Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.142 OF 2007- COURT OF APPEAL OF TANZANIA DAR ES SALAAM. Coram: RUTAKANGWA J.A, KIMARO J.A AND MANDIA J.A	**AWADHI SAIDI KAMWENDO VS THE REPUBLIC** (Appeal from the judgement of the High Court of Tanzania at Kilosa) **Criminal Sessions case No.37 of 2006** (Nyerere J)	Defence of provocation on the heat of passion as held in Said Hemed Vs Republic [1987] T.L.R 117 Court held that "where a killing is done in a heat of passion, the defence of provocation applies and the killing is not murder, but manslaughter".

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 142 OF 2007

AWADHI SAIDI KAMWENDO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Kilosa)

(Nyerere, J.)

dated 14th March, 2007

in

Criminal Sessions Case No.37 of 2006

.....

JUDGMENT OF THE COURT

19 May & 4 June, 2009

KIMARO, J.A.:

The appellant, Awadhi Said Kamwendo, was arraigned before the High Court of Tanzania sitting at Kilosa for intentionally killing Mariam daughter of Selemani, between 26th and 29th September 2004 at Mahara Magore within the District of Kilosa in Morogoro Region. He was convicted and sentenced to death by hanging. Being

aggrieved by the conviction and sentence he has filed three grounds of appeal:

> *"1. The learned trial Judge erred in law and fact in holding that the conduct of the appellant after the killing of the deceased showed that there was no adultery and hence no provocation.*
>
> *2. The learned trial Judge erred in law and in fact in holding that there was no adultery on the ground that the appellant did not know the assailant and was unable to describe his appearance or mention his name; and*
>
> *3. The learned trial Judge erred in law and in fact in convicting the appellant for murder and sentencing him to suffer death by hanging."*

At the hearing of the appeal, Mr. Melkizedeck Lutema, learned counsel, appeared for the appellant. The respondent Republic was represented by Ms Evelyne Makalla, learned State Attorney.

Before embarking on the determination of the grounds of appeal we find it pertinent to first traverse the evidence the trial court relied upon to convict the appellant.

The factual situation admitted by the appellant is that himself and the deceased were husband and wife and he was the one who killed the deceased. The only dispute in the case was whether the killing was intended. On this disputed issue the prosecution was firm that the killing was not accidental but an intended one, and the learned trial judge and the assessors unanimously supported this view. The learned trial judge made a finding that the appellant killed the deceased with malice aforethought hence the conviction and the sentence as indicated above.

What evidence did the trial court had to prove that the appellant killed the deceased with malice aforethought? That comes from the evaluation of the totality of the evidence that was led by the prosecution to prove its case that was made by the learned trial

judge and the opinion of the assessors who sat with her. The evidence was that the appellant and the deceased were living in Mbana village, Kilosa Division Rural Morogoro. For their living, the appellant dealt with a charcoal business while the deceased was a farmer. One Esta Blasi (PW1) was their neighbour, living within a vicinity of 70 paces. It was the testimony of PW1 that on 28th September, 2004 she visited the house of the appellant twice to request for a container for fetching water. The first visit was made early in the morning at 6.00 a.m. but there was no response. The second one was made at 10.00 a.m. This time she found the appellant at home peeling tomatoes. In answer to PW1's question on the whereabouts of the deceased, the appellant informed the witness that the deceased traveled to Turiani for a funeral of her sister's daughter.

On the next day, 29th September 2004 Tatu Abdallah, (PW2) visited PW1. This witness was the deceased's sister. She inquired from PW1 about the whereabouts of the deceased and PW1 told her that the information she had was that the deceased travelled to

Turiani for the funeral of a daughter of her sister. Given the relationship of sisterhood between the deceased and PW2, PW2 became suspicious of that information, as she claimed that the deceased could not have left for Turiani without informing her of that death. According to PW2 she saw the appellant that morning carrying two bags of paddy on a bicycle and she suspected that the appellant could have stolen that paddy from the deceased. That suspicion prompted both PW1 and PW2 to visit the house of the appellant and when they peeped into the house through the window, they saw the body of the deceased lying on the bed. The witnesses said the body had started rotting because it had a foul smell with a lot of flies moving around. The witnesses cried and shouted to raise alarm. People gathered around to see what had happened. The incident was then reported to the Village Executive Officer, Mr. Erdegarde Mkude (PW3), who upon his arrival at the house, led the villagers to the house where they found the body of the deceased lying on the bed. It was in the evidence of all the prosecution witnesses, namely PW1, PW2, PW3 and No. E 1180 DC Emmanuel (PW5) that the deceased had a wound on the rear side of her head. The post

mortem examination report, admitted in evidence as exhibit P1 showed that the cause of death of the deceased was head injury inflicted by a heavy object.

A caution statement made by the appellant to the police was admitted in Court unopposed, as exhibit P3. Therein, the appellant admitted beating the deceased on her forehead on 26th September, 2004 after returning home from his charcoal business and found her committing adultery with a man he knew only by an appearance.

In his defence, the appellant consistently repeated what he told the police in his caution statement, that he slapped the deceased after finding her committing adultery. According to him, the man who was committing adultery with the deceased ran away carrying his clothes under his arm. The defence of provocation was raised that he hit the deceased out of passion after finding her committing adultery with the unknown man and he consistently insisted on it.

The learned trial judge was not impressed by the defence of the appellant that it raised doubt in the prosecution case. To her, the conduct of the appellant after killing the deceased negated the defence of provocation and proved that the appellant killed with malice aforethought. First, the appellant neither reported the adultery nor the death of the deceased to anyone; not even to neighbours. Instead the body of the deceased remained in the house from the date of her death until 29th September, 2004 when PW1 and PW2 saw the body as they peeped into the house. Second, is what the learned trial judge described as unexpected behavior on the part of the appellant that he locked the body of the deceased inside, took bags of paddy and went to sell them and bought new clothes. The learned trial judge was of the view that such behaviour was unbecoming for the appellant, who said was a good Moslem, and prayed every Friday and did not take any alcohol. An added reason which is not in the proceedings that was considered by the learned trial judge was that it is an Islamic ritual that once death is confirmed, the body is buried immediately. For these reasons the learned trial judge rejected the defence of provocation and found the

appellant guilty of murder as charged and sentenced him accordingly. She was of the opinion that the case of **Said Hemed Vs R** [1987] T.L.R.117 relied upon by the appellant to substantiate his defence could not assist him as it could be distinguished from the facts of this case.

In support of his first ground of appeal, the learned counsel for the appellant said it was wrong for the learned trial judge to associate the appellant's concealment of the death of the deceased and his failure to report the adultery as negating the defence of provocation. The law, contended the learned counsel, does not impose any obligation on the part of the accused to report a crime. Even if the appellant left the body of the deceased in the house for several days, argued the learned counsel, that may not necessarily prove malice afore thought. In his opinion, how a person reacts after the commission of the offence may not necessarily prove that the killing was deliberate. Traversing the prosecution evidence, Mr. Lutema said there was no evidence of a previous quarrel between the appellant and the deceased, nor that of drunkenness or the

motive for the killing. Looking at the status of the appellant, the learned counsel argued that the appellant was a typical man, who had not gone to school, and yet, on his own free will and without assistance from anyone, he kept on insisting that he killed the deceased because of provocation. Mr. Lutema said since there was no evidence to dispute his defence it was wrong for the learned trial judge to discredit it. Furthermore, contended the learned counsel for the appellant, the appellant did not kill the deceased there and then. The defence of the appellant was that the deceased died several hours after she was hit by the appellant and the appellant did not even run away immediately. Under the circumstances, argued the learned counsel, the appellant did not kill the deceased with malice aforethought.

For the second ground of appeal it was contended by the learned counsel for the appellant that the learned trial judge is faulted for holding that there was no adultery simply because the appellant failed to know the person who committed the adultery. Considering the short period of five months the appellant stayed in

the village, submitted the learned counsel for the appellant, that would not have raised any doubt in the defence of the appellant.

On the third ground of appeal the learned counsel for the appellant said since there was no dispute that there was adultery and provocation, the appellant was supposed to be convicted of manslaughter and not murder. He prayed that his appeal be allowed and the conviction for murder be quashed and the sentence be set aside and the appellant be convicted of manslaughter and be punished accordingly.

In her brief submission, the learned State Attorney for the respondent Republic supported the appellant's appeal. Since the caution statement of the appellant was admitted in evidence as part of the prosecution case, contended the learned State Attorney, there was no way in which the defence of provocation could have been discredited as it explained how the whole incident occurred. The learned State Attorney said that if the caution statement of the appellant was not admitted in court as part of the prosecution case,

the situation would have been different. The learned trial judge would have justification for drawing an inference of malice aforethought from the conduct of the appellant after the commission of the offence. She supported the learned counsel for the appellant that the appellant should have been convicted of manslaughter and not murder and she prayed that the appeal be allowed.

The learned advocates appearing in this appeal submitted correctly, in our view, that the only issue in this appeal is whether the appellant killed with malice aforethought or not. Both of them said that the conduct of the appellant after the killing, which the learned trial judge considered in convicting the appellant, did not irresistibly point an accusing finger to him that he killed the deceased with malice aforethought. Rather it proved that he killed accidentally. On our part, after going through the proceedings and the submissions made in this appeal, we are of the same opinion that the evidence on record proved that the appellant killed the deceased accidentally and not with malice aforethought. Why do we say so?

There was no direct evidence to prove how the appellant caused the injuries that led to the death of the deceased. The only evidence on record is that of the appellant he gave to the police in a caution statement, and it forms part of the prosecution case. In that statement, and during the trial, the appellant consistently kept his word that he killed the deceased after finding her committing adultery with a man he failed to identify by name. The appellant raised the defence of provocation that he killed on the heat of passion. The learned trial judge rejected this defence and was of a firm view that the conduct of the appellant after the killing proved malice aforethought.

Admittedly, the conduct of the appellant after the killing was not a normal one. It is common knowledge that once a person is dead the next step is to bury the body and not to conceal the death and lock the body inside the house leaving it rotting on a bed, or behave in a manner which suggests that no death at all has occurred. All the same, in the absence of other evidence indicating that the death occurred otherwise than what is shown in the caution

statement, the defence of provocation could not have been rejected. The caution statement is part of the prosecution evidence. It has to be read as a whole and not in portions. If the prosecution did not believe that the appellant killed the deceased because he was provoked after finding her committing adultery, it should not have been relied upon as part of its evidence. Under such circumstances, much as the appellant's conduct left a lot to be desired, it could not have formed the basis for his conviction.

The case of **Said Hemed** (supra) which the learned trial judge rejected, claiming that it could be distinguished from the facts of this case is relevant in this appeal. In the said case the Court held that where a killing is done in a heat of passion, the defence of provocation applies and the killing is not murder, but manslaughter. As already shown, the prosecution evidence on record, from the caution statement of the appellant, was that he killed because of provocation. Failure to name the adulterer was immaterial. Given this position, no matter how bad the conduct of the appellant was, it could not have formed the basis of his conviction for murder. Even

the religious status of the appellant was of no evidential value to the prosecution case. On the question of when Moslems bury a dead person, we observe, and with respect to the learned trial judge that it did not form part of the record of the proceedings. We thus allow his appeal, quash the conviction for murder and set aside the sentence of death. In substitution thereof, the appellant is convicted of manslaughter and he is sentenced to ten years imprisonment. It is accordingly ordered.

DATED at DAR ES SALAAM this 29th day of May, 2009.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

(J. S. MGETTA)
DEPUTY REGISTRAR