IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 156 OF 2004

BETWEEN

JACOB TUWAY @ TWAHA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated the 26th day of May, 2004
in
Criminal Sessions Case No. 59 of 1999

JUDGMENT OF THE COURT

KAJI, J.A.:

The appellant, Jacob Tuway @ Twaha, was convicted of the murder of his wife Rehema Lawala, and sentenced to death by the High Court sitting at Dar-es-Salaam (Mihayo, J.). He is now appealing to this Court against conviction and sentence. The facts of the case can briefly be stated as follows:

The appellant and the deceased were husband and wife. At around the time of the incident on 9.4.97, their matrimonial life was not a happy one. At one time the deceased reported the appellant to the Police at Buguruni that he had unlawfully assaulted her. The appellant was arrested and charged, but was released on bail.

While on bail, the deceased complained again to the Police at Buguruni that the appellant had unlawfully assaulted her, and had threatened to kill her. The appellant was arrested again and charged. This time he was not released on bail. He was remanded in custody where he stayed for about 3½ months. He was released from custody on 3.4.97.

When he was released from custody, he found some of his properties and his children missing. By then the deceased was residing at her brother's home, PW7, Samwel Lawala. She was not ready to go back to the matrimonial home. The act of reporting the appellant twice to the police, and later finding his properties and his children missing, angered the appellant who started tracking the deceased.

It was the prosecution that on 9.4.97, at about 7.45 p.m., the appellant waylaid the deceased and strangled her to death. It was further alleging that the killing was premeditated, and that the appellant had formed the intention to murder the deceased from the time he was released from custody in order to revenge.

The appellant did not deny killing the deceased. However he denied to have killed the deceased intentionally. In his defence he claimed that the act of the deceased reporting him twice to the police angered him. Furthermore he said when he was released from custody and found his properties and his children missing, and his

house unroofed, he was very much infuriated. He added that on the date of incident he found the deceased drinking beer and chatting with a man. This provoked him, but he said, he played it cool at that time expecting that the deceased would probably agree to go with him to the matrimonial home after her paramour had left. Finally the appellant urged that contrary to what he had expected, the deceased refused to go back to the matrimonial home. He said, this provoked him as a result he lost control and killed the deceased.

The learned trial judge carefully considered the evidence of both parties and was of the firm view that, the act of the deceased reporting to the police what was happening to her could not, in law, provoke the appellant because, in his view, there was no evidence of malice. The learned trial judge also held that, the defence of provocation is not maintainable because the appellant did not react immediately when he saw the deceased with a man but had played it cool until when the man had left.

On whether the deceased's refusal to go back to the matrimonial home was provocative, the learned trial judge held in the negative. The appellant was convicted and sentenced as said. He was aggrieved.

Before us the appellant is represented by Mr. Rweyongeza, learned counsel. The respondent Republic is represented by Mrs. Kabisa, learned State Attorney.

Mr. Rweyongeza has preferred three grounds of appeal namely;

1. That, having regard to the evidence on record, the learned trial judge misdirected himself in fact and in law in finding that the appellant had formed an intention to kill before he saw the deceased on 9.4.1997.

2. That, having regard to the fact that the appellant found the deceased with a man and pleaded to her to return home, the learned trial judge misdirected himself in fact and in law in failing to hold that the events justified a defence of provocation.

3. That, having regard to the evidence on record and the circumstances of the case, the learned trial judge misdirected himself in fact and in law in holding that the prosecution had established the case beyond reasonable doubts.

Dealing with these grounds together, Mr. Rweyongeza contended that, in this case, it is crucial to determine at what stage did the

appellant form the intention to kill. In his view, the appellant did not form the intention to kill the deceased when he was released from custody and started tracking the deceased. The learned counsel contended that, the deceased's act of reporting the appellant twice to the police and the loss of the appellant's properties made the appellant boil with anger. The appellant started tracking the deceased. But in tracking the deceased it was not for the purpose of killing her but for trying to persuade her to go back home, contended the learned counsel. The learned counsel further contended that, in tracking the deceased, the appellant found her with a man. This provoked the appellant but he controlled his anger expecting that the deceased would probably agree to go back home, contended the learned counsel. The learned counsel further contended that, when the deceased refused to go back home, the refusal sparked off the appellant's anger whereby the appellant lost self control and killed the deceased. In the circumstances, it is the learned counsel's submission that, the series of events from when the deceased reported the appellant to the police twice, finding his properties and children missing and finding the deceased with a man, made the appellant "boil with anger", but not to the extent of forming an intention to kill the deceased. It was the deceased's refusal to go back home which sparked off the appellant's boiling anger whereby the appellant was provoked beyond self control and caused the death of the deceased, while the appellant was still in the heat of passion. In that respect, it is the learned counsel's submission that the appellant should have been found guilty of the lesser offence of manslaughter.

On her part, Mrs. Kabisa, learned State Attorney for the respondent Republic, contended that, the totality of the evidence on record suggests that the appellant formed the intention to kill the deceased when he was released from custody and found his properties and his children missing, whereby he started tracking the deceased in order to kill her. In tracking her, he found her at a kiosk with a man, but did not react. He only reacted later when the deceased refused to go back home, and by then the man had already left. In that respect, it is the learned State Attorney's submission that, the appellant's defence of provocation should not be entertained because, when the appellant killed the deceased, it was not in the heat of passion as the man had already left.

As observed earlier, the appellant does not dispute killing the deceased. What he is disputing is the accusation that he killed her intentionally.

The crux of the matter, therefore, is whether at the time of the killing, the appellant had been provoked within the meaning provided under the law.

Section 201 of the Penal Code Cap 16 provides the circumstances under which a person is considered to have killed another under provocation. It says:-

201: When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

Section 202 of the Penal Code Cap 16 defines the term "provocation". It reads as follows:-

202: The term "provocation" means and includes, except as hereinafter stated, any wrongful act or assault of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate case, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

For the purpose of this section the expression an “ordinary person” shall mean an ordinary person of the community to which the accused belongs.

In the instant case, in determining whether the appellant’s defence of provocation could properly be entertained, we have carefully considered the evidence on record, together with the circumstances surrounding the case. The events which occurred before the incident, and the appellant’s conduct before and after the event are also relevant.

In that regard, we have carefully considered the events which occurred before the incident, and the appellant’s conduct before and after the event.

It is in evidence that, before the event, the deceased had reported the appellant twice to Buguruni Police Station for unlawfully assaulting her, and for threatening to kill her. In our considered view, reporting such acts was neither unlawful nor provocative.
If anything, those acts portrayed the strained relationship between the appellant and the deceased before the event.

It is also in the appellant’s claim that, when he was released from custody and found his properties and children missing, and his house

unroofed, he got angry and considered the deceased to have been the cause. In our considered view, this cannot justify the defence of provocation in the instant case, because the appellant did not kill the deceased at that time but some days later when passion had already cooled down.

We do not accept the appellant's defence that he found the deceased with a man at a kiosk, and that he got angry, but he controlled his anger, expecting that the deceased would probably agree to go with him after the man had left. In our considered view, this cannot justify the defence of provocation in the instant case because, as stated by the appellant himself, he controlled his anger and did not react at that time.

In his defence the appellant also insisted that the deceased and the man left together and that he followed them and found them embracing, but the man ran away. He requested the deceased to go home with him but she refused. This provoked him to an extent of losing self control whereby he killed the deceased. In our considered view, this defence is lame.

In the caution statement Exh. P3, and the Extra Judicial statement Exh. P4, the appellant did not say that he found the deceased and the man embrace. Had this important event happened, the appellant would not have failed to say so in the caution statement and the Extra Judicial Statement. This was merely an afterthought in an attempt to give weight to his defence of provocation. In our view, this act of

embrace did not take place and was properly rejected by the learned trial judge.

Furthermore, the refusal by the deceased to go home with the appellant without uttering insults or the like, in our considered view, was not. In **Damian Ferdinand Kiula @ Charles v. R** (1992) TLR 16 where the appellant killed his wife when she told him that she was leaving him on account of his drunkenness and quarrelsome behaviour, this Court held as follows:-

i) 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.

ii) The words and actions of the deceased did not amount to legal provocation.

iii) ----------

In the instant case, we are of the firm view that, the deceased's refusal to go with the appellant did not amount to legal provocation.

We have also carefully considered the appellant's conduct after the event. It is in evidence that, after strangling the deceased to death, the appellant undressed the deceased and buried the body in a

sand quarry. He took the clothes and dumped them into the toilet. In our view, all this was an attempt to avoid detection which is unusual for a person who has killed another person unintentionally and in the heat of passion.

For the reasons stated, we are of the firm view that the defence of provocation was properly rejected; it was not tenable. This appeal lacks merit. This appeal lacks merit.

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

DATED at DAR ES SALAAM this 17th day of November, 2005.

D.Z. LUBUVA

JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)

DEPUTY REGISTRAR

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(Mihayo, J.)

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Between
The Republic..... Prosecutor
Versus
Jacob Tuway @ Twaha..... Accused

In Court this 17th day of November, 2005

Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal
The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal
And The Honourable Mr. Justice S.N. Kaji, Justice of Appeal

THIS APPEAL coming for hearing on the 24th day of October, 2005 in the presence of the Appellant AND UPON HEARING Mr. R.K. Rweyongeza, Counsel for the Appellant and Mrs. Kabisa, State Attorney for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day:-

IT IS ORDERED that the appeal be and is hereby dismissed in its entirety.

Dated this 17th day of November, 2005.

Extracted on the 17th day of November, 2005.

(S.M. RUMANYIKA)

DEPUTY REGISTRAR