IN THE COURT OF APPEAL OF TANZANIA
At DODOMA
(CORAM: RUTAKANGWA, J.A., KIMARO, J.A. And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 203 OF 2006

(Appeal from the judgment of the Court of Resident Magistrate of Dodoma at Dodoma)

(Mzuna, PRM E/J)

dated 19th May, 2006
in

E/J Criminal Session No. 43 of 2003
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JUDGMENT OF THE COURT

26 Nov. & 3 Dec. 2008
KIMARO, J.A.

Benito Mtitu, the appellant, was indicted for the offence of murder in the court of Resident Magistrate at Dodoma sitting at Mpwapwa, before Mzuna, PRM, E/J. He was alleged to have intentionally killed Athuman Mkemwa on 8th April 2002 at Kikuyu Village in Mpwapwa District. Although he pleaded not guilty to the offence of murder, he did not dispute killing the deceased.

Most of the facts were not disputed. During the trial, the Republic summoned only two witnesses to prove their case and both of them were eye witnesses to the killing of the deceased. Both witnesses, Felix Nyamanya *(PW1) and Aidas Msumani *(PW2) informed the trial court in their testimonies that on the fateful day as they were seated with the deceased in a pombe shop, in an open hut, drinking, at around 3.00 p.m., the appellant appeared with a bill-hook and holding it with both hands, he cut the deceased on his head. The deceased died instantly. The post-mortem examination report which was admitted in court as exhibit P1 shows that the deceased suffered a cut would of six centimetres long and three centimetres wide and he died because of severe haemorrhage.

The appellant consistently admitted the killing in a caution statement he made to the police (exhibit P3) as well as an extra-judicial statement he made before a Justice of Peace (exhibit P4), As he gave his defence, he maintained that the statements were true and made voluntarily, and were signed by him. Giving reasons for the killing, the appellant said the deceased eloped with his wife to Malolo village on 14th march 2002 and this greatly disappointed him.

As if that was not enough, the deceased pointed an accusing finger at him, calling him a destitute and that he (the deceased) came to collect his daughter so that she would join her mother. According to the appellant, the deceased made these utterances at the pombe shop. Because he failed to contain them, he went back to his house, about 300 meters away, collected the bill-hook, which he used to kill the deceased, the trial court made a finding that the killing was premeditated. The learned trial magistrate said the appellant has time to cool his passion. The appellant was convicted as charged and sentenced to suffer death by hanging.

Being aggrieved by the decision of the trial court, Mr. John Ruhimbika, the learned counsel who represented the appellant in both the trial court and in this appeal, has filed a memorandum of appeal containing four grounds, challenging the decision of the trial court. They are as follows:

> "1. **THAT**, the learned trial Principal Resident Magistrate, with Extended Jurisdiction erred in law and in fact by proceeding to try the appellant and convict him of the offence of **Murder c/s 196 of the Penal Code,** despite the fact that the defence counsel was served with a Dock Brief showing that the appellant was arraigned for the offence **Manslaughter c/s 195 of the Penal Code.** The learned Principal Resident Magistrate, therefore, through this impropriety clearly show an **insatiable** desire to try the appellant and convict him of **Murder, d**espite the fact that the defence counsel, who was taken aback, had ;pointed out to the Court that he had not prepared himself for the defence of the Appellant **vis-à-vis** the information of Murder since the Dock Brief served upon him did show that the information was **Manslaughter.**
>
> **2.** **THAT,** with the unfeigned respect to the trial Principal Magistrate, the said Principal Resident magistrate erred in laws and misdirected himself in failing to consider the defence of provocation which was pleaded by the Appellant. The deceased who had eloped with the appellant's wife, uttered contemptuous and humiliating words and insulted the appellant at the "pombe" club" The deceased accosted the Appellant at the "pombe" club and insulted him as follows: (in Swahili)
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> > "… Nimemchukua mke wakop umeshindwa kumfuata **kwani wewe ni fukara** huna fedha za kumfuata. Nimefika kuchukua motto kwani hutaweza kuwafuata…)' **[Emphasis added].**

Following those utterances, the appellant was outraged and at

the rage of fury the Appellant through provocation caused the death of the deceased. The deceased was the but-for-cause of this death.

3. **THAT**, the learned Principal Resident Magistrate erred in law and in fact by **influencing** the Assessors, who sat with him, when he called them into his chambers and **conferred** with them before summing up to those Assessors in the Open Court. This procedure marred the proceedings and giving rise to injustices upon the Appellant.

4. **THAT,** the learned trial Principal Magistrate erred in law and in fact by failing to conclude that the prosecution had not proved the case **beyond reasonable doubt** against the Appellant in respect of the offence of **Murder** given the contradictions in the evidenced of the only two witnesses called by the prosecution. **Provocation** was the obvious defence and the Appellant ought to have been accorded the benefit of doubt. The appellant had intended to plead guilty to **Manslaughter** from the day of the Preliminary hearing."

In support of the first ground of appeal the learned defence counsel complained that the dock brief he was served with showed that the appellant was arraigned for the off3ence of manslaughter and not murder. He blamed the learned trial magistrate for allowing the prosecution to proceed with the charge of murder, claiming that the magistrate had formed a prior intention to convict the appellant with the said offence.

In response, Ms. Mwanda, learned State Attorney who represented the respondent Republic contended that the were mere allegations which are unfounded as the record of appeal showed that it was the charge of murder which was read over to the appellant and he pleaded not guilty. She said the offence of manslaughter was offered by the defence but it was rejected.

With respect to the learned counsel for the appellant, we think it is important to dispose of this ground promptly because we find it has no merit. The appellant was not in any way prejudiced. The charge of murder was read over to him and evidence was led support of the charge. The defence counsel had an opportunity for cross examining the witnesses and he also gave his defence. The appellant is now before us challenging the judgment which was given against him. After all, the decision on which offence should any accused person be charged with has never been that of the magistrate or the court. The law makes a clear demarcation of the district role played by the prosecution and the magistrate in any proceedings. The complaint has no leg to stand on.

On the second ground the learned counsel for the appellant is of a firm view that the defence of provocation was wrongly rejected by the trial court. The utterances made by the deceased to the appellant, that he was destitute and he came to collect has child so that she would join her mother. Contended Mr. Ruhimbika , were highly provocative to the appellant. Citing the case of **Woolmington vVs Director of Public Prosecution** [1935] A.C. as reported by Rupert Cross and P. Asterley Jones, in Cases on Criminal Law, the learned counsel argued that the defence of provocation is available to an accused person even where the death is caused intentionally so long as the death was done in hot blood. He said the accused h ad no duty to prove his innocence. It is the prosecution which has the burden of proving the guilty of the appellant.

On her part, the learned State Attorney was quick to point out that the defence of provocation was rightly rejected by the trial court because the appellant did not act in a heat of passion as he had timed to cool down. She said the appellant had time to go back home and collected the bill-hook which he used to cut the deceased. She cited the case of **Damian Ferdinand Kiula & Charles Vs R [**1992] T.L.R. 16 to bolster her argument.

We do agree with the learned counsel for the appellant that the defence of provocation can be pleaded by an accused person charged with murder with a view of reducing it to manslaughter. See **Valerian Sail Vs R** [1990] **T.L.R 86.** However, we hasten to add that the requirements given in section 201 and 2102 of Penal Code must be met. The accused person must react to the provocative words instantly, and under heat of passion. There should be no time for cooling down. The said section provides thus:

> @Second 201 – When a person w ho 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 provocati8on as defined in section 202 and before there is time for his passion to cool, he is guilty of manslaughter only.

Provocation is defined in section 201 (1) as follows:

> ‘‘The term ‘‘provocation’’ means, except as hereinafter 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 conjugal parental, filial or fraternal relation, or in the relation of master or servant, to deprive of the power of self control and to induce him to commit an assault of the kind which he person charged committed upon the person by whom the act ort insult is done or offered.’’

In terms of section 202 (6) of the Penal Code the expression 'ordinary person'' means an ordinary person to which the accused person belongs.

Since the killing was not disputed, the issue before us in this appeal is whether the utterances which the appellant claimed the deceased made, could constitute provocation within the meaning of sections 201 and 202 of the Penal Code? What are the provocative words made by the deceased? These are given in the extra-judicial statement made before the justice of peace (exhibit P4):

> ''Nimechukua mke wako umeshindwa kumfuata kwani wewe ni fukara huna fedha za kumfuata. Nimefika kumchukua mtoto kwani hutaweza kuwafuata …''

Admittedly, the words spoken by the deceased could be insulting but did they amount to provocation? Our firm answer is negative. When the appellant gave his defence in the trial he said.

> ''On 8 /4/2002 I went to the pombeshop. Then at 2.00 p.m. Athuman (deceased) came. Her met me there. He said I was a man who could not reason. Her pointed a finger at me that Ian a destitute person (fukara). That he eloped my wife and he came now to take my daughter to her mother. I became angry. I lost control. **I went to my home took a bill-hook (hengo) and cut the deceased. Killed him, then I ran away. Nilipomuua mimi nilikimbia.''** (Emphasis added).

As it can be seen from the defence of the appellant, he did not react there and then when the words which h he claims to be provocative were spoken by the deceased., **Instead, he decided to go back to his house which a s we have already said was 300 meters away, collected the bill-hook and killed the deceased by holding it by both hands and cutting him on a delicate part of the body, the head.** Even if the appellant had been annoyed by the words spoken by the deceased, under the circumstances in which h he reacted to them, the defence of provocation could not be available to him. He had time to think, and he indeed thought of going back home where he collected a dangerous weapon and also chose to him the deceased at a very delicate part of the body and by using a big force.

In the case of **Damian Ferdinand Kiula** (supra), the appellant stabbed his wife to death because she told him that she was leaving him on account of drunkenness and quarrelsome behaviour. The stabbing of the deceased was of such a nature and extent that the knife embedded in the neck could not be removed at the local hospital. The deceased had to be referred to Muhimbili Medical Centre for its dislodging. The appellant raised the defence of provocation.

The 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. It held further that the words and actions of the dece3ased did not amount to provocation.

Under the circumstances, we respectfully disagree with the learned counsel for the appellant that the appellant was wrongly convicted of murder. The way the appellant reacted to those words showed that the killing was premeditated. Having disposed of this ground in the negative it goes without saying that ground four of the appeal also fails. Regarding the complaint about the trial magistrate sitting with the assessors, we have, with respect, to the learned counsel for the appellant say that he is not supported by the record. Even assuming that the allegations were true, they did not in any way affect the prosecution case given the evidence which is on record.

In the event we find the appeal has no merit. It is dismissed in its entirety.

DATED at DODOMA this 1st day of December, 2008.

E.M./K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S.MBAROUK
JUSTICE OF APPEAL

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

(S.S. MWANGESI)
SENIORF DEPUTY REGISTRAR