

TANZANIA / JUDGMENT

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, -- ,.. HT TI-I8 HIGH COUUT OF TANZL.ITIA ./; 11 j).AR. ES SALAJ:JI'I 7' ·3/ OI"J:C-INAL JURISDICTION (Ier es Salaam Registry) CRIMINAL SESSIONS CASE NO. 14 OF 1981 t- THE REPUBLIC Versus ~· ,· ,,,, KASolANI KJ-'JIDTI __j JUDGMEHT RUHUMBIKA - J • The accused in this case, YJt~1SIANI IWJUTI, fnces a charge of Murder. It is alleged by the Tiepublic that the accused wl th mnlice · · aforethought ldled his wife .named AUW, THOlV""UIS, on or about the 16th of August, 1978. at Mabawa village in the Region of I:forogoro. The Republic in order to_prove its case called a total of 10 wi tnessea . · · . including a child of te~der years, whose evidence was taken as provided for under Secti;n 127(2) of.the Evidence Act, 1967 (1981 edition) vmen read together with sub Section (5) of the same Section vmich prov~:.des tha:t the expression "Child of tender yearsi 1 means a. child of or below the age of fo'lU'teen years. The court will refer to the ndence of this child in great deta:..1 :otc:::, The accused on his p8.rt denied the alleg,rcion of :murdering his·· . . ~- wife, and set U)) a de:L'cncG of p:rovocation. 1' The facts of tl1j.13 ca,:..:e are straight forwoYd. TherG is no dispUte tbat the wfe ' ot the accused, AlifHl. TI;:OI':I!cS, is dead and -tba1n:· ;) ehe died a violent deo.th at the hands of the accused,. The father. .{ . of the deceased; TBOT.U S SEilJJRINI,?Vlo4, clea:r:;,y ider.tified the body-;}. of the deceased f her dauf;hter, as that of Ari!. •J:HOVI 3 • The doctor who conducted the autopsy on the body of the iJ.Gce~se~ found ..that : . _;: ...!· ~· j. i't\:: _; the cause ot death was because of e0Yer0 wou:LC°i.s t.r1le deceased~,,~ ~;:;u,, . , ... :,, , , . , f. ' ' ' ~ ' • :; ,! ~; ~i; ved which led to shock and profuse haemo1-rhace. 9:he doc tor noticed · · .. _;r:· ·} . two cut wounds. One was of about 10 cm. long and 4 cm deap and n,m" ., f through the upper part of the nose from the left eye ~Tl!. . _oe the right ' ~-:~;_i-_-:J\;:~:~_- . cheek. This wound completely dau;ged the left eye. 1•r1 wound . , . -i1 .. described had complcte:i.y fractured the max:i.llabone. The doctor ... ·i :~ ··· further no'ticed another cut wound on the left side of the neck I/-}\. which was of 1 om. long and 5 cm. deep, this wound involved the ·y1_.,/v·')· oarotid artery and.thus caused profuse blcoding. opinion a sharp anc1 heavy weapon was applied with

- ?.. -- to inflict those ·wounc1c of th8 described ma. 6'11i tude. The Cc•.use o:f:' death is not disputed by the defence. The accused j_n his extrn. judicic.l st8tement which was admitted in evidence and maI'ke:1 I;JChibH P .. ::, accepted to have ~ d his deceased wife with an axe, and repeated the S8me explanation while giving evidence in the wtness box on oath. However, he tiild,ll maintained provoce.-cion as the etuse of the lrillirie, just as he had nar::~~atecI to the jua tice of· the PeG:c (P 11!, 10) a P:'!i.ms.ry Court Magistrate who

recorded the evidence. The Republic in its bid to have this court believe that the accused killed his wife with malice aforethought relies mostly on the evidence of the daughter of the accused called MAGDALENA, a child of tender years. Before admitting the evidence of this child, the court has to direct itself to the provisions of section 112(2) of the Evidence Act, 1967, to find out whether the child understood the nature of an oath or not so that her evidence could be received on oath. Through questioning by the court, the child clearly stated that she did not understand the nature of an oath. The court did not stop there, but went on to question the child (voire dire) to find out whether she was possessed of sufficient intelligence to receive the reception of her evidence and whether she also understood the nature of speaking the truth. Through questions by the court and her replies to such questions by the said child, the court was satisfied that the child was possessed of sufficient intelligence and knew the duty of speaking the truth. Therefore her evidence was taken though not on oath. The evidence of this child, who in 1973 was 11 years of age when the incident took place was that on that fateful day (10/8/73) the accused father returned from a place where he had spent a night and came back home in the morning. According to this child, she was playing in the backyard of the home with the other children, but when the father came she left the other children and went in front of the house near the doorway from where she held the CQPDL8nd of full view of the house. She was taking place in the house. The child told the court that she saw the accused, her father, go into the bedroom and take an axe and all of a sudden struck the deceased, Mr. J. Othet twice and the mother fell down. The child did not at that juncture we

- raise an alibi and ran to the place of the grand father, THOMAS, 'be -- ... ~ 3 - rela3" th,i,s tragic masi:iage,. THOMAS wi tb.out wasting time dashed to El ~~,<JQ.1~ ~ r to r~port. The 1en cell leader is GEORGE II'.IAKIDLEMOt ,aco. together w::i.th TEOL.I'JJ 1'-u::::hcd to the ple.ce of the accuse.cl only ta,. J;:i..nd that JJ!UU, •r:::s alrQcdy in the ul tramundane. The re,jt ~~-the ~ ~n· Vftna9s did not witness how the ' Jdilly;ig wae done. their evidenQe at most simply corroborates the fact that the said decea8ed had died a violent death from tm- oush ~ing exed by the accused. Section 127 (2) of the Evidence Let, 1967, in very clear terms ~ets out the p:i:ocedure to be followed when acting on the .p.denoe of a child of tendel" years lilre MAGHAJ..1T;Nf., PVL3, Sub- section (2) of 8ection 127 of the l!:Videnca Act, 1967 sta.tee:- 11 (3) Notwi tJ;:1.1~tanding any rule of l::,w or practice to the contrary wher.e evidence is received by virtue of Sul,>- Section (2) is eiven on behalf of tho lJrosecut:i.on and is not oor~oborated by any other material· evid~noe· in support of it implj,cating the accuood, the 004rt may, after wa:rning itoolf of the danger of doing so, act on that c.Yidence to conYict the'accused if it is fully satisfied that the child is telling nothilJg but the truth, 11 .. . According to the consti:ution of the above subsection, although the Pourt could act on the evidence of a child without corrobo.ratton by any other material evidence, the court e.n only Sf1,felz do oo after wamiJ.lg itself of the daJ:16er of acting on eueh evidence without OJ~rr9bra tion. Going back to the evidence of the child, M.AGD/1LEl'fA1 ehe ~id not even mention the oth<'1r children with v,hom she was playing in i,he baok-yard o:e the hour.m when aho left tl10m to go 1nfront of the house. One would hr:ve illl3gined tba t when the

accused. The deceased lived in the house; definitely the woman ought to have screamed in agony of pain. This could have alarmed the other children too, especially the mother in the house. Again there is evidence to show that NUGDAI JANA was not the eldest child. There was another child older than MAGJAJANI, but the court was not told WM, who had happened to this child. The court was not even told of the absence of the other children who were playing with MAGDALENA in the pocket of the house. Our law as prescribed in Section 127(4) of the Evidence Act, 1967 allows the court to act on the evidence of a child of tender years when corroborated by the evidence of other persons of tender years.

- 4 - In disclosing the evidence of this elderly witness, the child of tender years, PW3, the defence relied on the evidence of PW7, JH SHL., JANI, who said under cross examination that on that fateful day he had seen the accused pass by near his house, as they were very close neighbours within the range of 70 paces. The accused was coming from Magole, another village, and then entered his home, where he remained for about an hour. Here, let it be remembered that this witness PW7 does not mention of having seen any of the children of the accused playing around the compound that morning when the accused came. The contention of the defence, as reflected in a sworn statement of the accused is that when he came back home from Magole village he found nobody at the house. He thus entered the house and started to prepare food for himself as he was unwell, and then went to Magole to visit a local medic named AMANI. Initially, according to the accused, he returned to this local medic in the evening. When he felt unwell again, he visited him the first time in the morning thereafter. The accused spent a night at ALANI's place, returning home on the morning of 16th August, 1978, the fateful day. The accused in his statement before court stated that no one was at the house but after a while the wife came there and found him (the accused) on bed as he felt unwell. "Thereupon the deceased scornfully uttered these words in Swahili: - 11 • • • • • once when alido i a fadhali nilale nifo m alido i ba (sina) maji ya kunikoshen, Xb. The defence contended that the words uttered by the deceased to the accused, especially the words, 11 Maji ya kunikoshe, were highly and gravely provocative in the sense that the deceased had the accused husband in disrespect and the words were derogatorily uttered to the accused without regard even that he was sick. That meant the deceased wished that the accused died his way as Dhe Qared not being about him. In further discrediting the unsworn testimony of MAGDALENA PW3, the court further confounded that she who narrated before the court should have been examined by the court, and even if it could be
- The court accepted that she was at the door, which the defence stated was high. If impracticable, she could not have heard the provocative words uttered by the accused. The defence prayed the court to be cautious with the evidence of this child as regards its probative value without other evidence to corroborate it. Of course it is not in dispute that the incident NLGD. ALANI went to inform her father THOMAS, but according to the testimony of iii. 7, ABDALLAH SHABANI, the

daughter of the deceased PW • 3 (MAGDALENA) was seen by this witness peep into the house and then dash out crying to go to the place of her grandmother THOMAS, after the accused had gone into the bush with an axe past the place where this witness was. Indicates that PW, 7 saw the accused twice. First when he was returning from the hospital back home, and the second time when he was going to the bush with his axe. This then contradicts the possibility of the accused to have been present during the time the accused beat the deceased with the axe in the room: explained. Indeed the court must conclude that this is a difficult case. It is a case that reflects the best behaviour of the accused husband. The barbaric propensity and inhumanity. Clearly the offences of the accused are grossly inhuman. But courts of law have to decide cases not by being moved by psychological influences, emotions or persons' convictions, losses or non-losses. Cases have to be decided on the basis of the judicial process of proof through evidence, and judicial reasoning, nothing more. Positive law prescribes the dictates to be followed, otherwise still, legislation to be obeyed by the citizenry. Law requires that for law to be enforced the offender must be penalised. And those who flout the law should face the consequences. In the jurisprudence of punishment makes it clear that once the law is broken, the tranquility of society at large is disturbed. The same society then expects the offender to pay the price by being subjected to the legal penal sanctions. But punishment has to be proportionate to the offence and if punishment is not proportionate to the offence unjustified. Murder is a serious offence, and is a mala in se offence, that is an offence by itself not prohibited, i.e., bad because it is forbidden by law. The appropriate punishment for murder if proved for the accused to face the gallows. What is just that under our law, being a serious offence, that is why the law provides defences like self defence, provocation, insanity, intoxication etc. in order that the offence could be reduced to a lesser offence of manslaughter.

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- Q - The case before the court is one such a difficult case, The court finds itself at crossroads, .. Vfi thout explanation if this very case was presented before the learned judges, it is not surprising that two different verdicts could be entered. One could be the trial of murder and perhaps the other could be of manslaughter. Provocation as a defence at law is provided for in Section 202 of the Penal Code, Which states: 'I.e term provocation means and includes 11, .-. any wrongful act or insult of such a nature as to be likely when done to an ordinary person..... 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. 11 (only the relevant parts of the section are reproduced here). The statutory provisions on the law of provocation as seen supra are not very specific. Therefore most of the provocation issues as defences in homicide cases are to be found in case-law. There are several decisions in respect of provocation as defences in murder cases. Some courts have in different circumstances either sustained provocation as a viable defence so as to reduce the offence of murder

to manslaughter, and in some instances provocation has been ruled out by courts. And in one of the decisions of the East African Court of Appeal, the court held that provocation in respect of a husband was a matter of fact depending on the circumstances of the case, See the ratio of , ... However, while the courts grapple with these propositions the court seeks to make it clear that at times courts find themselves in that position. The problem of trying; to verify; the case for the prosecution on the same balance as the case for the defence. Clearly this is an improper legal approach. It is 2, cardinal principle at criminal law that the onus of proving the charge against the accused beyond all reasonable doubt is always on the prosecution in Criminal cases. This burden does not shift. Likewise, the law does not require the accused person to prove his innocence beyond all reasonable doubt, because the underlying philosophy about the whole thing in common law countries is that a man is deemed innocent until proved guilty, ; This jurisprudential approach in Criminal trials becomes very taxing on the minds of the trial judges . Indeed a judge has a duty

- 7 - to make a decision, but he has to make a judgment (decision) according to his own conscience and upon the evidence as adduced before court. Otherwise it would be making a travesty of the judicial process. The criminal principles require that the accused need not be entitled to an acquittal if it is to raise a reasonable doubt over the whole <Yidenco against him. Once that reasonable doubt is raised and sustained by the court, then the accused is entitled to an acquittal, because the prosecution will have failed to discharge their burden of proof. In this case, it is true that the accused killed his wife in the most inhuman manner with an axe, thereby killing her, The accused has set up provocation as defence. The public on the contrary he argued all out for the accused to be convicted of murder and face the gallows if it were, Now let us go a little into the antecedents of the married life of the couple - the accused and the deceased. There is ample evidence that their marriage was a harmonious one, his testimony was made by TI:101L'G, PW,4, the father-in-law of the accused and the other prosecution witness who were neighbours to the couple. The matrimonial problem of the couple arose when in the month of January, 1978 the accused came back home after having been out in the forest to cut wood for charcoal as a means of livelihood to the family; and found to his utter disgust that his wife had conceived through some adulterous associations ; with a man named JANJARY. As the pregnancy was two months old, the wife had to confess to the deceased, and not only that but in a derogatory manner told the accused that she had to commit adultery with that paramour of hers as the husband (accused) was poor, that is could not the accused provide for her needs. Here it will be remembered that the accused had gone to cut the wood together with his father-in-law, who testified that the accused made a trip back home in between to bring money to the family, the couple were blessed with four children. Apart from that, the accused took up the matter in the most amicable way, he did not harm his wife but made accusations to the traditional elders. GEORGE MAKELEMO (PW,8) the ten-cell leader of the village reconciled the parties. In fact the evidence Is. -8 is clear that the accused confessed that she was made pregnant by a man named JANUARY

during the absence of her husband. For that matrimonial offence the father of the deceased PW,4 (THOMAS) paid Shs. 140/= compensation to the wronged husband - the accused. It is a gesture of good will the accused returned Shs. 100/= to the deceased's 9 wives Shs. 200/= to the elders as witnesses and gave the remaining Shs. 20/= to his wife, thereafter life was normal. But in the view of the court, the behaviour of the deceased's wife was contemptuous to her husband, When arguing about whether provocation could be available to the accused in this case, the learned counsel for the defence cited the case of *LJJ. filKI KITEKA v. - (1972) I-r.c.D, n.207*. It is obvious that the facts of that case are different from those of the case before this court. But the salient point to note in that decision (per JJ; Jz.:v1\ S, J, as he then was) is the hypothesis of cumulative provocation. The Court held that: "Provocation for the purpose of Section 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 provocative sufficiently grave, which might not have been so considered if it had not been the first act of its kind. This court finds that the hypothesis of cumulative provocation put forward in the case cited is well placed, and indeed apart from the fact that the facts of the present case are different from those of the cited case, the question of cumulative aggravating circumstances which are antecedent in the marital life of the couple are clearly present in this case. Note that the husband was grossly wronged to find his wife pregnant by another man, and note the derogatory manner in which the deceased told the accused that she decided to have an adulterous affair with JHJU/P.Y because he the deceased was poor. Then the last of the gravely provocative straw is when the deceased told the accused who was in bed and indisposed in Swahili (the words of which are already reproduced in extenso in Gwoli in this judgment), but whose English equivalent could be: "Batter sleep and die and I will fetch water to wash your body." These words uttered to a wronged husband like the accused, who knew that his wife had no regard for him whatsoever could certainly, in the view of the court, and taking the accused's walk of life, be a provocation.

- 9 - render his loose his self control and in a heat of moment took the deceased. When summoned up to the gentlemen assessors, all of the three were unanimous that the accused was guilty of murder. Their remarks were not evidence. They said the words alleged to have been uttered were concocted as there was no evidence to prove them, or even though they were not provocative. With the greatest respect to the impeccable wisdom of the three gentlemen assessors, with great reluctance I beg to differ with their opinions. The result is that the court would be wrong to weigh the case for the defence on the same balance with the facts for the prosecution. The court has earlier on gone to great detail to explain this. All the court has to ask itself is whether it is reasonably true that the deceased's wife, who uttered those words, to the accused. And if she uttered those words is it reasonable to say that those words could have provoked him so gravely so as to lose his self control and attack his wife as he did, But to require an accused person to prove his innocence that would be to make a travesty of our present judicial system. Once a reasonable doubt is erected and is accepted by the court, the criminal law principle

requires that the accused should be entitled to an acquittal. Will all fairness, in this case the findings that the accused has raised reasonable doubt over the whole evidence against him by setting up provocation as his defence, according to the words which in his statement he made before the Justice of the Peace and also before court on oath, To disregard the defence completely would be to make the trial biased. As was held in the case cited in this judgment, the court after having accepted that a reasonable doubt exists, it is imprudent than to rule out the possibility of provocation on the part of the accused. Therefore the benefit of doubt is to be accorded to the accused as a principal in criminal law. On the other hand, the fact that the accused is charged with the murder of a woman which he is charged with on the available evidence the accused is found guilty of a murder of a woman of the name of the deceased contrary to Section 195 of the Penal Code which offence he is accordingly convicted,

- 10 It is said that the behaviour of the accused cause the loss of life to an 'innocent baby who was almost to come to this world as God's precious gift to mankind. Sgd. (H. J. L., Ruhumbika) MOROGORO 12th April, 1983: 13/4/1983 Coram: R. J. L. Ruhumbika, J. Mr. Shio for the Republic vs. r. 1 shot for 1, accused Accused: Present under custody. All three Assessors. Pre-Gent. Court: - The judgment is delivered in the open Court this 18th day of April, 1983 at Morogoro. a.a.: L. Ruhumbika JUDGE 13/4/1984 Mr. Shio: - Ny Lord, the accused is a first offender but he is barbaric. But I pray that a very stiff sentence should be given taken into account the seriousness of the offence was committed, That is all my Lord, Ggd. R. J. L. Ruhumbika vs. JU (13/1/1983, ALLOCUTUS: Mr. Shio: My Lord, the accused has been on remand since 1978, This is a period of six years, That period has told the accused how precious human life is. The accused has also learnt how to exercise care when provoked. The deceased is very much to blame, She uttered very grave and provocative words. In African tradition, There is nothing more provocative than "wishing another person death. And this much so do the deities. The deceased is the source of all these incidents. She offered her body knowing that she was a married woman, and this is a very unbecoming behaviour in traditional society.
- 11 - society. Not only that, Lord, when the accused was sick the deceased never cared her. Turning back to the accused it is noted that since 1976 when they were married the accused did not have a good husband could do. Even when the deceased admitted adultery, the accused played it cool. It will also be recalled that after the accused had injured his wife with the axe; he offered himself to the authority without difficulty. Lastly, the accused has no children to look after, much as they could be taken care of by relatives they need parental care. All in all I pray that this court be lenient in sentencing the accused. Then will be all, my Lord. Sgd. (n. J. L. Ruhumbika) JUDGE 13/4/1983 Accused: - I have nothing to say. Sgd. (R. J. L. Ruhumbika) JUDGE 13/4/1983 SENTENCE: In this case the accused killed his own wife in a most inhuman and barbaric manner. He hacked the poor woman who was pregnant with a full term baby, by whom was almost to be delivered as a reward of God to this world, in addition to the general statement It is true that after much and careful consideration of the

GirCUJI1S-. tances the offence ,ras committed nd the ontecedents of the couple the accused and the deceased - the court accepted the plea of pro- voq_ation so as to reduce the offence from murder to manslaughter. under the provisions of Seotions 201 of thc·Peml Code when read together with Section 202 of the saae Code., Nevertheless, this is Q mo::;t brutal manslo.ughter case, and does not reflect any convincing grounJs upon which the court could clireot its mind regnrndg pr.:idng a leneient sentence to the o.ccused. Let it be·cleo.riy noted thnt ·the ~':l.ccused h.-::is just narrowly missed :facing the gcllows, if the court hnd not availed him (the accused) of t~is defence of provocntion in the ciNULL\Sta.noes the offence wo.s. «;Oijllilj. 'j::;ted, clefuu.,tely he ought. to hnve faced the gallows•, • ,/12

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- 12 - The mitigtirig factors put forwo1--d by the defence have ~n -considel'Cd, but in the light -of the. evidence before court on how the ocused committed the offence, th:..It is cutti:cg without rool'Oy his own p~gn_"lnt wife with a.n a.,ce not only once but twice, tb.ia ~ fails to see hoY>' it could under such oil'0Ulll&tance-s ~er~iso its leniency and met out o. lenient sentence, Indeed the court is o.11 out to support the coll for the Republic tlli't the ~cused should be given a stiff sentence for his bnrb::i.ric o.ct when he killed his wife in the manner he did. Tb.ere is no court of law which lrikea pleasure in either condemning convicts to face the gallows or i.mpossi.ng seTeN sentences to ~onvicts, But tha jurisprudence of puniar.unent requires tlmt a P\UliS]:lment toot is just should be the one valich is propotionute to the offence commi- tted. As earli:::r on rmue.rked· in, this judgment when some one offends the law the society expects hiL1 to pny a fact price for the offence he ha.s committed, ::>.s the tr~.UGUilli ty of the society is dis- turbed when offences ore corirr:ii tted. Criminal offences are not personal rac.tters; they involve the stnte, o.nd that is vm:, the Republic is the ono thnt prosecutes the offen<len. With due respect to whr,t the clefe:ace counsel has submitted, this court will have failed in its Judicial functions if it ! give a light and negligible sentence to the :iccused, Slustice should not only be done but should a.lso be seen to be done, Aocueed KASSIANI KLNU'.CI shouLI 1·ogard himself luoky to have narrowly escaped to foce the gallowo, but the conviet will not have any mercy whn t - soever in eentc11cing him far the. kind of mnnslaughter he committed on his pregl'lru\t wife, In these cirC\XIIIstnnces nnd with due- ragu:r:d tG oll the mi ti- gnting factors the sen·conce tmt would meet the ends of justice in this o~se is o.s follows:- The ccused person, lv;/J::;IMJI E1.:N'U;U_, is OOJ.ttenced to impri· solJII].ent fore term of 25 years. Sgd. (H. J. :t., Ruhunll>iko) . . . JUDGB W.IOROGORO 13th April, 1983. . . . Court: - ~-~ aoou1=:od is :i.ilfo1'l1ied of lt:i.,<3 ;r~ta o.t appeal., '• ~ 13 - {_-:,gd. R, J, I., nuhumbika) JUDGE MOROGORO 13th April 1 -1983. Court: This is the end of the crimiml sessions case this tiloo nt Morogoro. Sgd. (R. J. L, Ruhumbilm) Jff:)GD ;1.3th April, 1983. This is to certify that this is the true copy of the origi.~_l-

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