

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: RAMADHANI, J.A; MUNUO, J.A; And MSOFFE, J.A.)
CRIMINAL APPEAL NO. 36 OF 2002
SILVA MAKANYAGA ... APPELLANT
VERSES
THE REPUBLIC ... RESPONDENT
(An Appeal from the Decision of the High Court of Tanzania,
at Morogoro)
(Mkwawa, J.)
dated the 22nd day of March, 2002
in
Criminal Sessions Case No. 63 of 1998

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JUDGMENT

2 & 16 June 2006

RAMADHANI, J.A.:

The appellant, Silva Makanyaga, was convicted with the murder of his wife, Alphinciana Simon, and was sentenced to suffer death by hanging. MKWAWA, J. was satisfied with the evidence of the only eye witness, Teresia Makanyaga, PW 1, a child of tender years, and an offspring of the union of the appellant and the deceased. At the time of giving evidence PW 1 was thirteen and so, at the time of the crime, five years ago, she was eight.

The story of PW 1 was that on the fateful day the appellant returned home after being away fishing for about six months. She said that the deceased was packing paddy in sacks when the appellant stabbed her with a knife and when the deceased fell down the

appellant bolted. PW 1 was aware of constant quarrels between the appellant and he deceased who was demanding to be divorced. Even on that day, PW 1 said, the deceased had demanded a divorce. However, she was emphatic that the deceased did not touch the appellant on that day but the appellant just stabbed the deceased.

Upon being cross-examined PW 1 said that there was a man in the house who ran away when the appellant came home. She went further to say that that man used to come home whenever the appellant was absent.

MKWAWA, J. found that the story of PW 1 was corroborated by the evidence of Romanus Liwama, PW 3, who was a neighbour. He said that he met the appellant who had a knife in his hand and that the appellant did not return PW 3's salutation.

Against that story was the evidence of the appellant who denied killing the deceased. The appellant said that when he got home he went into the bed room and as he was seated on the bed a stranger emerged from under the bed. There was grappling between the appellant and that unknown man. The deceased assisted that other by pulling the appellant's testicles. The stranger happened to have a knife which he wanted to use on the appellant but missed him and fatally stabbed the deceased who cried 'yallah' and fell down. The stranger then scuttled and the appellant, too, ran away to hide himself.

Before us was Mr. Barnabas Luguwa, learned advocate, for the appellant and Ms. Christina Maganga appeared for the respondent Republic. Mr. Luguwa pursued the two versions of what happened. First, basing on the appellant's version of what transpired on that day, that it was that other man, who ran away, who killed the deceased. The second version was based on the evidence of PW 1 and Mr. Luguwa, in the alternative, submitted that the appellant was provoked when he saw a man whom he did not know emerging from underneath the bed and fleeing.

The defence of provocation was not at all considered by the learned trial judge. He addressed the assessors on the offence of manslaughter where death resulted from a fight. We have to put the situation extremely clear here. There are two stories: The defence story is that the appellant is completely innocent. The appellant did not cause the death of the deceased at all. The one who killed the deceased was the stranger. So, there was no question of manslaughter because of a fight. That would have been the case if the stranger was the one in the dock. If the appellant is believed then he is innocent.

On the other hand if PW 1 is believed then it is either murder or killing by provocation because an unknown man bolted from the premises when the appellant appeared at the matrimonial home. There was no manslaughter because the death did not result from a

fight. PW 1 never said that there was a fight. That was the story of the appellant which we have dealt with above. PW 1 was emphatic that "I did not see my mother touching my father before she was stabbed." So there was no fight between the appellant and the deceased.

Admittedly, PW 1 owned several times that there was a quarrel or altercation between the deceased and the appellant. But that is not a fight. It is only a fight which reduces murder to manslaughter. PW 1 said that the deceased had been pressing for a divorce and that even on the fateful day the deceased had asked for a divorce. Again that is not a fight. Admittedly, too, PW 1 said that she heard the appellant telling the deceased that she had insulted him. There was no elaboration of what was the insult. But even if that was substantiated it would have been killing by provocation caused by the insult.

