IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: NYALALI, C.J., MAKAME, J.A. and KISANGA, J.A.

CRIMINAL APPEAL NO. 35 OF 1986

ALOYS KIRILEHI .....APPELLANT

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mwanza)(Mwalusanya, J.) dated the 26th day of March, 1986

in

Criminal Sessions Case No. 10 of 1984

JUDGEMENT OF THE COURT

NYALALI, C.J.:

The appellant Aloys Kirilehi was charged and convicted in the High Court at Bukoba with the offence of murder contrary to section 196 of the Penal Code and was sentenced to suffer death by hanging. He was aggrieved by the conviction and sentence, hence this appeal to this court. Mr. Rutakolezibwa, learned advocate, represented the appellant in this Court whereas Mr. Ndoloni, learned Senior State Attorney, appeared for the respondent/Republic.

From the proceedings in this Court and the High Court, there are a number of matters which are not in dispute between the prosecution and the defence. These are: That on the 12th of May, 1983, in the evening, the appellant was drinking with some guests some local pombe known as 'Rubisi' at his home in Nyakabongo Village in Muleba District. Among his guests were John Zacharia, who is the second prosecution witness (P.W.2) and Mathias Bachumu, who is the third prosecution witness (P.W.3).

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Present also w s his wife Severina w/o Aloys who was, however, not drinking. Later the appellant announced that the drink was finished and informed his guests that they were free to go away and they began to leave soon after. Sometimes later that day the appellant speared his wife many times in her thighs. An alarm was raised and a number of people came at the scene in response to the alarm. The wife was taken to the hospital that same day where she died shortly afterwards. The appellant was apprehended and taken to the CCM office and subsequently to the police station. A post mortem examination was conducted on the body of the deceased and the Doctor found that the deceased had sustained ten wounds in the area of her thighs, and that she had died due to haemorrhage and shock.

With regard to matters which are in dispute between the parties, it is the prosecution case that when the appellant was asked by the people who came to the scene in response to the alarm to explain what had happened, the appellant told them to wait until the next day when he will be in a position to give them an explanation. It is part of the prosecution case that the appellant had malice aforethought in killing the deceased, and that he had no justification in doing so.

On the other hand, the defence case is that after the guests had left the appellant's home after they had finished the drinks, the appellant, who was a polygamist, decided to go and pay a visit to his other home in another village where his other wife lived. While on the way, he remembered that he had forgotten some tobacco and so he returned to his first home where he found his wife committing adultery with P.W.2, John Zacharia, in his house and in his matrimonial bed. Before he could know what was happening, the said John Zacharia butted him in the head and he fell down with the result that the said John Zacharia managed to escape and ran away. The appellant then noticed his wife pulling

down her clothes to cover her nakedness. He was so annoyed that he picked a spear that was nearby and speared her in the area of her thighs.

The first point for consideration and decision in this case is whether the appellant found the deceased committing adultery with P.W.2 or anyone else. The learned trial judge, Mwalusanya, J., considered this point and found, like the gentlemen assessors who sat to assist him in the trial, that the appellant did not find the deceased committing adultery with any one. He stated:

> "On my part after a close scrutiny of the evidence I have arrived at the same conclusion as the gentlemen assessors. The act of adultery in the circumstances of this case was not in the least probable. While we agree that P.W.2 could not commit suicide by incriminating himself yet the whole evidence glaringly points in the opposite direction. Why did he not raise an alarm as it is customary in such matters as pointed out by the assessors so that the adulterer could be pursued and arrested? I accept the prosecution case that it was P.W.1 and other children who raised the alarm and not the accused. And if John Zacharia (P.W.2) had been in the house at least P.W.1 would have seen him as he managed to see his mother coming out on her knees. And at least P.W.4 who was the first person to appear at the scene would have seen a person fleeing at a distance. But that was not the case. Again why did he not immediately tell P.W.4 as to why he killed his wife? In the circumstances the conclusion that what he stated the next day is an afterthought and a concoction is inevitable.".

