

A And lastly there is the question of malice aforethought. With  
 respect, I totally adopt the reasoning of the learned State Attorney.  
 In short he argued that from the nature of the wound it is clear that  
 B the person who inflicted it intended to slaughter the deceased. And  
 invariably, he slaughtered in order to kill. Thus in this case it is  
 clear that whoever slaughtered the deceased, he did so with a clear  
 intention of killing her. As I said, I totally agree with this reasoning.  
 C Hence in the present case I find it as proved that when the first accused  
 killed the deceased, he did so with malice aforethought.

From what I have said so far I am of the opinion that the charge  
 of murder against the first accused person has been proved beyond  
 reasonable doubt. I accordingly find him guilty and convict him as  
 D charged. On the other hand there is reasonable doubt as to the guilt  
 of the second accused person. In compliance with the law, I am resolving  
 this doubt in favour of him. The second accused is therefore acquitted.

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## REPUBLIC v. ISMAIL NAPOSE

F

HIGH COURT OF TANZANIA  
 ATMTWARA  
 (Msumi, J.)

G

### CRIMINAL SESSIONS CASE No. 34 OF 1982

H *Criminal Law – Murder – Defence of Provocation – Acts that may constitute  
 provocation – Whether wife's refusal to have sexual intercourse is an act  
 constituting provocation.*

I *Provocation – Evidence – Burden of proof when provocation is pleaded as a  
 defence to a charge of murder – Burden on the prosecution to show absence  
 of provocation.*

A The accused was charged with the murder of his wife. In his sworn testimony before  
 the court he admitted that he killed the deceased by cutting her with an axe, which  
 was exhibited in court. The accused, however raised the defence of provocation  
 claiming that the deceased had refused him sexual intercourse, in addition to a number  
 of annoying acts, namely: her refusal to accompany him home at night from a *ngoma* B  
 ceremony, her delay in coming back home that same night, and her decision and act  
 of going back to the *ngoma* the next day without the permission of the accused. The  
 main issues before the court were whether the refusal of sexual intercourse was  
 legally provocative and whether the accused was still in the heat of passion when he C  
 inflicted the fatal wound on the deceased.

**Held:** (i) Refusal of sexual intercourse *per se* does not constitute provocation; it may  
 constitute provocation if it is coupled with other circumstances;

(ii) The acts of the deceased of refusing to accompany her husband home from D  
 a local *ngoma* ceremony and staying there until morning, and of subsequently going  
 back to the *ngoma* without her husband's consent were not so grave as to constitute  
 provocation;

(iii) The conduct of the accused was not consistent with that of a man acting in E  
 the heat of passion, as the accused was in a controlled and sober state of mind when  
 he decided to cut the deceased with the axe; the plea of provocation is therefore  
 dismissed;

(iv) The burden of proof of provocation is not on the accused person but, whenever F  
 provocation is raised as a defence or facts suggest its presence, it is for the prosecution  
 to prove the absence of such possibility.

***The accused is found guilty of murder*** G

Case referred to:

(1) *Rex v. Saidi s/o Nakandu*, (1948) E.A.C.A. 110

Mr Kumwembe for the Accused H

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**JUDGMENT**

(Delivered 14 January 1985)

B **MSUMI, J.:** The accused, Ismail Napose, stands charged with murder contrary to section 196 of the Penal Code. It is alleged that on the 4 January 1981, at Nangomba Village, Masasi District, the accused murdered his wife one Hadija d/o Hassan. He denied this allegation.

C The fact of the death of Hadija d/o Hassan and its cause were sufficiently proved by the prosecution. There is the evidence of the father of the deceased one Issa Mtegama (PW3) who, among other things, testified that on 5 January 1981 he got information of the death of his daughter. The report further revealed that the deceased was hacked to death by the accused. And on the following day he identified the deceased's body to the doctor who performed autopsy on the same. In addition there is the post mortem examination report  
 D (Exhibit P4) which certifies that one Hadija d/o Hassan is in fact dead and that her death was due to acute blood loss and asphyxia. And similarly the accused himself admits that his wife one Hadija d/o Hassan is dead and that she died out of a cut wound inflicted on her body.  
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As one of the few exceptions among homicide cases, there is no dispute in this case on the allegation that it is the accused who unlawfully killed the deceased. The sole evidence on this question  
 G has been provided by the accused himself. In his sworn testimony before this court the accused admitted that he killed the deceased by cutting her with an axe. There is also the evidence of P.C. William (PW1) and Detective Sgt. Dunstan (PW2) that on the morning of 5  
 H January 1981, while they were on duty at Masasi Police Station, the accused came and reported to them that he had cut his wife with an axe and he feared that she might be dead. To confirm this report, Dt. Sgt. Dunstan went to the house of the accused where he found the deceased dead with a cut wound on the neck. And near the deceased  
 I body there was lying an axe stained with human blood of the same

group with that of the deceased (Exhibit P2). There is also an extra judicial statement (Exhibit P3) made by the accused to the Justice of the Peace, one Alto Barnabas Mbuti (PW5). In the said statement the accused narrated quite vividly how he hacked the deceased with an axe while she was a sleep. The substance of this statement was positively accepted by the accused.

It is uncontroverted that the accused killed the deceased by cutting her on the neck with an axe. The axe in question was exhibited before this court and there is no doubt that it is quite lethal. The report on post-mortem examination shows the gravity of the said fatal cut wound. To quote the doctor's words, it was a "deep cut wound on the front of the neck at suprasternal notch. The (L) carotid artery completely torn off, the esophagus was discontinued and the trachea just below the larynx was open and some segments were missing." From this description of the wound it is quite clear that the accused must have used great force in inflicting it. Furthermore it is relevant to point out the fact that the neck is one of the most vulnerable parts of the human body. Now taking into consideration all these factors, the only reasonable conclusion is that the accused killed the deceased with malice aforethought.

Accused raised the defence of provocation. To elaborate this, the accused gave the following story. He said on the night of 4 January 1981 himself and the deceased attended an initiation ceremony where there were some local *ngomas* being played. They stayed there up to midnight when the accused asked the deceased that they should go back home. The deceased refused saying that she still wanted to watch the *ngomas*. After he had failed to persuade her, the accused decided to return home alone. The deceased stayed there the whole night and returned home in the morning at about 11:00am. Again, without the consent of the accused, the deceased went back to the said ceremony at about 1:00pm after she had prepared food for the family. She came back at 6:00pm and after they had taken their meal, the accused and the deceased retired to bed. The accused then asked the deceased for sexual intercourse; she refused saying that she was

- A not in the mood. The accused tried to persuade her to the extent of attempting to undress her underpant by force but without success. Hence he despaired and left her alone. Then about two hours later after the deceased had fallen asleep the accused picked the axe in question from underneath the bed and with it he cut the deceased.
- B After that he walked for over ten miles to Masasi Police Station to report the matter. The accused claims that the deceased's previous conduct of refusing to accompany him back home from the *ngoma* where she decided to stay till the following morning and her decision to go back to the said *ngoma* on the afternoon of the material day coupled with her refusal to play sex with him made him so angry that he lost his control and hence administered the fatal wound on her.
- C
- D The defence of provocation is statutory. The law as embodied in section 202 of the Penal Code says that when a person kills another in the heat of passion caused by any wrongful act or insult of such a nature as is likely, when done to an ordinary person, to deprive him of the power of self control and to induce him to commit upon the person by whom the act or insult is done or offered, and he does the killing before there is time for his passion to cool, then he is in law said to have killed in provocation and hence the offence committed is manslaughter as opposed to murder. As alleged by the accused, in
- E the instant case the alleged provocative act is the deceased's refusal of sexual intercourse. Happily the law is quite clear on whether refusal of sexual intercourse by a wife is a sufficient act to cause legal provocation. Among the leading decisions on this point is that of
- F *Rex v. Saidi s/o Nakandu* (1). In that case it was held by the then Court of Appeal for Eastern Africa that, refusal of sexual intercourse *per se* does not constitute provocation. However, such refusal may constitute provocation if it is coupled with other circumstances. In
- G the present case it has been strongly argued by Mr Kumwembe, the learned defence counsel, that there were some circumstances which rendered the refusal of sexual intercourse legally provocative. On this, the learned defence counsel pointed out the fact that on the
- H night previous to the incident the deceased insolently refused to
- I

accompany the accused back home from the local *ngoma* and instead she stayed there till the following morning. And again on the afternoon of the fateful day, the deceased decided to go back to the said *ngoma* without the prior consent of the accused. With respect to the learned defence counsel, I don't think that these two incidents were so grave as to precipitate the deceased's refusal of sexual intercourse to an act which would have caused legal provocation. Hence, no wonder that the accused did not make a fuss on either of the incident. There is no evidence that the accused queried the deceased on the alleged insolent acts, let alone reprimanding her for the same. It appears that the accused took both incidents quite lightly or at most he was courageous enough to endure them without bitterness. By the time the accused and the deceased went to bed the alleged two incidents were almost forgotten issues.

This fact accounts for the accused's move for sexual intercourse as soon as they were in bed. It is quite evident that the accused's sudden change of temperament which climaxed to his inflicting the said fatal wound on the deceased was motivated wholly by the deceased's refusal of sexual intercourse.

But assuming, for the sake of argument, that there were circumstances which justifiably rendered the deceased's refusal of sexual intercourse legally provocative, still the question remains whether the accused was still in the heat of passion when he inflicted the fatal wound on her. I find it irresistible to give a negative reply to this question. What happened is that after the accused had failed to persuade her, which included his attempt to take off her underpants by force, he got despaired and apparently decided to call it off. He remained in bed with the deceased for almost two good hours, apparently pondering what he should do next. By that time the deceased was peacefully asleep. It was then that he decided to pick the axe in question, and executed his murderous intent. Such conduct is not consistent with that of man acting in the heat of passion. It is quite clear that the accused was in a controlled and sober state of mind when he decided to cut the deceased with the axe. As a whole I am quite convinced

- A that the facts of this case are such that they do not suggest any possibility of the accused killed the deceased in provocation. I make this finding while fully conscious of the fact that our law does not impose any burden on an accused person to establish a defence of provocation.
- B Whenever the facts of a case suggest, albeit remotely, that the alleged killing might have been done in provocation, then it is for the prosecution to prove the absence of such possibility.

- C Both two gentlemen assessors were of the unanimous opinion that the accused is guilty. They out rightly dismissed the accused's plea that he killed the deceased in provocation. With respect, I am of the same opinion. I am satisfied that the charge of murder preferred against the accused has been proved beyond reasonable doubt. I accordingly find him guilty and convict him of the same.

- E Accused has been convicted of one of the most heinous offences known in our law murder. There is only one mandatory sentence which this court is required to impose. Accused is sentenced to suffer death by hanging.

F **YASINI MIKWANGA v. REPUBLIC**

G **HIGH COURT OF TANZANIA**  
**AT Mtwara**  
**(Msumi, J.)**

**CRIMINAL APPEAL No. 15 of 1982**

H (From the District Court of Kilwa District at Kilwa, in Criminal Case No. 33 of 1981, T.B. Mutakyawa, Esq., District Magistrate)

I *Criminal Law – Contempt of Court – Refusal to answer a question after the court has ruled that it should be answered – Whether an act of contempt.*

A *Criminal Practice and Procedure – Summary conviction – Whether the trial magistrate must frame formal charge before conviction*

B *Criminal Practice and Procedure – Testimony by accused person – Accused person refusing to answer question – Whether accused person who opts to testify may refuse to answer question*

*Criminal Practice and Procedure – Sentencing – Sentence for Contempt of Court – Whether a sentence of six months' imprisonment is legal.*

C The appellant and three others were charged with shop breaking and stealing before the Kilwa District Court. During cross examination by a co-accused, the appellant refused to answer a question put to him, contending that it was irrelevant. The trial magistrate ordered the appellant to answer the question but the appellant still refused, whereupon the trial magistrate summarily convicted him of Contempt of Court. On appeal to the High Court the main issue was whether that refusal amounted to Contempt of Court.

E **Held:** (i) The cardinal purpose of creating the offence of Contempt of Court is to arrest all whose conduct is reasonably feared to be interfering with the proper administration of justice

F (ii) Once the Court Rules that a witness should answer a question then the witness ought to comply, otherwise he will be liable for Contempt of Court, except where the witness is impaired by physical infirmity.

G (iii) The refusal of the appellant to comply with the trial magistrate's order to answer the question contravened the provisions of section 114(1)(b) of the Penal Code; upon opting to testify in the witness box the appellant automatically subjected himself to all rules governing witnesses.

H (iv) In summary proceedings the magistrate should frame the charge before entering conviction.

I (v) There are no set rules to comply with in drafting a charge under summary proceedings but explaining the gist of the offensive conduct, the particulars of the law it contravenes, and finally availing an opportunity to make a reply to the charge are things that should be done, and all these were complied with before the appellant was convicted; the conviction, therefore, complied with section 114(1)(b) of the Penal Code.