We agree with the learned trial judge that the issue is one of reliability of witnesses. Was PW 1 credible as the learned trial judge and the three assessors found her to be?

Mr. Luguwa strove to persuade us that PW 1 was not credible. He pointed out some contradictions within her testimony. The learned trial judge, too, admitted that there were discrepancies. However, he did not elaborate, as Mr. Luguwa pointed out. Some contradictions itemized by Mr. Luguwa were: The issue of Romanus Liwamba, PW 3. Was he at the scene of crime or not? Was he in his room or was

he at his brick laying site? Could a pocket knife be brandished as PW 3 claimed to have seen the appellant doing?

PW 1 herself said in examination-in-chief that PW 3 was at the scene of the crime but in cross-examination and also in re-examination she said that he was not. PW 3 himself never said that he was at the scene of the crime. So, PW 3 was not at the scene of the crime while the deceased was stabbed but that he went there after the event.

Then PW 1 said that PW 3 was in his room at the time of the incident. It is obvious to us that PW 1 just could not have known that from where she was, at the scene of crime. In fact PW 3 said that he was at his brick-laying site which has not been explained where exactly that was but definitely not in his room.

Admittedly, PW 1 is recorded to have said that "He used a pocket knife. He took it from his trouser pocket." Then PW 3 narrated that he met the appellant brandishing a knife. Mr. Luguwa queried whether a pocket knife could be brandished. Chambers 20th Century Dictionary defines brandish as "to wave or flourish as a brand or weapon". Yet Oxford Advanced Learner's Dictionary (6th Ed) provides: "to hold or wave something, especially a weapon, in an aggressive or threatening way".

From the above two definitions we do not think that it is impossible to brandish a pocket knife which has just been used to kill someone.

It is a real weapon and no doubt, it can be waved in an aggressive or threatening way.

We agree with Ms. Maganga that these discrepancies do not make PW 1 or PW 3 incredible. Four years elapsed from the day of the event to the time PW 1 gave evidence. Apart from that these instances do not detract from the core of her evidence that the appellant, it was, who stabbed the deceased. PW 3 supported her when he said that after the crime he met the appellant who did not respond to his greeting and that the appellant was having a knife.

We are satisfied that PW 1 and PW 3 were credible. We are also satisfied that appropriate *voire dire* was conducted which convinced the learned judge that PW 1 possessed sufficient intelligence and knew the duty to tell the truth and so, accepted her evidence not on oath.

Now, according to PW 1 there was a man at the scene of crime who ran away when the appellant appeared. PW 1 knew that man because he frequented the place when the appellant was absent. She answered an assessor that she did not know the relationship between that man and the deceased. But if that man had honourable intentions he would not have scuttled when the appellant appeared and he would not have been visiting the deceased when the appellant was away. It is obvious to us that there was illicit relationship between the deceased and that man.

Was this the reason the appellant told the deceased that "you have insulted me" as PW 1 said? This fact ought to have been put across to the assessors to consider whether it could have provoked an ordinary husband of the community to which the appellant belonged.

Our attention has been drawn to Shaban Rashidi v. R. [1995] TLR 259. In that case the appellant had been cohabiting with one Fatuma, a prosecution witness and the only eyewitness. On the fateful day the appellant found Fatuma and the deceased. The appellant said that he found them making love and a fight ensued with the deceased who drew a knife but fell on it. So, according to the appellant, the deceased killed himself. But Fatuma gave a different story which was believed by the learned trial judge, MACKANJA, J., and also by this Court on appeal.

A full court of this Court said at p. 262:

On our part we think that for the defence of provocation to avail the appellant, two factors must be present. First, that a relationship between him and Fatuma still existed, and secondly, he must admit to killing the deceased ...

The second factor was also absent because the appellant denied killing the deceased. According to him, the deceased fell on his own knife he was holding in readiness to stab him. Once this version was rejected as it was, then the defence of provocation disappears. We are therefore satisfied that the Trial Judge was right in rejecting the defence

of provocation. It was not available to the appellant in the circumstances of this case.

This appeal is not all fours with Shabani Rashidi. It is distinguishable. For one thing the relationship between the appellant and the deceased was still on unlike in Shabani Rashidi. Then we do not know what exactly Fatuma said in evidence as that was not reproduced. Our brothers merely said that the learned trial judge believed Fatuma. But in this appeal we know exactly what PW 1 said: that there was a man who fled and that the man used to frequent the home when the appellant was absent. That might be the distinguishing factor.

Moreover, we think that saying that for the defence of provocation to be available to the appellant he "must admit to killing the deceased" may be is going too far and is against the cardinal principle of criminal law that onus of proof is on the prosecution. That principle is reiterated a number of times including in Mohamed Said Matula v. R. [1995] TLR 3 where this Court said:

Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and *no duty is cast on the appellant to establish his innocence.* (Emphasis is ours.)

The onus is on the prosecution to prove the guilt of an accused person beyond reasonable doubt. This in our minds means to prove all the ingredients of the offence and eliminating any possible

defence that is available to the charge. We think this is why section 194 (4) and (5) of the Criminal Procedure Act require a notice of alibi to be given to the court and the prosecution before the hearing or at any stage before the close of the prosecution case. That enables the prosecution to prepare its case so as to prove the offence beyond reasonable doubt which definitely includes proving that the accused person was at the scene of the crime.

It is our considered opinion that if the inculcating prosecution evidence is accepted to convict an accused person despite his/her denial of guilt then the exculpatory parts of the prosecution evidence should also be taken into account in favour of the accused person despite his/her denial of guilt. If there is a reasonable doubt as to the availability of a certain defence to the charge, then that is not proof beyond reasonable doubt and the accused person should benefit.

In this appeal PW 1 did not mince her words that there was a man who used to frequent the deceased when the appellant was away and that that person was there on the fateful day and that he fled when the appellant appeared. As we have already said that the visits and the intentions of that man could never have been honourable. It may also not be out of place to observe that this snippet of information came out in cross-examination and in answers to the Court and assessors. There was no attempt in re-examination to offset that information. We think that this is significant.

We have no flicker of doubt that the situation depicted by PW 1 was provocative. But we are also aware that provocation has to be determined by assessors as representing the ordinary person in the community. This has been said in many decisions like Yovan v. Uganda [1970] E. A. 405 citing with approval Chacha Wambura v. R. (1953) 20 E. A. C. A. 339. However, in Katemi Ndaki v. R. [1992] TLR 297, this Court held that:

The omission to address the issue of provocation raises doubts as to whether an ordinary person of the community to which the appellant lived would not have been provoked by the deceased's outlandish behaviour. The doubt is resolved in favour of the appellant.

That is the situation in the present case. We have to resolve the doubt in favour of the appellant.

In fact in the present case we are on a firmer ground. The East African Court of Appeal in Festo Shirabu Musungu v. R. (1955) 22 E. A. C. A. 454 was of the view that:

Facts relied on as provocation do not have to be 'strictly proved'. It is only necessary that there should be such evidence as to raise reasonable probability that they exist. If this is the effect of the evidence, the onus lying upon the prosecution is not discharged and murder is not proved.

Here, PW 1 is loud and clear of the facts leading to provocation.

So, we allow the appeal. We quash the conviction of murder and find that the appellant killed by provocation, and so, it was manslaughter under section 195 of the Penal Code (Cap. 16). We set aside the

sentence of death and substitute it with a term of imprisonment for five years from the date of this judgment.

DATED in DAR ES SALAAM, this 13th day of June, 2006.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

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




S. M. RUMANYIKA
DEPUTY REGISTRAR
COURT OF APPEAL