IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KWARIKO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 591 OF 2017

KAGAMBO S/O BASHASHA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Fikirini, J.)

dated the 27th day of October, 2017

in

Criminal Sessions Case No. 150 of 2014

JUDGMENT OF THE COURT

26th & 7th December, 2021

MKUYE, J.A.:

In the High Court of Tanzania sitting at Mwanza, the appellant Kagambo s/o Bashasha was charged with an offence of murder contrary to section 196 and 197 of the Penal Code [Cap. 16 R.E 2002; now R.E. 2019]. It was alleged that on 18th January, 2012 at Kasang'wa Village within Geita District in the Region of Geita, the appellant murdered his mother, one, Rebeka d/o Fares (the deceased). When the charge of murder was read over to the appellant he pleaded: "*Ni kweli nilimuua*

mama yangu kwa sababu alikuwa amenificha baba yangu". Then, the counsel for the appellant intimated to the trial court about the appellant's readiness to plead to a lesser offence of manslaughter but upon objection by the learned State Attorney, the trial court ordered for the preliminary hearing to proceed as scheduled. Upon a full trial, the appellant was found guilty, convicted and sentenced to the mandatory punishment of death by hanging.

Before embarking on the merit of appeal we find it apt to give a brief background of the case. It goes thus: The appellant was one among eight children of the deceased seared from different fathers. What is gathered from the record of appeal is that, the appellant on several occasions had made requests to the deceased to divulge to him the whereabouts of his father who at all material time remained unknown to him. Those requests were met with unfavourable answers that offended the appellant. It would appear that the appellant each day nursed a grudge against his mother.

Days leading to the death of the deceased, the appellant went to the place where the deceased resided at Chato and invited her to where he lived in order to assist him in harvesting cotton crop. The deceased

heeded to the appellant's request unknowingly of the plan the appellant had hatched to kill her.

On the fateful day, the deceased while asleep with one of her daughters one, Asha Moshi (PW1) in a separate house, the appellant woke up in the midst of the night and set ablaze the house that was occupied by the deceased. The deceased woke up while screaming for help but the appellant did not respond spontaneously as would have been expected. He then after a while responded and astonishingly savagely cut the deceased with a panga on the neck almost severing her head from the torso. The deceased fell down at the entrance door. Other people responded to the alarm for help and on arrival at the scene of crime they found the deceased had already succumbed to death.

The appellant was restrained while at the scene of crime and he informed the people who had arrived that he was the one responsible for the deceased's death. The appellant was then tied up with a rope and handed over to the police. He was then arraigned before the court as alluded to earlier on.

In his defence the appellant did not deny killing his mother. He testified that he killed his mother because she refused to tell him who his father was and that at one point, she told him that he had no father

and at another point that he belonged there, translated in Swahili, "*wewe ni wa hapa hapa tu.*" He also testified that her mother and his wife were not in good terms and that as he (the appellant) was not ready to divorce her, she threatened to either kill his child or cause him impotent "*atavunja nguvu za kiume.*" He testified further that, thereafter on his attempt to have conjugal rights with his wife or go with street women, he was not able to perform as he was not functioning. Thus, he said, he was angered and killed his mother.

Upon the conclusion of the trial, the appellant was found guilty with the offence of murder. He was, subsequently, convicted of murder and sentenced to death by hanging as alluded to earlier on.

Aggrieved with the decision of the High Court, the appellant has preferred this appeal to this Court on a memorandum of appeal consisting three grounds of appeal. However, at the hearing of the appeal, the learned counsel for the appellant sought to rely on the memorandum of appeal filed by the appellant on 28th January, 2019 while abandoning grounds nos. 1 and 2, the fact which was confirmed by the appellant and, thus, remaining with ground no. 3 to the effect that:

"3. That, the appellant's pre and post conducts indicate manslaughter rather than murder, so the trial court should have convicted him with manslaughter."

At the hearing of the appeal, the appellant was represented by Mr. Deocles Muhanuzi Rutahindurwa, learned advocate whilst the respondent Republic enjoyed the services of Mr. Hemedi Halidi Halifani, learned Senior State Attorney assisted by Ms. Lilian Meli, learned State Attorney.

Submitting in support of ground 3, Mr. Rutahindurwa argued that the cause of the appellant's grudge against his mother (deceased) was that **one,** though he had persistently asked to be informed about who his father was and his whereabouts, his mother kept on giving him different versions. He explained, for example, that PW5 testified that the appellant told them that his mother told him that "he had no father" and that "*wewe ni wa hapa hapa tu"* literally translated "he belonged there." **Two**, the relationship between the deceased and the appellant's wife was not good as shown at page 39 of the record of appeal when the appellant on cross-examination stated that the deceased said that *"sitaki kuishi na mwenga kama wewe"* literally translated "she does not want to live with such an in-law" and that at one point the appellant's wife told

him that *"sikuja kufanya kazi ya kukupikia ugali tu"* literally translated that "she did not come just to cook stiff porridge for him." **Three**, that the relationship between the appellant and the deceased deteriorated as she told him that she will make him impotent *"atamvunja nguvu za kiume."* and that when the appellant tried to have conjugal rights with his wife he did not function and even when he tried with street women within two days (16/1/2012 and 18/1/2012) still he did not function.

In this regard, Mr. Rutahindurwa contended that, had the trial Judge considered the circumstances or the series of events pertaining to this case, she would have convicted him with manslaughter and not murder as she did. In support of his argument, he referred us to the case of **Salum Abdallah Kihonyile v. Republic** [1992] TLR 349 at page 353 where the Court stated that:

> *"The deceased was no longer aggressive. But having in mind all the background incidents, the continuous almost deliberately trespassing of their farms by the Masai cattle, the aggressive approach by the Masai and the subsequent attack on the appellant which resulted in his being injured on the forehead, convince us that at the time the appellant speared the deceased, he was still affected by this provocation which is sufficient to reduce the offence to the lesser*

one of manslaughter. But as indicated he was still under the influence of provocation."

On being prompted by the Court, if witchcraft can easily be proved he stated that it is not. On further probing by the Court whether the appellant had involved other persons to solve the matter, he said he consulted his maternal aunt (DW2) but was of no assistance as she said that his father was a teacher who passed on while the appellant was 13 years old and that the appellant knew all this. Nevertheless, he urged the Court to find that the appellant killed out of annoyance (provocation).

In response, Mr. Halfani prefaced by declaring their stance that they supported both the conviction and sentence. He agreed that the appellant killed his mother because she did not tell him who his father was as that was the reason, he had advanced even during the plea taking and preliminary hearing. However, he argued, during that time the appellant did not raise any issue relating to impotence or that his mother said "*wewe ni wa hapa hapa tu.*" He said, those issues arose in the course of the trial of the case.

At any rate, the learned Senior State Attorney contended that on the issue of the identity of the father, DW2 explained during cross

examination that she knew Kagambo's father who died when the appellant was 10 years old and that the appellant knew about it. In this regard, it was Mr. Halfani's argument that, the contention that the appellant killed his mother for failure to tell him about his father was not true.

As regards the issue of the misunderstanding between the appellant's wife and the deceased, he said, it did not feature anywhere from the beginning of the case. He argued that, that could not have been the reason for killing his mother because the appellant lived far away from where his mother lived in Chato. The deceased just came at his residence to assist in harvesting cotton crop after being asked for help by the appellant and she performed that duty on 17th to 18th January, 2012.

The learned Senior State Attorney went on submitting on the issue of impotence that it arose during his defence. He explained that, looking at the questions asked to the prosecution witnesses (PW3 and PW5) they did not relate to impotence which could have laid down a foundation to that effect. But all the questions to the prosecution witnesses related to the issue that the deceased did not disclose to him as to who was his father. In any case, he wondered how could the

appellant conclude that he was impotent for only two days alleging to have failed to function when he sought conjugal rights from his wife and when he tried with street women after the deceased had arrived at his residence on 16th January 2021 and told him that "*atamvunja nguvu ya kiume.*" At any rate, he argued that there was no scientific proof to that effect. He was, therefore, of the view that the issue of impotence came out as an afterthought.

As the appellant was imputing witchcraft on his alleged impotence, it was Mr. Halfani's argument that the appellant ought to prove that the deceased was seen practicing witchcraft as was held in the case of **Mathias Tangawizi Lushinga v. Republic**, Criminal Appeal No. 220 of 2016 (unreported). In the said case the Court discussed the issue of witchcraft and cited the case of **John Ndunguru Rudowiki v. Republic**, [1991] TLR 102 in which the Court pronounced the circumstances under which witchcraft belief can be relied as a defence and stated as follows:

> *"Although mere belief in witchcraft is no defence to a charge of murder, a threat to kill by witchcraft may in certain circumstances constitute legal defence to the charge."*

The learned Senior State Attorney was of a firm view that in this case there was no evidence to show that the deceased practiced witchcraft. He added that the appellant's contention that his mother declared that he would make him impotent was a mere metaphysical rather than physical as per the case of **Mathias Tangawizi Lushinga** (supra) quoting the case of **Bakari Bakari Ismail v. Republic**, Criminal Appeal No. 107 of 2013 (unreported).

In relation to the contention that the Court should consider the circumstances of the case or series of events which could have influenced the appellant to kill his mother, Mr. Halfani dismissed it based on what has been already argued.

In conclusion, the learned Senior State Attorney submitted that, the issue of provocation does not arise as the appellant did not kill the deceased in the heat of passion - See **Mathias Tangawizi Lushinga** (supra) where the Court cited the case of **Fabiano Kinene s/o Mukye and 2 Others v. Republic**, [1991] EACA 96 and stated as follows:

> *"That on the evidence the appellants were entitled to be held to have acted under grave and sudden provocation."*

At most he contended that, the killing was out of motive which in terms of section 10 (3) of the Penal Code is immaterial. He insisted that the conduct of the appellant depicts that he killed the deceased with malice afore thought. To fortify his argument, he referred us to the case of **Semburi Musa v. Republic**, Criminal Appeal No. 236 of 2020 (unreported). He went on to point out that the factors such as inviting his mother who lived far away from him to come and assist him in harvesting cotton crop and killing her within two days; his confession that *"niliamua kumuua mama"* literally translated *"I found it better to kill my mother"*; the manner the killing was effected, that is, by cutting her twice with a machete on the neck, all amount to murder and not manslaughter. He, in the end, urged the Court to find that the appeal has no merit and dismiss it.

In rejoinder, Mr. Rutahindurwa reiterated his earlier position that the series of events caused the appellant to kill. In the circumstances, he stressed that the conviction of murder be reduced to manslaughter.

We have dispassionately considered the lone ground of appeal and the rival submissions from the parties. We think, the issue for our consideration is whether the series of events in the circumstances of this

case constituted the defence of provocation so as to warrant the Court to reduce the conviction of murder to manslaughter.

Our starting point would be to revisit the law relating to provocation and when it can be relied as a defence on an offence of murder. Provocation is provided for under section 201 of the Penal Code as follows:

> *"When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder,* ***does that act which caused death in the heat of passion caused by sudden provocation as defined in section 202, and before there is time for his passion to cool, he is guilty of manslaughter only.****"* [Emphasis added]

On the other hand, section 202 of the Penal Code referred to in the above quoted provision defines the term "provocation" as follows:

> *"The term "provocation" means, except as herein after stated, any wrongful act or insult 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 care, or to whom he stands in a conjugal, paternal, 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."

In the case of **Said Kigodi @ Side v. Republic**, Criminal Appeal No. 281 of 2009 (unreported), the Court discussed the circumstances where the defence of provocation can be relied on and stated as follows:

"We are of the firm view that the defence of provocation is available to a suspect who kills at the spur of the moment, in the heat of passion before he has time to cool down."

Also, in the case of **Damian Ferdinand Kiula @ Charles v. Republic**, (1992) TLR 16 where the appellant killed his wife after she had told him that she was leaving him because of his drunkard behaviour and quarrelling with her, the Court considered whether there was a defence of provocation and held that:

"

(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."

In this case, the circumstances or chain of events of which this Court is invited to consider is based on the appellant's account for killing the deceased which is two fold. **One**, the deceased's failure to divulge who was his father and his whereabouts; and **two** the deceased's misunderstanding with her in-law (appellant's wife) whom the appellant did not want to divorce which allegedly culminated into being made impotent by the deceased.

To begin with the first limb of the appellant's reason for killing the deceased that the later did not tell him who was his father, the appellant contended that when he persistently asked his mother to tell him, she gave different versions on the issue. At one stage she told him that "he did not have a father". At another stage she told him that "he had neither a father nor a mother." Yet, at another point she told him that "he belonged there" in Swahili "*wewe ni wa hapa hapa.*" This was according to his evidence in defence and in his extra judicial statement (Exh P4). PW1 who was the appellant's sibling testified that the appellant and the deceased had an issue which she did not know and

she also denied that there was a misunderstanding between the deceased and the appellant's wife.

In the case of **Saidi Kigodi @ Side** (supra) cited above, it was emphasized that for the defence of provocation to stand, the suspect must have killed in the heat of passion. Further to that, such defence has to pass the test of whether the ordinary person in the suspect's community would have been provoked – See **Damian Ferdinand Kiula @ Charles** (supra).

On our part, we have considered the evidence and the circumstances of the case and, we are of the view that, the appellant's defence of provocation did not pass those tests. We say so because, the appellant did not lead evidence to the effect that such denial by the deceased happened spontaneously before killing her so as to suggest that he killed in the heat of passion. Though the appellant alleged to have been persistently asking the deceased such questions; he did not show the time or even the dates when he did so. Neither did he tell the court that they had exchanged words to that effect immediately before killing her. Even PW1 who was at the scene of crime, though she testified that when the appellant and decease went inside the burning house to pick out some stuff she heard them talking, she did not hear

what they were talking about. Even if we assume for the sake of argument that he inquired the deceased to tell him who was his father and his whereabouts, we think, he got such annoying answers sometimes back which gave him time to cool down. It cannot, therefore, be said with certainty that there was exchange of words relating to the question the appellant had persistently asked the deceased immediately before he killed her.

But again, we are of the considered view that defence of provocation did not pass the test of an ordinary person in his community - See **Damian Ferdinand Kiula @ Charles** (supra). This is so because **one,** it did not come out clearly in evidence as nothing was testified in the trial court to that effect. **Two**, Joyce Phares Chamba (DW2), the deceased's sister testified in court among others that the appellant knew his father who was a teacher and that he passed on when he was ten (10) years old. **Three**, none of the assessors who were best placed to assess the circumstances of the case and whether an ordinary person in the appellant's community could have been provoked, did not give opinion to that effect. We note that the 1st assessor, Mr. Mussa Toyi opined that the appellant was not guilty of murder because he deserved to know his father the fact which could have been disclosed by none

other than his mother, the deceased, but he did not move a step ahead to show if such denial could have provoked an ordinary person of his community. In the absence of such evidence, we agree with the learned Senior State Attorney that in the circumstances of this case the defence of provocation cannot stand.

We now turn to the second limb of the appellant's account that there was a misunderstanding between the deceased and appellant's wife and when he declared his stance of not divorcing his wife, the deceased threatened to kill his child or do something bad to him (*nitavunja nguvu za kiume*). The appellant claimed that the deceased made him impotent as when he tried twice to have conjugal rights with his wife he did not function and that the same condition repeated when he tried with street women, in the sense that he is imputing witchcraft. It should be noted that at this juncture that unlike the claim that the deceased did not tell him the whereabouts of his father which featured from the very beginning, the issue of misunderstanding between the deceased and appellant's wife, which was denied by PW1, anyway, and being made impotent featured in defence.

In dealing with this issue, we think, it is instructive to understand the meaning of witchcraft and how it can be relied upon as a defence.

Section 2 of the Witchcraft Act, Cap 18 R.E. 2002 has defined the term "witchcraft" to include "sorcery, enchantment, bewitching, the use of instruments of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge."

Generally speaking, witchcraft is not a defence to murder. In order for the said defence to be available, in exceptional circumstances, it must come as a shock as it was stated in the case of **John Ndunguru** (supra). In the said case, the appellant had a brother who was mentally sick. On consulting witchdoctors, he was told that his grandfather (deceased) had killed a number of family members and caused temporary sterility of his daughter through witchcraft and when he asked the deceased, he confirmed it. On the material date the deceased visited the appellant's home to see Danstan (the sick grandson) whereupon there erupted an exchange of words between the appellant and deceased, in the course of which, the deceased threatened to kill the appellant by witchcraft. Suddenly, the appellant picked an axe and attacked the deceased with it and thereby caused his death instantly. Though the High Court convicted him with murder, on appeal the Court considered the defence of provocation and held that:

"As far as the appellant is concerned therefore, the deceased's threat to kill him on the day of incident was sudden and must have come to him as a shock. Such sudden threat has to be viewed in the context of the deceased's previous admissions, in the appellant's presence, to have caused deaths and misfortune to some family members and the appellant's honest belief in his having the power to do so...

In this respect it is perhaps pertinent to point out here that in killing the deceased the appellant did not follow the deceased; rather it was the deceased who had gone to the appellant's home, and that would tend to incline more to the view that the killing was in circumstances of provocation rather than premeditation."

In the end, the Court quashed the conviction and set aside the sentence of death and substituted for it the conviction of manslaughter and sentenced him to twelve years imprisonment.

Yet, in discussing the defence of provocation in a different way in the case of **Joseph Kamiliango and 5 Others v. Republic,** [1983] TLR 136, the Court refused the defence of witchcraft on account that the appellants did not act suddenly and that their conduct had showed

that they calculated their move with cool minds and in full possession of their faculties. Also, in the case of **Kasongi Yabisa v. Republic** [1995] TLR 28 when the Court was confronted with an akin scenario, it stated that:

> *"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 Kisongi. However, as there was no sudden shock which might have deprived the appellant of his self-control the killing was murder.*
>
> *To constitute a defence in a charge of murder the belief in witchcraft must be founded on some physical and not metaphysical act."*

In this case, the appellant claimed that the deceased threatened to kill his child or to make him impotent after he had declined to divorce his wife and that he was indeed made impotent. He, therefore, ought to have proved how the deceased practiced witchcraft to the extent that he was unable to function when he tried to have conjugal right with his wife or when he tried to have sex with street women. As if that is not enough, the appellant's claim was not scientifically proved given the fact that he complained his experience of non-performance within two days

from when the deceased came and was at his home. Apart from that, he did not testify to the effect that he saw the deceased practicing witchcraft. We think that his complaint imputing witchcraft practices on the part of the deceased was mere metaphysical rather than physical - (see **Bakari Bakari Ismail** (supra). Even if for the sake of argument, the deceased was seen practicing witchcraft, which is not the case anyway, we think, still, the defence of provocation could not be available since, if at all she did it on the day she arrived at his homestead on 16th January, 2012, still he had sufficient time to cool down up to 18th January, 2012 when he effected his plan of killing him. In this regard such defence of witchcraft cannot be used to reduce the offence of murder to that of manslaughter.

We have considered the case of **Salum Abdallah Kihonyile** (supra) which was cited by Mr. Rutahindurwa but, we think, it is distinguishable to this case because the circumstances in that case were aggravating to the extent that apart from continuous and deliberate trespassing to the appellant's farm by the Masai cattle, the appellant was injured by the deceased unlike the circumstances or the sequence of events in this case where no violence was used.

On the other hand, weighing the evidence in its totality we agree with Mr. Halifani that the appellant might have killed his mother out of motive which in terms of section 10(3) of the Penal Code is irrelevant in criminal responsibility - See also **Semburi Mussa** (supra). On the contrary, we are satisfied that there was sufficient evidence to prove that the appellant's killing of his mother was actuated with malice afore thought. In other words, the appellant had premeditated mind of murdering the deceased. This is so because of his overt conduct. **One**, the appellant deliberately lured the deceased from where she lived in Chato to come to his home to assist him in harvesting cotton crop. **Two**, the appellant set the house in which the deceased was in ablaze. **Three**, he did not respond to the alarm for help raised by his mother. **Four,** he attacked the deceased and cut her with a machete on various parts of her body. **Five**, he inflicted injuries on most vulnerable parts of the body such as the neck, head and the waist.

On the basis of the principle enunciated in the case of **Enock Kipela v. Republic,** Criminal Appeal No. 150 of 1994 (unreported), we are satisfied that the appellant had premeditated to kill the deceased which he effected on the material date - See also **Semburi Mussa** (supra). In this regard we find that the trial court correctly convicted him

with the offence of murder and that the sentence awarded to him was proper.

With the foregoing, we are satisfied that the prosecution proved beyond reasonable doubt that the appellant murdered the deceased. We, therefore, find the appeal to have no merit. We hereby dismiss it.

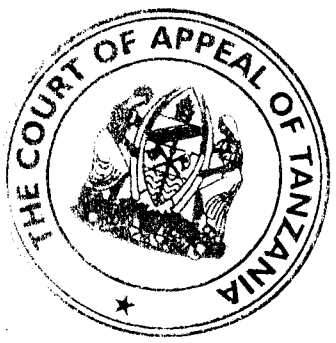
DATED at **MWANZA** this 3rd day of December, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 7th day of December, 2021 in the presence of Appellant in person via phone facility connected at Butimba Prison and Ms. Ajuaye Bilishanga, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL