IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 281 OF 2009

SAIDI KIGODI @ SIDE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mafinga)

(Uzia), J.)

dated the 21st day of July, 2009
in
Criminal Session Case No. 10 of 2008

JUDGEMENT OF THE COURT

1 & 1 July 2011

MUNUO, J.A.:

In Criminal Sessions Case No. 10 of 2008 in the High Court of Tanzania at Iringa, the appellant, Said s/o Kigodi @ Side was convicted on two counts of murder c/s 196 of the Penal Code namely:-

Count 1: Murder c/s 196 of the Penal Code in that on the 25th April, 2007 at Usokami Village in Mufindi District within Iringa Region, the appellant murdered one Sophia d/o Kasige.

Count 2: Murder c/s 196 of the Penal Code, Cap. 16 R.E. 2002 in that on the 25th April, 2007 at Usokami Village in Mufindi District within Iringa Region, the appellant murdered one Tukae d/o Kigodi.

The High Court found the appellant guilty of murder as charged and sentenced him to death by hanging under the provisions of section 26 of the Penal Code, Cap. 16 R.E. 2002. Aggrieved, the appellant lodged this appeal to challenge the conviction and sentence.

The facts of this case are not complicated. The appellant is the step son of the deceased, Sophia d/o Kasige. The latter was the wife of the appellant's father who testified at the trial as PW1. The appellant's father, Faustine Kigodi, initially married and cohabited

with the appellant's mother. However, the first marriage got sour whereupon PW1 left the appellant's mother and married the late Sophia Kasige. It appears the deceased and her appellant step son did not get on well and they were fighting over land. PW1 gave to the deceased. It was the evidence of PW1 that the appellant had threatened to eliminate his step mother when he found her clearing the land in dispute by warning her –

"nitakupoteza", meaning he would make her vanish.

On the fateful day, the deceased and her 1½ year old daughter, Tukae, went to a funeral at the village. By evening they had not returned so PW1 got concerned. Because the deceased failed to return home, PW1 started searching for them. As he was searching for them, PW1 saw a trail of blood. He followed the trail of blood into the bush only to find the badly wounded bodies of the deceased lying dead with multiple cut wounds. He suspected the appellant who had threatened to cause Sophia Kasige to disappear, to be the killer. PW1 had the appellant arrested and turned over to the police.

The appellant recorded a cautioned statement and an extra judicial statement admitting that he killed the deceased. In his extra judicial statement, Exh. P5, the appellant stated in Kiswahili;

> *"Nakumbuka ya kuwa huyo marehemu alikuwa ni mwizi alikuwa ananiibia mali zangu mahindi shambani. Alianza muda mrefu kuniibia nilimshtaki mara nyingi ofisini lakini yeye aliendelea kuniibia tu. Yeye hakupenda mimi nilime eneo hilo na eneo hilo alinipa baba yangu aitwaye Faustin Kigodi. Ndiyo maana nilimkuta akifyeka eneo hilo. Yeye alikuwa hapendi kabisa mimi nilitumie eneo hilo. Aliendelea kuiba viazi vyangu. Nilitoa malalamiko serekalini wakasema watafuatilia. Wao walikuwa walimuelekeza (walimuendekeza) hawanitii mimi ndipo tulikutana njiani na ndipo niliamua kumpiga na panga kichwani akaanguka chini na akafa hapo hapo. Baada ya siku tatu kupita ndipo mimi nilishikwa na nikaletwa kituo cha polisi."*

As it was, the appellant admitted that he slashed the deceased with a machete on the head causing her to collapse and die instantly.

The post-mortem examination report, Exh. P1, of the late Sophia Kasige, was tendered without objection at the preliminary hearing. Exhibit P1 states that the cause of the death of Sophia Kasige was severe hypovolaemic shock and multiple cut wounds. The body had multiple cut wounds on the head, on both upper limbs and both lower limbs with massive bleeding. The post-mortem examination report for Tukae Kigodi, Exhibit P2, shows that the said child died due to severe head injury with brain tissue exposed out and to the nose. The body had a deep cut wound on the parietal area with brain tissue exposed out and also cut wounds on both upper limbs. Hence, Sophia Kasige, and her small daughter, Tukae Kigodi, died unnaturally due to severe panga cuts the appellant inflicted on their heads and limbs.

In his sworn defence, the appellant admitted killing his half sister and step mother on the 25th April, 2007 but not with malice

aforethought. He deposed that on the material day, Sophia Kasige went to his home and threatened his life because she wanted to take the farm which was in dispute. He stated, furthermore, that he hated his late step mother because she took his farm. He said that when the deceased went to threaten him on the morning of the 25th April, 2007 he decided to kill her at 6.00 p.m. that evening.

The appellant deposed that he also went to the funeral the deceased had gone to. After the funeral he waylaid the deceased and killed her out of anger which he said did not cool for the whole day. The appellant said anger gripped his heart for the 21 years his step mother was married to his father, because she took his farm and threatened his life. The appellant said that he did not intend to kill Tukae whom he accidentally struck with the machete he killed her mother with. It was the evidence of the appellant that he did not kill the deceased persons with malice aforethought. He admitted that he recorded in his cautioned statement that he left the funeral earlier so that he would ambush and kill his step mother on her way back:

"Mimi niliondoka kule kwenye msiba kwa madhumuni ya kuja kumvizia marehemu njiani pindi atakapopita ill nimwue."

In this appeal, Mr. Samwel Mwamgiga, learned advocate, represented the appellant. The respondent Republic was represented by Ms Andikalo Msabila, Senior State Attorney.

The learned Counsel for the appellant filed two grounds of appeal, namely that:–

1. *The learned judge erred in law in not considering the appellant's defence of provocation.*

2. *The learned judge erred in law and in fact to convict and sentence the accused to suffer death for the reason asserted in ground 1.*

At the hearing, counsel for the appellant reiterated the appellant's defence that he killed under provocation. He contended that the appellant attended a funeral and upon spotting his step mother at

that funeral, he recalled that she had threatened his life at 9.00 a.m. on that day. The appellant then allegedly got provoked and went to waylay her and when she was returning home at 6.00 p.m., he fatally slashed her with a machete and accidentally slashed the deceased's daughter as well. The parties had a land dispute for 21 years and despite seeking the intervention of the village authorities, counsel for the appellant submitted, the appellant got no assistance. The learned judge should convict the appellant of the lesser offence of manslaughter c/s 195 of the Penal Code, counsel for the appellant urged, insisting that the appellant did not kill the deceased persons with malice aforethought. Hence, Mr. Mwamgiga prayed that the conviction for murder be reduced to manslaughter and the sentence of death be quashed and set aside. Counsel referred to the case of **R. versus Lameck Kitoka (1972) HCD 207** wherein the Court held that;

> *"But in my view whether an act can be said to constitute sufficiently grave and sudden provocation for the purposes of sections 201 and 202 of the Penal Code should always be*

considered in the light of antecedent aggravating circumstances over a period, if such exist, so that a culminating "last straw" may be considered as provocation sufficiently grave, which might not have been so considered if it has been the first act of its kind."

Ms Andikalo Msabila, learned Senior State Attorney, supported the conviction and sentence. Referring to section 202 of the Penal Code, Cap 16 R.E. 2002, the learned Senior State Attorney submitted that there are no elements of provocation in this case because the appellant did not kill under provocation. She contended that assuming that the deceased threatened the appellant at 9.00 a.m. on the material day, and the killing was executed by the appellant at 6.00 p.m. in the evening, it means the appellant had a 9 hour interval for cooling down so the defence of provocation was not available to him.

The issue is whether the appellant killed the deceased persons under provocation.

Provocation is provided for under Sections 201 and 202 of the Penal Code, Cap 16 R.E. 2002:-

> *"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 defined in section 202, and before there is time for his passion to cool, he is guilty of manslaughter only."*

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.

Section 202 of the Penal Code, Cap 16 R.E. 2002 defines provocation as follows:-

> *"202. (1) 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 immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master 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 **Joseph Marwa Chacha versus Republic (1980) TLR 272** the Court considered the defence of provocation and held that –

> *"(i) -----*
>
> *(ii) Where the appellant asserts that a threat constituted provocation, even if the threat annoyed the appellant, in this case the*

annoyance should have ended when the appellant disarmed the deceased."

In the present case the appellant alleged in his defence and in the extra judicial statement that he had a land dispute with his late step mother for 21 years which bitterness culminated in his killing her on the material evening. He, furthermore, alleged that on that particular day his step mother had threatened his life at 9.00 a.m. and he killed her at 6 p.m. by ambushing and slashing her on her way home from a funeral because when he saw her at the funeral he recalled that she had threatened him at 9.00 a.m. and that recollection aroused great anger amounting to provocation. Unfortunately, we are not persuaded that there was any provocation at all in the circumstances. If the deceased step mother uttered threats at 9.00 a.m. and the appellant killed her at 6.00 p.m., after nine hours, he had more than sufficient time to cool down and report the uttered threats to the police. We are of the settled mind that provocation would be a defence if appellant passionately killed his step mother at the spur of the moment when she threatened him; not when he killed her nine hours after being threatened.

It is pertinent to reaffirm the decision of the Court in **Joseph Marwa Chacha's** case cited *supra* that –

> "--- *for purposes of assessing sufficiency of provocation, the community of a Tanzanian is fellow Tanzanians, not members of the tribe of the accused."*

We are of the considered view that the appellant's assertion that the killing would be justifiable in his tribe is to say the least repugnant to good conscience and respect for human dignity and life. The appellant ought to have sued for the repossession of the land the deceased dispossessed him for 21 years instead of ambushing and killing her by ambush.

In view of the above, we are satisfied that the appeal is totally lacking in merit. We find no ground for reducing the conviction to manslaughter.

The learned judge passed an omnibus sentence of death. We are mindful of the decision in the case of **Agnes Doris Liundi versus Republic (1980) TLR 46.**

In that case the appellant was convicted on three counts of murdering three of her children by poison. It was held among other things that –

> *"The sentence of death should only have been passed on one count, the convictions on the other two events being allowed to remain in the record."*

We, therefore, pronounce the death sentence imposed by the learned judge to be on count 1 only. The conviction of murder on count 2 remains in the record.

Save for the specification of the death sentence on count 1, the appeal is devoid of merit. We dismiss the appeal.

DATED at IRINGA this 1st day of July, 2011.

E.N. MUNUO
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(J.S. MGETTA)
DEPUTY REGISTRAR