It is apparent that the learned trial judge in rejecting the appellant's story was influenced by the fact that the appellant did not raise an alarm when he found his wife committing adultery, and on the fact that P.W.2 was not seen running away by P.W.1 or P.W.4. With due respect to the learned trial judge, he appears to have misdirected himself on the evidence regarding this matter. It is apparent from the statement made by the appellant to the police, and which was adopted and produced at the trial as part of the evidence against the appellant, that the appellant claims to have raised an alarm which made the neighbours come to the scene. This claim by the appellant is consistent with the evidence

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given by P.W.4, a neighbour of the appellant, who heard an alarm being raised at the appellant's house.

As to P.W.1's failure to see John Sac[illegible]ma running away, the learned trial judge does not appear to have realised that P.W.1 was not a reliable witness, as his testimony contains several contradictions and inconsistencies. As to the evidence of P.W.4, there is nothing to suggest that the proximity of the appellant's house to P.W.4's house and the surroundings were such that no one could run away from the appellant's house without being seen by P.W.4. It has to be noted that it is common in that part of the country, that is, Mulelu District in Kwagera Province Region, for houses to be amidst plantations of bananas which as act as a good cover for a fleeing person.

There is, however, a strong point raised by the learned trial judge; and that is the refusal by the appellant to explain what had happened until the next day. This conduct of the appellant has given us great anxiety. It is unusual for a man who has found his wife committing adultery and who has, consequently, seriously injured her, not to disclose what has happened, and instead to inform his fellow villagers to wait until the next day! We have considered the possibility that the appellant felt so overwhelmed, shocked and possibly ashamed by the experience that he found himself inhibited from disclosing what had happened. This possibility does not, however, appear quite convincing, and in the absence of other factors, we would have been inclined to agree with the learned trial judge and his assessors in finding that there was no adultery committed.

But there is one stricking feature in this case, and that is the undisputed fact that the appellant speared his wife around the thighs ten times, which is consistent with a sexual offence having been committed. Why should not the appellant spear the deceased even once on any other part of the body if something other than

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adultery had moved him to assault her? The appellant seems to have directed his anger and assault towards the area of his wife that had annoyed him. This, in our view, lends credence to the appellant's story.

For that reason we are satisfied, and find it as a fact, that the appellant found his wife committing adultery with some man, and we also find that the appellant's assault upon his wife was a result of provocation resulting from finding his wife in flagrant delicto.

But this is not the end of the matter, since not every provocation amounts to legal provocation. We have to ask ourselves whether a reasonable person in the community of the appellant would have acted in the manner that the appellant acted, and whether the mode of retaliation was proportionate to the provocative act. We do not doubt that a reasonable person would be provoked by the act of finding his wife or her husband committing adultery. But then, the appellant, in spearing his wife ten times in the area of the thighs, acting merely under provocation or was he also influenced by revenge?

We think that the circumstances in this case, that is, the undisputed fact that the man who was committing adultery with his wife was a long time and close friend and the fact that, that man butted him down before running away, so aggrivated the provocation that the appellant's viciousness in attacking his wife cannot be said to have gone beyond the boundaries of legal provocation. There was thus, in our view, legal provocation under which the appellant acted. It follows, therefore, that the conviction for murder was improper and we shall have to interfere with it and substitute therefore a conviction for manslaughter.

In doing so we shall have, necessarily, to consider an appropriate sentence. We will take into account the fact that the

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appellant had been in remand prison for a period of three years at the time of conviction, and also, of course, the fact that he was brutal in killing his wife, and the fact that he is a first offender.

In the final analysis, therefore, the appeal partially succeeds, and we quash the conviction for murder and set aside the sentence of death, and substitute instead a conviction for the offence of manslaughter contrary to section 195 of the Penal Code, and sentence the appellant to ten (10) years' imprisonment.

DATED at MAFIA this 29th day of November, 1986.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

J. H. MSOFFE
DEPUTY REGISTRAR