIONS CASE No. 43 OF 2017

JUDGMENT

28.11.2022 & 29.11.2022
Mtulya, J.:

In the present case this court was invited to resolve an issue whether: *killing of a person by reason of witchcraft unaccompanied by any physical attack could invite the defence of provocation within the principles of adversarial system, which this State inherited from* ***English Legal Tradition***. The reply is obvious from our superior court of the land, the **Court of Appeal of Tanzania** (the Court), that: *for provocation to constitute a defence in a charge of murder, the belief in witchcraft must be founded on some physical and not metaphysical act* (see: **Kasongi Yabisa v. The Republic** [1995] TLR 28).

The Court arrived at the decision after borrowing a leaf from the practice of the East African Court of Appeal in the

precedent of **R. v. Akope Karuon & Another** [1947] 14 EACA 131. However, the Court in the precedent of **Kasongi Yabisa v. The Republic** (supra) had drafted a very important clause in *obiter dictum* for future judges to test its applicability on the subject. The Court stated:

> *There can be no doubt in this case that the appellant killed his sister, the deceased,* ***in the honest belief that she was responsible, by reason of witchcraft,*** *for the death of his daughter, Luja Kasongi. However, as* ***there was no sudden shock which might have deprived the appellant of his self-control the killing was murder.***
>
> (Emphasis supplied).

From the *obiter dictum*, it is obvious that killing by reason of witchcraft may invite the defence of provocation within the principles of adversarial system of **British Common Law Legal tradition**, provided that ***there is sudden shock which deprives accused of his self-control.*** This thinking had already received support in a bunch of precedents (see: **Mariam Tumbo v. Harold Tumbo** [1983] TLR 293 and **Joseph Kamiliango & Five Others v. Republic** [1983] TLR 186). Where allegations of threats of witchcraft powers by words or actions against any

person or property are registered in normal criminal trials, section 3 of the **Witchcraft Act [Cap. 18 R. E. 2002]** (the witchcraft Act) is normally invited to apply. However, according to the Court, there are some words, which in themselves may appear as innocent, but if are looked at hindsight of what transpires, they are powerful dynamite sufficient to blow off the faculty of reasoning of human minds (see: **Benjanin Mwansi v. Republic** [1992] TLR 85). In the precedent of **Benjanin Mwansi v. Republic** (supra), the Court had words to say on issues related to provocation:

> *...thus in killing on provocation circumstances which constitute murder are proved and established. But that is not the end. There is something extra and that is sudden provocation.* ***If we were to be mathematical and devise a formula we would say: killing by provocation is equal to circumstances which constitute murder plus sudden provocation without time for cooling down****....Now, those words in themselves appears very innocent. But if they are looked at with the hindsight of what had transpired, they are a powerful dynamite sufficient to blow off the faculty of*

*reasoning of the appellant...**Did he have time to cool down? No, obviously not** ...We, therefore, find the appellant not guilty of murder but of manslaughter. So we quash the conviction for murder.*

(Emphasis supplied).

The thinking of the Court has been cherished in a bundle of precedents of the Court itself and this court without further reservations (see: **Republic v. Godfrey Francis Mwesige**, Criminal Sessions Case No. 58 of 2017; **Said Hemed v. Republic** [1987] TLR 117; **Benjanin Mwansi v. Republic** [1992] TLR 85; **Shabani Rashid v. Republic** [1995] TLR 259; and **Damiana Ferdinand Kiula & Charles v. Republic** [1992] TLR 16).

It is now certain and settled law that provocation as enacted in section 201 of the **Penal Code [Cap. 16 R.E. 2019]** (the Penal Code) and defined in section 202 (1) of the Penal Code and interpreted in the precedent of **Benjanin Mwansi v. Republic** (supra) that: *it must be a sudden provocation without time for cooling down.* In my considered opinion, I think, in cases where a defence of provocation is produced, the key question is whether: **accused had time to cool down?**

Now, let this court turn to the present case. Two deaths occurred at Mmanyonga area within Mkalinzi Village of Ngara District in Kagera Region on 31st May 2015. The facts and evidences registered during the hearing of the case show that the natives of the village in Mkalinzi Village live in a typical African society in belief of magic, superstitions, wizardry, and witchcraft that can cause disasters in families, including death.

Two events related to the deaths of the villagers had occurred in the morning hours of 31st day of May 2015 in the village, namely: first, death of a baby boy of **Mr. Masumbuko Fredrick** (the accused); and second, expiry of accused's step mother, **Bennazita Frederick @ Benadatha Fredrick** (the deceased). The first died on allegations of witchcraft and the second from hammer attacks which were directed at her head by the accused.

According to police officer, G.3691 D/C Felis (PW1), the accused recorded statement at police station admitting the killing, but claimed a day before the delivery and death of his son, the deceased had requested his wife to hold a baby boy, and that on the night of delivery of the baby, there were a lot of noises produced by wolves (*mbwa mwitu*) and owls (*bundi*)

and in the morning hours, the baby had expired. According to the tradition of Ngara natives, owls and wolves noises are signs of bad luck. The facts registered by PW1 show further that in the same morning, at around 11:00am, the accused went and attacked the deceased at her residence. The facts regarding recording of accused's statement registered by PW1 during the hearing of the case, were not disputed or cross-examined by the defence side.

However, the defence added further materials that displayed a week before the delivery of the child, the deceased had informed the wife of the accused, in the presence of the accused, along the way from Mmanyonga Centre to their home residence, that: *mtoto wenu mtamu kuliwa* (your child is delicious to be eaten). The question therefore, before this court is whether: *the cited words and circumstance of the present case are powerful enough to blow off the faculty of reasoning of the accused.*

Before, replying the indicated question and considering the need to appreciate the case, I will briefly produce the material facts of the case registered by the parties during the hearing of the case. In order to prove the case against the

accused, the Republic had marshalled a total of seven (7) witnesses and two exhibits whereas the defense side had produced one (1) witness (DW1), the accused himself, without any exhibits. PW1 was marshaled and testified that in the morning hours of 1st June 2015, he went at the scene of the crime accompanied by a medical doctor and found a dead body of the deceased. According to PW1, he interrogated and recorded statements of Teodora, Teopista and later the accused, with regard to the death of the deceased.

In his investigation role, PW1 had sketched a map of crime scene and was admitted in the case as exhibit P.1. According to PW1, on 3rd June 2015, he recorded accused's statement and admitted to have killed the deceased because she was witch and caused the death of his son by use of magic and superstitions.

According to PW1, the accused stated further that the deceased had informed the wife of the accused, a day before delivery that she needed to hold a baby in her hands, which was interpreted by the accused as a witchcraft. To PW1, the accused admitted its belief because on the delivery day there were a lot of wolves and owls noises and in the morning hours

the baby had expired and that it was the same morning at 11:00am, the accused went and killed the deceased at her home residence.

Teopista Francisco (PW2) and Teodora Sprian (PW3) who were mentioned by PW1 were marshalled in this case to testify what they have witnessed. PW2 on his part testified to have seen the accused attacking the deceased with a small sized hammer on head while seated at her residence on 31st May 2015 at around 11:00am. According to PW2, he witnessed the incident when she was preparing a local brew *Mramba*. PW2 stated further that the accused showed up and greeted them, but immediately out pocketed hammer from his trouser and attacked the deceased on fore and back head and escaped.

PW3 on his part testified that on 31st May 2015, she was at the deceased's home residence and around 11:00am, the accused appeared, greeted them all and immediately started attacking the deceased at the fore and back head by use of small sized hammer. PW3 stated that after launching the attacks, the accused escaped the scene of the crime. PW3 stated further that she did not know the cause of the attacks, but after the incident she heard from the villagers that the

source of the attacks to the deceased was associated to the death of the accused's son.

Balozi, hamlet and village authorities in Mkalinzi Village were marshalled in representation of Mr. Jovin Fredrick (PW4), Mr. Julius Mtima (PW5) and Mr. Richard Mavogoro (PW6) to testify their exposure on the case. They all admitted their absence during the killing of the deceased by the accused. However, each one had his own narrations.

According to PW4, in 2015 he served as *Balozi* of the area and on 31st May 2015, was invited at the scene of the crime where she found the accused had already expired, but was told by PW2 and PW3 that the accused had killed the deceased for reasons of witchcraft. PW4 testified further that there was already existed bad-blood relations between the deceased and some of the family members that the deceased *anawavurugu*. Finally, PW4 stated that the accused is a person of good behaviors and neighbors the deceased's house, about six (6) to seven (7) minutes walking distance.

PW5 on the other hand testified that he served as hamlet chairman at Mmanyonga area in Mkalinzi Village and that on

31st May 2015 at around 09:00am, he was at the church and later on the day, he was informed the deaths of two (2) villagers by PW2 and PW3 and that the accused had attacked the deceased to death. PW5 testified further that, he informed a village chairman and went at the scene of the crime to witness the body of the deceased. According to PW5, the death of the deceased was caused by witchcraft beliefs as there were underground complaints and misunderstanding among family members alleging that the deceased caused the death of *Mama Mdogo* and following the death of accused's son, the pressure mounted to the uncontrollable level.

PW6 on his side testified that he was a Village Chairman at Mkalinzi Village in Ngara District and was informed of the death of the deceased and accused's son on 31st May 2015 at around 01:00pm by PW5. According to PW6, he went and saw the body of the deceased at the crime scene and reported the matter to the police. PW6 testified further that there were long complained allegations of witchcraft on part of the deceased, but there were no proof of the same in science.

The Republic finally marshaled a medical doctor, Dr. Revelian Kahamba (PW7), who testified that on 1st June 2015,

he went and examined the deceased body and found the source of death being: *traumatic injury on the head which caused by blunt instrument to cause severe bleeding on the head.* In order to substantiate the statement on the source of death, PW7 tendered the Postmortem Examination Report of the deceased (the report), which was admitted as exhibit P.2.

The defence on the other hand had marshalled one witness (DW1), who admitted to have killed the deceased with hammer because he believed the deceased had caused the death of his son by witchcraft powers. To substantiate his allegation, DW1 stated that one week, that is 22nd May 2015, before his wife delivered a baby boy, she met the deceased along the way between the center of Mnanyonga and their home residence, and the deceased said to his wife that their child is delicious to be eaten (*mtoto wenu mtamu kuliwa).*

According to DW1, the story happened to be true as his son expired just after delivery and he could not sustain the moral injury hence decided to go and attack the deceased with hammer. With regard to distance from his home residence to the deceased, DW1 testified that it is like from Biharamulo District Court to Biharamulo District Prison [estimated at 150

meters or three minutes walking distance]. DW1 testified further that it was from those depraved words of the deceased which had blown off his mind to attack the deceased.

These were the materials registered during the hearing of the case. It is vivid from the material facts of the case that there are issues related to witchcraft, wizardry, magic and superstitions beliefs leading to the attacks to the deceased. This court has been receiving situations like the present one since colonial time. I am aware that during colonial period in Africa, it was difficult for colonial courts to see how an act of witchcraft unaccompanied by any physical attack could kill a person and invite the defence of provocation within the principles of **English Common Law Legal Tradition.**

It was from this thinking that the defence of insanity or provocation associated with witchcraft was rejected by the courts (see: **Konkomba v. Gold Coast** (1952) 14 W.A.C.A. 236 (Ghana); **Erika Galikuwa v. R** (1951) 16 E.A.C.A. 175 (Uganda); **R. v. Akope Karuon & Another** [1947] 14 EACA 131 (Kenya) and **R. v. Kumwaka Wa Malumbi & 69 Others** (1932) 14 K.L.R. 137. (Kenya).

The available record shows that courts were refusing the approach for various reasons, *viz*: first, the approach would encourage aggrieved parties in witchcraft issues to take the law into their own hands; second, the allegations cannot be established by science; and finally, the approach may cause more mischief to public peace and tranquility than cure. It was thought that courts' decisions cannot be part of the reality in the African circumstances. The thinking is still cherished by some of the learned minds in the African Continent, who cannot distinguish circumstances and happenings of Anfield Road, within Anfield area in Liverpool and Mkalinzi Village within Ngara District of Kagera Region.

However, the supporters of the move failed to consider each case has its own peculiar circumstances, and in any case witches would make no comfort to innocent natives in their areas of jurisdiction. That is why courts in African continent have currently starting to change their course in favour of reality on ground and situate their decisions on realistic premises regarding matters affecting African societies (see: **Patrick Magit v. University of Agriculture Markud & Three Others** [2006] All FWLR 1313 (Nigeria); **Stephen Ngalambe v. Onesmo**

Ezekia Chaula & Another, Misc. Civil Application No. 5 of 2022; and **Republic v. Mokiri Wambura @ Makuru**, Criminal Sessions Case No. 7 of 2022 (Tanzania).

Tanzanian courts are not part of the exception in the changing gear and have considered and determined the defence of provocation in murder cases associated with witchcraft. The key consideration in place is whether the accused produces materials which display sudden shock which may deprive his self-control (see: **Mariam Tumbo v. Harold Tumbo** (supra); **Joseph Kamiliango & Five Others v. Republic** (supra); and **Kasongi Yabisa v. The Republic** (supra).

In the decision of **Kasongi Yabisa v. The Republic** (supra), where the appellant had killed his sister in the honest belief that she was responsible, by reason of witchcraft, for the death of his daughter, the defence of provocation was considered, but rejected. The reason of refusal was that the facts disclosed that there was no sudden shock which might have deprived the appellant of his self-control.

Similarly, the judgment in **Joseph Kamiliango & Five Others v. Republic** (supra), where appellants believed that the

deceased was a witch who had killed, by witchcraft, many members of their family. They also believed that the deceased had bewitched their father who was seriously ill at the time when they decided to pay the first accused a visit. The court held that:

> *...since* ***the appellants did not act suddenly and as their conduct clearly showed that they had calculated their move with cool minds and in full possession of their faculties,*** *the defence of provocation by witchcraft cannot be availed to them.*
>
> (Emphasis supplied).

Their Lordships reasoned that the four sisters were determined to finish the deceased and observed that:

> *It was quite clear on the evidence that the four sisters did not act suddenly but they deliberated upon their move at a meeting held to consider their position. They then travelled across the lake from their island village to the mainland where they negotiated with the first accused.* ***The conduct of these four sisters clearly shows that they had calculated their move with cool minds and in full***

possession of their faculties. The defence of provocation by witchcraft is thus not available to this gang of four. *They were a party to the killing of the deceased by hiring the killer.*

(Emphasis supplied)

The materials produced in the present case show that the son of the accused expired on 31st of May 2015, just after his birth. A week, before this day, on 22nd of May 2022, the accused on his way from the centre to his residence accompanied by his wife, who was a pregnant, the deceased uttered the words *mtoto wenu mtamu kuliwa,* followed by the death of the baby boy and on the same morning at 11: 00am, the accused attacked the deceased on head by use of a small sized hammer to cause her death. According to the deceased, the words: *mtoto wenu mtamu kuliwa* followed by the actual death of his son had caused sudden shock in his minds to deprive self-control hence had killed the deceased.

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 which provides that: *any person who, with malice aforethought,*

causes the death of another person by an unlawful act or omission is guilty of murder. According to the accused, the attacks were caused by provocation whereas the Republic thinks that the materials on record display malice aforethought.

To the contesting parties, death in the present case was obvious from the evidence of witnesses and exhibits P.1 and P.2 and that all materials in the case show that it was the accused who had killed the deceased. The only question remained for determination in this court is whether: *the cited words and circumstance of the present case are powerful dynamite sufficient to blow off the faculty of reasoning of the accused.*

It was fortunate that I sat with three (3) Hon. Assessors during the hearing of the matter and asked their interpretation on the matter. All had the same view that the accused acted under provocation. However, each had his own reasoning. The first assessor reasoned that the deceased had caused her own death in uttering the words that the child was delicious and it happened. The second assessor opined that if someone had predicted a thing to happen and it actually happened,

provocation may be produced whereas the final assessor stated that the words uttered by the deceased, on eating of the child and it happened the child died in few days later, the words were powerful to cause a heat of passion in the natives of Ngara District.

I am aware the time when the accused's son had lost his life is not displayed on the record, but the time when the words were uttered and attacks to the deceased is depicted in the record. It is fortunate that the distance between homes of the accused and deceased is displayed on record. It is not a long distance, just three to six minutes. It is unfortunate that the cautioned statement of the accused, which he admitted the killing of the deceased, was not tendered by the Republic and no reasons were registered during the hearing of the case. The statement could have produced some light on the test of time. This court is denied the story of the accused produced at the police station.

The position of the Court of Appeal in such instances has been that the statement has to be admitted to assist this court in arriving at justice (see: **Bushiri Mashaka & Three Others v. Republic,** Criminal Appeal No. 45 of 1991 and **Republic v.**

Massanja Karume @ Mohamed & Another, Criminal Sessions Case No. 13 of 2018 and **Republic v. Mokiri Wambura @ Makuru**, Criminal Sessions Case No. 7 of 2022). The Court has been reminding those charged with the duty of investigating and recording confessions of accused persons in criminal investigations to repeat statements of the accused persons before justice of peace and bring the same in courts for smooth justice delivery (see: **Bushiri Mashaka & Three Others v. Republic** (supra). Failure to do so brings some doubts and from the practice of our courts, doubts are to be resolved in favour of the accused persons. There is a large family of precedents insisting on the subject (see: **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994; **Faustine Kunambi v. Republic**, Criminal Appeal No. 32 of 1990; **Mohamed Said Matula v. Republic** [1995] and **Marwa Joseph @ Muhere & Another v. Republic**, Criminal Appeal Case No. 96 of 2021).

The Court in the precedent of **Faustine Kunambi v. Republic** (supra) has categorically stated that:

> *Where there is difficult on evidence to say that the accused intended to kill the deceased, he should be*

given the benefit of doubt and found guilty not of murder but of manslaughter.

In the present case, to cite malice aforethought on the part of the deceased is a tough exercise. Let alone the decline of the Republic to register the statement of the accused which is in their possession, The facts of the case show that there was sudden provocation caused by the deceased by uttering the cited words a week and day before the delivery of the deceased's son.

In the present case, evidences produced by witnesses of both sides display on witchcraft and circumstances leading to the death of the two villagers, the accused's son and the deceased. In totality of evidences presented in the case there is a room for divergent views on the interpretation of the fact hence this court cannot state there is malice aforethought on part of the accused.

In the end, I hold that the accused had no time to cool down after the death of his son and that the cited words and circumstance of the present case were powerful dynamite sufficient to blow off the faculty of reasoning of the accused.

Having said so, I am moved to convict the accused with a lesser offence of manslaughter contrary to section 195 and 198 of the **Penal Code.**

Ordered accordingly.

F.H. Mtulya

Judge

29.11.2022

Court: This judgment was pronounced in open court in the presence of the accused, **Mr. Masumbuko Fredrick** and his learned counsel, **Mr. Manase King** and in the presence of learned State Attorney, **Ms. Rose Sulle.**

F. H. Mtulya

Judge

29.11.2022

ANTECEDENTS

Sulle: My Lord, we have no previous record of he accused. We pray him be sentenced according to the law. That is all My Lord.

F. H. Mtulya

Judge

29.11.2022

MITIGATIONS

King: My Lord, the Republic said no previous record of the accused in criminal matters. This is the first offence and had stayed in custody for a total of seven (7) years. My Lord, this accused had left behind a family of a wife and one (1) child, who depend on him. My Lord, the accused has 36 years old and this State depends on his efforts to build this nation. My Lord, the deceased was relative to the accused. My Lord, seven (7) years in custody is a good lesson and he has learnt a lot. My Lord, we pray to the accused be given a lenient sentence, and if it pleases your court, be discharged unconditionally. I pray to submit My Lord.

F. H. Mtulya

Judge

29.11.2022

SENTENCE

Court: I have heard submissions of learned minds in this case. I am aware the law enacted under section 198 of the **Penal Code [Cap. 16 R.E. 2019]** may invite up to life imprisonment, in cases like the present one. However, practice

at our superior court has shown that each case has to be determined at its own peculiar circumstance.

In the precedent of **Benjanin Mwansi v. Republic [1992] TLR 85**, the Court of Appeal sentenced the appellant to four (4) years imprisonment, but considered three (3) years in custody. This was appropriate sentence.

In the present case, the accused had already spent a total of seven (7) years in prison, but in order to discourage behaviors of persons, like the present accused, I am moved to sentence the accused person to one (1) year imprisonment from the date of this order, 29th November 2022.

It is so ordered.

F. H. Mtulya

Judge

29.11.2022

Court: This order was delivered in open court in the presence of the accused person, **Mr. Masumbuko Fredrick**, and his learned counsel, **Mr. Manase King** and in the presence of **Ms. Rose Sulle**, learned State Attorney, for the Republic and in the presence of Hon. Assessors, **Mr. Fortunatus Kakwele**, **Ms. Imelda Nestory** and **Mr. Abel Kambona**.

F. H. Mtulya

Judge

29.11.2022

Court: Hon. Assessors thanked and discharged.

F. H. Mtulya

Judge

29.11.2022