IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

Criminal Appeal No. 134 of 2002

BETWEEN

ADVENTINA ALEXANDER.....
APPELLANT

AND

THE REPUBLIC.....
RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Bukoba)

(Masanche, J.)

dated the 4th day of July, 2002
in
Criminal Sessions Case No. 20 of 1998

JUDGMENT OF THE COURT

KAJI, J.A.:

The appellant ADVENTINA w/o ALEXANDER was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16. She was sentenced to the mandatory sentence of death by hanging

At the trial it was the prosecution case that the deceased ALEXANDER s/o MTATEMBWA and the appellant were husband and wife respectively having solemnized their Christian marriage in 1960 and having been blessed with seven surviving children.

In the night of 20.3.94 at about 11.00 p.m. or 12.00 midnight the deceased arrived at home drunk. His daughter VENASTINA d/o ALEXANDER (PW1) who was living with her parents in the same house opened the door for him. The deceased entered peacefully and declared that he was not going to eat because he was drunk, and that he would eat on the following day. He never saw the expected day. While in bed the appellant picked a hoe, walked stealthily and hacked him on the head. She (appellant) picked a panga and cut him (deceased) several times in the neck. The deceased died instantly. The appellant ordered PW1 to assist her to dress up the deceased and to throw the body in a nearby path. This they did.

On the following day the appellant was arrested. She admitted the killing. But at the trial she raised a defence of provocation which was rejected by the learned trial judge (Masanche, J.).

Before us in this appeal the appellant was represented by Mr. Matata learned advocate. The respondent Republic was represented By Mr. Feleshi, learned State Attorney.

Mr. Matata raised one ground of appeal, namely that on the evidence on record the trial court ought to have found that PW1 was not a reliable witness, and that she was a witness with a purpose of her own to serve, and that the

defence of provocation was available to the appellant.

In elaboration Mr. Matata, learned advocate, stated that the learned trial judge erred in relying heavily on PW1 VENASTINA d/o ALEXANDER who was not a reliable witness. He said PW1 had said that the deceased did not utter any words other than what she had told the court. She had told the court that the deceased had simply said that he was not going to eat as he was drunk and that he would eat the following day. The deceased had also later on spoken faintly “Adventina njoo uangalie damu sijui inatoka wapi”.

Mr. Matata urged that the deceased uttered more words than what PW1 had said. He said that the deceased had called the appellant to come and suck his male organ. He said that since by then it was around midnight and PW1 was just about 15 years old, she was probably asleep and therefore could not have heard those insults.

Second, PW1 had assisted the appellant to dress up the deceased and to throw the body in a nearby path. In that respect, he said, she was an accomplice who was ready to tell lies to exonerate herself, and that her evidence required corroboration which was lacking.

Third, PW1 did not tell the village chairman PHILLEMON MERKIOLI (PW2) everything she had seen and heard. For

example he said, she did not tell him about the conversation she heard between the appellant and the deceased. She also did not tell him that she had assisted the appellant to dress up the deceased and to throw the body in a nearby path, or that she had assisted the appellant in burying some of the deceased's clothes. Mr. Matata urged that had the learned trial judge considered all these he would not have relied heavily on her evidence in convicting the appellant, and that he would have accepted the appellant's defence of provocation.

Mr. Matata further submitted that the appellant was provoked by the deceased's insult for telling her to suck his male organ. He said that those words were very provocative especially to the appellant who was a village old woman aged 53 years. He cited the case of DAMIAN FERDINAND KIULA & CHARLES (1992) TLR 16. In that case this Court 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. Matata further argued that there was also another provocative incident. He stated that some days before the killing of the deceased the appellant had found the deceased committing adultery with a woman. He said that on the fateful day when the deceased called her to suck his male

organ this rekindled her previous anger over the adultery. Mr. Matata argued that adultery is a very provocative act capable of reducing the offence of murder to manslaughter. He cited the case of BENJAMIN MWASI V R (1992) ELR 85.

Mr. Matata further submitted that the killing of the deceased was not premeditated and that the learned judge erred in refusing to accept the appellant's defence of provocation for no reason at all. He said that the appellant had no duty to prove provocation. He cited a persuasive holding in the case of KENGA V R (1991) 1 EA 145. In that case the Court of Appeal of Kenya sitting at Mombasa held that the accused does not have to prove provocation, but only to raise a reasonable doubt as to its existence. Mr. Matata urged that there was no evidence to ground a conviction of murder apart from that of PW1 who was an unreliable witness. It was his submission that had the learned trial judge considered all these factors he would have come to the conclusion that the appellant was provoked, and would have found her guilty of manslaughter.

On the other hand Mr. Feleshi learned State Attorney submitted that the learned trial judge fully considered the veracity of PW1 and found her to be a credible witness. She was not an accomplice. She only participated in assisting the appellant to dress up the deceased and to throw away the body under threat by the appellant herself who was her

mother. Mr. Feleshi further stated that PW1 had no interest or purpose to serve because she had not participated in killing the deceased.

As far as provocation is concerned, the learned State Attorney conceded that the words “come and suck my male organ” are very provocative indeed. But that such words were never uttered by the deceased, otherwise PW1 would have heard them because she was awake and was the one who opened the door for the deceased. She did not hear them. Mr. Feleshi further argued that there was no evidence that the appellant had previously found the deceased committing adultery. In that respect it was his view that the case of Benjamin (Supra) is inapplicable in this case.

We have carefully considered Mr. Matata’s submission as to why he believes that PW1 was not a reliable witness, together with the appellant’s defence of provocation. We have equally carefully considered the learned State Attorney’s reply thereat. With respect to the learned advocate, we are unable to agree with him that PW1 was an unreliable witness for the following reasons:-

First, the appellant and the deceased were her parents. By the death of the deceased PW1 was deprived of one of her parents. She was left with only one parent, the appellant, who could provide her with parental love. By all

means and in ordinary life she would definitely not wish to lose both parents. It is highly unlikely that she would be willing to give incriminating evidence against her mother, who would be hanged thereby losing both parents. But with all this dilemma lingering in her mind she decided to tell the truth. She told the truth.

Second, PW1 told the Village Chairman Phillemon (PW2) everything in respect of the whole event. This was said by Phillemon (PW2) himself in his examination-in-chief.

Third, PW1 did not participate criminally in the killing of the deceased either as a principal or an accessory before or after the fact. She had simply been ordered through threat by her mother, the appellant, to assist her to dress the deceased and to throw the body in a nearby path. Under the circumstances we are satisfied that she was not an accomplice. In a persuasive case of DAVIES V DPP (1954) 1 ALL E.R. 507 at page 514 the House of Lords defined the word “accomplice” as follows:-

> “The definition of the term “accomplice” covers participe criminis in respect of the actual crime charged, whether as principals or as accessories before or after the fact”.

This view was adopted by the Court of Appeal for Eastern Africa in the case of JETHWA & ANOTHER V R (1969) EA 459.. We adopt the same view.

The learned trial judge who saw PW1 giving evidence was satisfied she was truthful. We have found nothing to fault him on this. In the case of ALI ABDALLAH RAJABU V SAADA ABDALLAH RAJABU & OTHERS (1994) TLR 132 this Court held, *inter alia* "that where the decision of a case is wholly based on the credibility of the witness, then it is the trial court which is better placed to assess their credibility than an appellate Court which merely reads the transcript of the record". Also in the case of OMARI AHMED V R (1983) TLR 52 this Court held, *inter alia,* "that the trial court's finding as to credibility of witnesses is usually binding on an appeal Court unless there are circumstances on the record which call for a reassessment of their credibility". In the instant case there are no such circumstances.

We now turn to Mr. Matata's second complaint, that is, provocation. Indeed the words "come and suck my male organ" are very provocative.

But in this case there is nothing indicating that such words were ever uttered by the deceased. Had they been uttered by the deceased, PW1 would have heard them because she was in the same house. She was not asleep

because she was the one who had just opened the door for the deceased, and after a short time she heard rattling noises whereby she asked some questions followed by the actual killing of the deceased by the appellant, and a threatening order to assist the appellant to dress the deceased and to remove the body. It is true an accused person does not have to prove provocation but only to raise a reasonable doubt as to its existence as held in the KENGA case (Supra). But in the instant case there is no doubt whatsoever in our minds that the alleged provocative words were never uttered by the deceased. They never existed. Therefore the cases of DAMIAN and KENGA cited by Mr. Matata learned advocate for the appellant are inapplicable in this case.

Mr. Matata complained also about an act of adultery alleged to have been committed by the deceased some days prior to the killing. We hasten to say that there was no evidence about it. Even if it is accepted that such an act took place, that would not afford the appellant the defence of provocation because the killing occurred some days later when the appellant was no longer in the heat of passion as required by Section 201 of the Penal Code, Cap 16. Therefore the case of BENJAMIN cited by the learned advocate is inapplicable in this case.

In the event, and for the reasons stated above we

dismiss the appeal in its entirety.

DATED at DAR ES SALAAM this 15th day of July, 2004.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR