THE POTENTIAL FOR THE UTILISATION OF DEFENCES OF PROVOCATION AND SELF DEFENCE FOR WOMEN IN TANZANIA WHO KILL THEIR VIOLENT INTIMATE PARTNERS: BARRIERS AND OPPORTUNITIES

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DEDICATION

This dissertation is dedicated to my father Vedasto Paul Rugalema

And

My mother Edwardina Kokulabikirwa Rugalema,

who first sent me to school.

"TO GOD BE GLORY"

ABSTRACT

In this dissertation the writer employs a meaningful combination of methodologies and methods of collecting evidence to prove that Tanzanian law is in danger of putting to death women who kill their partners while they are suffering from the universally accepted, but only recently acknowledged, "battered women's syndrome." He shows how the existing traditional (i.e., male-biased) common law defenses of provocation, self defense and insanity fail such women. Finally, he is heartened by the encouraging words of experts in the criminal justice system who look forward to the suggested reforms that should be made across the legal spectrum so as to protect these vulnerable women in accordance with international human rights instruments to which Tanzania is a signatory

DECLARATION

I, Augustine Rutakolezibwa, do hereby declare that this Dissertation is my own work and has not been submitted and not currently being submitted for a degree in any other University.

Signed: ……..

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CHAPTER ONE

INTRODUCTION

This introductory chapter of the research seeks to give an overview of the problem and justification of my research. It also defines and explains some expressions and terms which will be used and discussed in the following chapters. The research questions and assumptions are outlined as well in this chapter. Finally the sources of information obtained which lead to my findings, and the structure of the dissertation will be outlined.

Justification of the study

The defences of provocation and self defence have been used by courts of law in Tanzania without distinction of gender. It remains an argument that theories of criminality have been developed for male subjects and validated on male subjects (Morris: 1987:2). A study of violence against women in Southern Africa has shown that more women die at the hands of their intimate partners than men (WILDAF, 1995: 24). The law in Tanzania, provide for defenses of provocation, self-defense and insanity for murder charges. Men have used the defenses of provocation and self-defense successfully. In some of the cases where men have pleaded "provocation while intoxicated" a lenient punishment was passed.

The key point of this research is that women, despite the availability of defenses of provocation and self-defense, have not been able to utilize them successfully as their reactions to violence against their partners fall outside the ambit laid down by the law.

While self-defence is generally the most appropriate defence for women who kill in a domestic violence context, in practice the courts have not been able to see women's actions as self-defence. This is because self-defence, like provocation, is based on male models of behavior as it was commented by Kimaro, J.A, during the research interviews, thus;

> "The law was enacted in absence of women therefore these defences cannot really help women. There is a need of redefining the law".

In other jurisdictions like UK, U.S.A, Canada and Australia, courts have used what is termed as "battered women syndrome" to explain why women kill their intimate partners.[1] Through the aid of experts, the courts are able to understand the behavior of women who are subjected to prolonged abuse that they are suffering from a battered woman syndrome.

On the other hand, the Tanzanian case of ***Doris Liundi***[2], where the court held that;"*the accused was mentally stressed but was legally sane, she knew what she was doing and that she was doing wrong",* shocked my mind to contemplate that, defenses available for murder charges, do not fit into some of the circumstances and conditions women are facing. Although she did not kill her intimate partner, a she was battered woman. Battered women, who kill, reasonably believe that what they are doing is necessary for their defense, and sometimes they act under cumulative provocation of long term abuses.

Influenced by the study of women, criminal law, criminal procedures and punishment, at SEARCWL the bells of my mind rung and induced me to conduct this research in Tanzania. I had in my mind a picture of a "Battered woman" and how the law treats her on the utilization of the defenses. I thought that women in violent homes face difficulties in utilization of these defenses because of the legal requirements. Understanding that most women do not fit the requirement because of the circumstances they are facing in homes and the community at large, I see this as an important study.

Therefore this research seeks to investigate and discuss obstacle and barriers women face in the application of the defenses of provocation and self-defense. I shall also discuss opportunities the women have to use the defenses successfully compared with men.

Research assumptions

This research was guided by the following assumptions:

1. Some women commit homicide as a result of domestic violence.
2. There is a lack of gendered and sexed awareness in application of self-defense and provocation in homicide cases where women are offenders.

[1] R v Ahluwalia 1992 (4) All ER 889 R v Thornton (No. 2) 1996 (2) All ER 1023.

[2] R Vs. Agnes Doris Liundi [1980] T.L.R 38

3. Women are unable to defend themselves by using the defenses of provocation and self-defense in homicide trials resulting from domestic violence.
4. The existing laws and judicial practices impede women to successfully use the defenses of provocation and self-defense in homicide trials.
5. Judicial officers, prosecutors and defence lawyers need to be able to engender these defences
6. The battered woman's syndrome is not considered by the courts and legal practitioners in Tanzania, in homicide trials resulting from domestic violence.

Research objectives

The main objectives of this research are:

1. To understand better women as offenders in domestic related crimes as distinct from male offenders.
2. To analyze and understand the extent of the application of self-defense and provocation by the criminal justice system in the country.
3. To understand to what extent sex based theories of crimes are appreciated in the criminal justice system.
4. To find out whether the battered woman's syndrome has been considered by the High Court and Court of Appeal in homicide trials.

Research questions

The questions that were formulated from the research assumptions are:

1. Are women committing homicide crimes because of domestic violence?
2. Is there a gendered and sexed awareness in application of self-defense and provocation in homicide cases where women are offenders?
3. Are women able to defend themselves using defences of provocation and self defence in homicide trials resulting from domestic violence?
4. Are the existing laws and judicial practices favourable for women to successfully use the defenses of provocation and self-defense in homicide trials?

5. Are the judicial officials in criminal justice system in the country aware of sexed and gendered application of self defence and provocation in homicide cases where women are offenders
6. Is the battered women syndrome considered by the courts and legal practitioners in Tanzania, in homicide trials resulting from domestic violence?

Definition of terms

What is the battered women syndrome?

The 'battered woman syndrome" is described as a pattern of psychological and behavioural symptoms found in women living in battering relationships. The definition was coined by psychologist and prominent feminist academic, Lenore Walker, to denote a set of distinct psychological and behavioural symptoms that result from prolonged exposure to situations of intimate partner violence (Craven 2003:2). She explains that a woman must experience at least two complete battering cycles before she can be labeled a 'battered woman'. According to her the cycle has three distinct phases, the first being the tension building phase followed by the explosion or acute incident culminating in a calm loving respite, often referred to as the 'honeymoon' phase. (Craven 2003:2)

Nicolson and Sangvi[3], also citing Lenore Walker, explain what happens at each of the three phases mentioned above. They say that the first phase involves a period of heightening tension caused by the man's argumentativeness. In this stage, they say that the woman unsuccessfully tries various pacifying strategies. This tension building stage ends when the man erupts into a rage at some small trigger and acutely batters the woman. This is followed by the honeymoon stage in which the batterer pleads for forgiveness and promises not to repeat the violence. Later he breaks the promise and the cycle is repeated. (Nyoni 2004)

In the course of developing her synopsis, Walker utilized social learning theories to explore ways in which environmental factors could interact with individual personality traits to create particular behavioural, cognitive and emotional responses. Specifically, she adapted Seligman's

[3] D Nicolson & R Sanghvi, "Battered Women and Provocation: The Implications of R v Ahluwalia" in Feminists Perspectives.page 658.

theory of "learned helplessness" to explain why so many battered women fail to leave their abusers (Craven 2003:4). Seligman's theory thought to explain certain forms of psychological paralysis by utilizing social learning and cognitive/motivational theoretical principles. Based on a study conducted with laboratory animals whereby the animals were repeatedly and non-contingently shocked until they became unable to escape the painful situation. The theory argued that the reason the animals failed to attempt to escape, even when escape was both possible and readily apparent to animals who had not undergone the previous shock treatment, could be found in their distorted perceptions of one's capacity to alter their position (Craven 2003:4).

Drawing from Seligman's theory, Walker hypothesized that the continual exposure to battering, like electric shocks, would, over time, diminish a woman's motivation to respond and produce the same kind of cognitive, behavioural and motivational responses. In other words, she says that a woman who remained in a violent relationship was more likely to exhibit signs of learned helplessness than one who had never been in, or had escaped a violent relationship (Craven 2003:4).

This theory explains why some women stay with violent men, particularly when previous attempts to leave have failed because of a lack of financial support, housing and other services, or because the woman was relentlessly pursued by the man.

However, the battered women syndrome has been criticized for the reason that there is no single profile of the effects of battering. There is some misunderstanding about this issue, which has led some to believe that feminists are advocating that all women who kill violent partners should be acquitted - as if being battered is in itself a defence. However, this is not the case. As long ago as 1984 American lawyer Roberta Thyfault explained:

> "The defence which is asserted is self-defence, not that the woman was a battered woman. What must be proved is that at the time of the incident, the woman reasonably perceived her life to be in imminent danger. Thus, while the history of abuse does not justify the use of deadly force, it does provide the woman with the knowledge to reasonably perceive that she is in imminent danger of death or grievous bodily harm." (Australian women criminal code 2004:85)

What is a crime of murder in Tanzania?

In accordance with the penal code, murder is defined as any unlawful act or omission with malice aforethought, which a person causes the death of another person.[4] In order to establish malice aforethought for the crime of murder there should be any one, or more of the following circumstances;

1. An intention to cause the death of, or to do grievous bodily harm to any person.
2. Knowledge that the act or omission causing death will probably cause death of or grievous bodily harm to some person
3. Intent to commit an offence.[5]

What are Defenses to murder?

In Tanzania defenses recognized to murder are;

1. The defense of provocation[6]
2. The defense of self-defense.[7]
3. The defense of insanity[8]

Provocation is a partial defense to murder. A person who pleads successfully this defense is convicted of the lesser offence of manslaughter. Furthermore a person who pleads successfully self-defense is likely to be acquitted if there are no other circumstances provided by the law, such as reasonableness of the force used and whether the danger anticipated was imminent. Under insanity, someone is proclaimed guilty but insane and is committed to a mental institution. All these defenses are discussed in the following chapters.

Sources of information

Information for this research was obtained from selected key informants, who were located in Dar es salaam. These were judicial officers, judges as custodians of the law, state attorneys, defense lawyers, assessors, law students and court social workers. All these were interviewed and responded to research questions posed to them. Defence lawyers were interviewed in their

[4] S.196 of Cap 16 (the Penal Code)
[5] S.200
[6] S.201
[7] S.18
[8] S. 13

capacity as the people who are tasked with putting the case of these women before the court. Court social workers were interviewed to find out their opinion, as experts in human behaviour, of why these women end up killing.

Court records and court judgments were also used to obtain information. Finally the extensive literature review was another source of research data.

Structure of the dissertation

This dissertation is divided into five chapters. The first chapter is the introductory part. The second chapter is the methodology and the third chapter seeks to examine, and discuss the findings of the research. It deals with the issue when a battered woman kills; barriers and opportunities of the use of defenses of provocation and self-defense. Chapter four deals with the hypothetical test case given to law students and the emerging theme of the defense of insanity vis a vis the battered woman syndrome. Chapter five concludes with discussing the legal, constitutional and human rights frame works. It finally ends with the recommendations

CHAPTER TWO
Research Methodology and Methods

Introduction

In conducting this research various research methodology and methods were used. The first and foremost was a women's law approach as the topic was on opportunities and barriers for women who kill their intimate partners, to use the defenses of provocation and self-defense. This involved the extensive law and literature review. All the methodologies were used hand in hand with legal and human rights approach. The methods of data collection involved key informants interviews and focus group discussion. However, key informants interviews went together with discussions. Another method was the use of hypothetical test case among the university students.

In this chapter all methodologies and methods of data collection will be discussed fully.

Women's law approach

One of the objectives of this research was to understand better female offenders in domestic violence related offences as distinct from male offenders. Therefore in this research theories of criminality were to be reviewed through gender perspectives. I was also seeking to ascertain how these theories are appreciated by judges, defense lawyers, assessors and prosecutors.

In using this approach, I would admit that I have in mind the issue of inequality between male and female. Even if the defenses of self-defense and provocation apply to both female and male without distinction of gender or sex, it is not equitable if they are applied in a gender blind manner.

If these defenses are to be utilized fully, the law should recognize that there are biological and cultural differences between women and men.(Bentzon et al 1998:92). By using personal experiential data, primary and secondary data, through key informants interviews and discussions as well as literature, legal and case reviews, the reality was revealed. I do not deny that there were no opportunities for women to utilize these defenses but from the findings the barriers outweighed the opportunities. Using the women's law approach, the research intended to address the lived realities of women who kill their intimate violent partners. Using the existing

penal law on criminal responsibilities, it is true that battered women could not fit the laid down test for the defenses. That is why one of my main assumptions was that the battered women syndrome is not applicable in courts of law in Tanzania.

Therefore through legal analysis, case reviews, interviews and discussions, I looked at and ascertained the problems affecting women in using the defenses of provocation and self-defence based on gender neutral penal laws. The point I sought to explore was whether a woman such as a battered one, could use these defenses equally as their counterparts, the men, and who are in most cases the violators of women's rights.

Legal, constitutional and human rights approach

In my research methodology, I looked into the legal and human rights frameworks which relate to and affect women's rights on the utilization of defenses of provocation and self-defense. The law on defenses of murder is provided under the penal code (Cap 16) as a substantive law. As a matter of procedural law and evidence, the Criminal Procedure Act, 1985 and the Law of Evidence (Cap 6; R.E 2002) are applicable. These applicable laws were analyzed to ascertain whether they conform to constitutional and human rights frameworks. For the purpose of this research topic and because of my women's law approach, I decided to use women's specific international instruments for women's rights. These are the Convention on the Elimination of all Discrimination Against Women (CEDAW), The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) and a Declaration of SADC Heads of States on Gender and Development.

This approach helped me to analyze my research data using a rights based approach. The data analysis using this approach was to determine if the defenses of provocation and self-defense fit the laid down human rights standard of equality before the law. Tanzania as a signatory member state of the all mentioned instruments above is under international legal obligation to ensure the equitable realization of these rights between women and men. By using this approach, I was able in my findings to discuss and theorize on women's rights. Furthermore in the findings and recommendations the rights based approach is used to show the gaps of the existing penal laws and suggest measures, including affirmative action.

On the issue of constitutionalism, a deep analysis was undertaken to find out whether the laws in criminal liability, both substantive and procedural, are constitutional. The articles on the equality of human beings and equality before the law were used to test this.[9] Throughout this research most of the assumptions such as on gendered fair trial were tested by the rights based approach.

Personal experiential data

Using personal experience as a lawyer I was able to have quick and specific targets for data collection. This included where to get case law and materials, who is to be interviewed and the modalities of conducting these interviews and discussions without causing inconveniences to interviewees and other persons occupying public offices. For example court sessions start at 9.00 a.m to at least 1.00 p.m. By that experience the arrangements and appointment were to be made before this time. Having passed through the University of Dar es salaam, I was able to access some materials, discuss with law students and teachers. It was through that I obtained a permission to conduct a group discussion and hypothetical test case.

On the other hand I had experience of working in the field of women empowerment as a gender and advocacy coordinator. This helped me to use both women's law and rights based approach to collect data from various primary and secondary sources.

Methods of data collection

Literature and case law review

I needed a thorough understanding before I went out interviewing and discussing legal issues with the judges and lawyers. Being a lawyer was not an issue but rather the deep knowledge of the concepts. Therefore by using this method I was in the position to lead interviews and discussions and finally get the desired answers.

The case law review was important, so as to get the clear picture of utilization of defenses of provocation and self-defense between men and women. I must admit that reviewing courts records was not a simple task. I obtained permission from the Registrar of the High Court and

[9] Articles. 9, 12 & 13 of the Constitution of the United Republic of Tanzania, 1977

Court of Appeal at Dar es salaam to use courts' library and records. The records were not in order or in an arrangement that I could have easily traced murder cases and specifically those were women were offenders. So I had to peruse through all the criminal records to trace the specific records.

I was also able to review cases from other jurisdictions so as to make a comparative analysis of the law applicable and to suggest the ways our jurisdiction can adopt good practices. The literature and law review are used for data analysis and discussion in other chapters. For the purpose of future references some of reported and unreported cases have been attached as annextures.

Key informants interviews and discussions

As the nature of my key interviewees was, I combined both interview and discussions together. In pursuing women's law approach, the means of data collection used were; key informants' interviews, group discussions, individual interviews by using structured and unstructured questions.

In this method the key informants were judges both of the High court and Court of Appeal at Dar es salaam, defense lawyers especially women, state attorneys responsible for prosecuting murder cases, assessors, law students at the university of Dar es salaam and the court's social workers at Kisutu Magistrate Court in Dar es salaam. The following is the list of key informants interviewed.

From the list of key informants; 2 judges of the Court of Appeal and 2 judges of the High Court at Dar es salaam were interviewed. Others were 6 state attorneys from the Attorney General office, 8 private lawyers, 2 assessors, 25 students at the University of Dar es salaam and 2 court's social workers at the magistrate court. The total of respondents was 47

S/N	PLACE/LOCATION	POSITION	SEX		TOTAL
			MALE	FEMALE	
1	THE HIGH COURT OF TANZANIA AT DAR ES SALAAM	JUDGES	2	0	2
2	THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM	JUDGES	0	2	2
3	PRIVATE LAW FIRMS MEMBERS OF TANZANIA WOMEN LAWYERS ASSOCIATION AND TANGANYIKA LAW SOCIETY	PRIVATE ADVOCATES	3	5	8
4	THE REGISTRAR'S OFFICE AT THE HIGH COURT OF TANZANIA AT DAR ES SALAAM REGISTRY	ASSESSORS	2	O	2
5	UNIVERSITY OF DAR ES SALAA- FACULTY OF LAW	LAW STUDENTS	10	15	25
6	THE KISUTU RESIDENT MAGISTRATE'S COURT AT DAR ES SLAAM	COURT SOCIAL WORKER	2	0	2
	TOTAL		19	28	47

FIG; THE LIST OF KEY INFORMANTS

Most of my interviews were with individuals except that conducted among students at the university. I had to follow my respondents to their work places, either in their offices or at the courts. It was difficult to find most of the defense lawyers in office, unless you follow before and after court sessions. Interviewing the judges, I had to follow them into their offices before court sessions and early in the morning after getting an appointment with them.

Most of defense lawyers were too busy and sometimes I failed to conduct interviews and discussions with them. For the judges at the court of Appeal I presented first the topic and the sought an appointment the following day. The interviews involved discussions as the judges seemed to have more interest on what I was researching. But the little time they had, 2 hours or less was enough to exhaust the structured and unstructured questions. Some of the structured questions were;

1. What is your experience in homicide cases involving women as offenders?
2. Are women offenders in homicide cases different from male offenders?
3. Is there a gendered and sexed awareness in application of self-defence and provocation by the judges, prosecutors and defense lawyers?
4. Is there any need of law reform to these defenses?

Focus group discussion and hypothetical test case method

This method of data collection was used at the University of Dar es salaam. Most students preferred more writing to speaking. Therefore I opted for this method. In the test case as it is discussed under chapter four, the hypothetical picture of a woman who has killed her violent husband was illustrated through the facts of the case. The intention was to test how the defenses of provocation and self-defense could be used by judges, prosecutors and defence lawyers; how they are able to engender the defenses and what other remedies a woman like Amina in a hypothetical case could use for her defense. From the answers I realized the kind of the curriculum included in the training. I preferred to use law students, because these will be the future judges, defense lawyers and prosecutors. Furthermore I used the university of Dar es slaam as a sample because most lawyers and judges underwent the same curriculum of training at the same University.

I first had a group discussion with a few students in their 3rd and 4th years of study. The preference was based on their experience and the courses they had covered so far. The discussions were on the issue of law in general and how gender studies can be used in the rights based approach. However, most of students reiterated what they learnt in class.

Qualitative data collection and analysis

The research was more on the qualitative data collection method than quantitative method. However, these methods can go hand in hand. What was of more importance was getting qualitative information even if it was to be obtained from the few key informants, whose data were more reliable. That is why I chose to interview judges, prosecutors and defense lawyers, assessors, who are part of the legal system and the due process of women's criminal liability in homicide cases.

Analysis of methodology

With women's law approach, I was flexible in the choice of respondents. I was dealing with only respondents who would help me with information regarding my research. For example not all lawyers opted to deal with criminal cases. Even the choice of the judges was based on their

history of dealing with certain cases involving human rights, or from the experience they formerly had. For example one judge was formerly a commissioner for human rights and another one was the Director of Public Prosecution. Two other judges had a history of dealing with cases involving women's rights and human rights in general. However, through interviews, I could even gather information for the next respondent to interview or where to find clarification of the data or information gathered.

SWOT analysis; Strength and Limitation

The field research mechanisms and logistics had **S**trength, **W**eakness, **O**pportunity and **T**hreats.

The strength of this research was that I was collecting data in a geographic area I was familiar with. Having a legal knowledge helped me to sample the data, informants and areas of visiting. The other strength was that the research topic was based on legal point of view, the area I was familiar with.

One of the weaknesses of this research was the timing of field research. Going through bureaucracy, obtaining appointments and permission were time consuming. From the time I started the field research, it was difficult to get some of the key informants as it was nearly the close of the year. For example most of the judges and lawyers usually go for their annual leave. It would have been for the interests of this research if the time was available to enable court observations as one of the methods of data collection and get the disaggregated data (qualitative analysis) from women offenders and defending advocates. I also went to conduct discussions and the test case at the university while the examination period had set in. It would have also been important to conduct interviews and discussions with the psychologists because they are the experts of human psychology and behavior. It was unfortunate that I failed to trace one.

I had an opportunity of accessing court records, interviewing some the key informants because of pursuing a master's degree in women's law, as it was the interest of some of key informants. I used my experience at the university to obtain permission to conduct the test case among the students. It further helped me to get permission to use the university library for some of my literature review. I had also an opportunity of discussing collected data from the field days with my supervisor, Professor Julie Stewart, of the University of Zimbabwe, at the Southern and

Eastern Africa Regional Centre for Women's Law. This helped me helped me to assess the way forward for the next field activities of data collection. Using the time table of activities, note books, the dairy and recording daily in my laptop, it was easy to analyze and arrange my data accordingly.

Another opportunity was the easiness of moving around to conduct interviews without the need of transport within the city most of the time. The field of research was not far from my place of residence.

A threat to this research is that there are no other researches which were done before on the topic so as to quickly move political will and raise public awareness on women's human rights. . There should be many researches on the subject matter so as to raise public attention on the issue. To some extent this should be a starting point of other researches to keep the light of the candle which has been kindled by this research. Another threat is that most of key actors are not gender sensitive to engineer reforms.

CHAPTER THREE

When battered women kill; the utilization of self-defense and provocation

Introduction

Women in abusive relationship who kill in self-defense currently have difficulty in successfully pleading self-defence because of problems with the defense. It appears that women often use provocation because of inadequacies and difficulties with the application of self-defense. Actually these difficulties face defence lawyers to put up the defense because of the law requirement.

In this chapter we shall look into the utilization of these defences by women in comparison with their application to men. The chapter discusses the opportunities and barriers the women have in utilizing the defences. The research findings will be presented, analysed and discussed.

Self-defense; the test of reasonableness, imminence and necessity.

Many battered women who kill their abusers are charged with murder and many of these women are convicted. It was found that there are difficult questions about the application and limitation of the self-defense doctrine and the role that gender plays in the creation and application of law.

From the research questions, the issue was whether this defence is gendered. Almost all the respondents interviewed; i.e the defence lawyers, judges, public prosecutors/state attorneys; responded that the defence of self-defence in murder cases is gender neutral. In his response to this question, Godfrey Shahidi (the judge of the High Court at Dar es salaam) said,

> "The defences are not gendered. There is no difference between women and men offenders. The law applies equally."

In Tanzania self-defense is justified when the actor uses a reasonable amount of force against [her] adversary when [she] reasonably believes (a) that [she] is in immediate of unlawful bodily harm from [her] adversary and (b) that the use of such force is necessary to avoid this danger.[10]

[10] S. 18 CAP 16

The issues at play in self-defense in homicide generally are: whether there was reasonable belief that force was necessary to guard against death, serious bodily harm, rape, or kidnapping; whether the force used was proportionate; and whether the killing was sufficiently close enough in time to the danger. According to Tanzania penal code[11] a person is permitted to use reasonable force against another person when one reasonably believes that person is threatening him/her with imminent and unlawful bodily harm and that such force is necessary to prevent the threatened harm. All of these factors raise difficult and unique concerns in the situation of a battered woman who kills her abuser.

However, in the case of ***R. vs. Nyakaho***[12], the judge did not find any difficulty in acquitting the accused on the defence of provocation. The accused in this case was charged with murder of her father in law by slashing him to death with a panga. The deceased, an old man of 60 years, entered the house of his son, the husband of the accused, where the accused was sleeping, recovering from a tuberculosis attack. The accused was suddenly awakened to find the deceased lying between her legs, his trousers stripped down to his feet, trying to have sexual intercourse with her. When she refused to have sexual intercourse with him, he tried to throttle her to stop her from shouting for help, whereupon the accused jumped out of bed, picked up a panga and fatally cut the old man several times on the head and arms.

While acquitting the accused, the late Said J held inter alia that;

> "There was no doubt whatsoever that the accused was in all circumstances entitled to defend herself against the assault on her by the deceased. She was a weak woman who had been suffering from TB and was just recovering from the effect of this illness. She was lawfully resting in her own house; while in deep sleep she was awakened by the deceased who had entered the house, locked the door, which was then open, stripped his trousers, raised the bed sheet with which the accused was covering herself and started to lie on her. The accused exercised her right of self-defence when she was throttled by the deceased. If she had not done so, she would have been shocked to death. Again under the law a woman is entitled to defend her chastity against a man who wants to have carnal knowledge of her forcibly."

[11] Cap 16 s.18
[12] (1970) H.C.D. 344

I find this reasoning as a good interpretation of the penal code[13] where the law says that the right of self defence shall extend to a person who, in exercising that right of self defence, causes death, and that the person was acting in good faith and with honest belief based on reasonable grounds that her act is necessary for the preservation of her own life in the circumstances where the unlawful act is with the intention of committing rape or defilement or unnatural offence.

In this case the rapist was the accused's father in- law. Would the matter be different if the deceased was her husband, trying to have sexual intercourse with her without consent? The question was posed during research interviews thus;

> QN; "what is the implication if a woman kills her husband because the later wanted to rape her; and self-defence is pleaded?"

In answering the question Munuo, Judge of Appeal at Dar es laam responded,

> "Rape in a marriage is difficult to prove. It becomes rape when marriage is no longer there anymore. There is no marital rape offence in Tanzania. Therefore self-defence cannot be used. How can you prove beyond a reasonable doubt that there was rape between a wife and husband? And when does it become rape? I have not got such like a case of a woman to allege that she was raped by her husband".

On the other hand Nathalia Kimaro, Judge of Appeal at Dar es salaam, added from a gender perspective,

> "As me, I can interpret the law in accordance with the situation of that case so as to accommodate the defence".

It is therefore my opinion that, it is difficult for women to use self-defence as against their husbands in marital rape. However, it can be justifiable if a woman kills another person. In order to accommodate the defence the law should be looked at through a wide-angle lens rather than microscopic. Looking into the gender interpretation of the law, Kimaro, J.A, commented;

> "There is always a problem from the judges who are presiding over such cases. In most of the cases they are men. In using the defence, there is a stereotype. This is the thinking of men. Men are using self-defence and provocation successfully. The defences cannot be used successfully by women because of patriarchal system. Even in the court most of assessors are men who are determining whether there was provocation or self defence".

[13] S. 18(1) c

As it was already stated, the defence lawyers find it difficult to plead self- defence. There are cases where you fail to see why self-defense was not pleaded and instead provocation alone was pleaded, or not at all. One example is the case of ***R vs. Juliana Kiwale***[14].

In this case the deceased and the accused were husband and wife. They had 6 issue of their marriage. At around 1.00 p.m the deceased and the accused were at their house. The accused asked the deceased for "ulasi- pombe" (local brew) which was in the house, that she would drink but the deceased refused. When the deceased went to take bath the accused took the brew and drank it. When the deceased learnt that, the conflict began. The deceased took a 6 weeks old baby from the accused and threatening to throw her down. Their neighbor, who was nearby, intervened and took the baby from the deceased. The accused picked up a knife which was nearby and threw it at him. It injured him and caused his death because of abdominal infection.

The accused was charged with manslaughter upon her own plea of guilty. In his judgment, Kyando,L. A, held;

> "The deceased was aggressor in the incident. I order that the accused be discharged absolutely."

In this case, one can ask why the plea of self-defence, of defending the baby, or provocation because of that act was not raised by the defence lawyer. However, the judge used his wisdom to discharge the accused.

In another case, the defence of self-defence, in my opinion, was obvious but the defence lawyer only raised the plea of provocation. This is the case of ***Magdalena Sanga v. R***[15].

In this case the appellant was convicted of murder of her husband by the High Court at Dar es salaam. The appellant who was the only witness to the killing which occurred at a matrimonial home made an extra-judicial statement before the magistrate. The statement in which she was alleged to have admitted the killing on the ground that the deceased assaulted her and provoked her by saying that he had killed their matrimonial child. The statement was taken by the court interpreter, who was not called as the witness at the trial. The Court of Appeal allowed the appeal and substituted the conviction to manslaughter by holding;

[14] case No. 7/1991 at Morogoro, Dsm HighCourt Registry,(unreported)
[15] [1980] T.L.R 305

> "Failure to call a person who took down the statement to testify is a fundamental irregularity which renders the statement of the accused hearsay. The trial judge should have considered the defence of provocation and self defense."

The appellant cut the deceased to death with an axe. She made an unsworn statement. She related that she had taken a complaint to the ten cell leader. At the material time when she came home the deceased asked her why she had done so. The deceased was angry to her action and locked the room door saying that he was going to eliminate her. The deceased said that the appellant was wasting her time as her complaint to the ten cell leader would not bring back her deceased child. The appellant had alleged that it was the deceased who had boasted to her that he had bewitched and killed that child as he thought that the appellant had that child from an adulterous connection. She said, "He grabbed my throat. I pushed him back and he fell against a bed. I looked round and saw an axe. I was convinced he was going to kill me. I picked the axe and cut him with it. He fell by the bed. I opened the door and ran into the "*maize-shamba*". The trial court had rejected this unsworn statement in favour of the extra-judicial statement made by the appellant. The court of Appeal considered that the extra-judicial statement was inadmissible and the account of circumstances of the killing was contained in unsworn statement. The court held;

> "We think that the appellant killed under provocation. However, the deceased was not armed and when he was pushed and fell back against a bed, the appellant could have opened the door and run off. In any event using the axe to cut the deceased in the circumstances was excessive. We will quash the conviction of murder, set beside the sentence of death passed on her and substitute therefore the conviction for manslaughter. We sentence her to 10 years imprisonment."

My question was why did the judges fail to consider the defence of self-defence? Was there no imminent danger on the side of the accused? The action of the deceased locking the door and uttering words that he was going to eliminate her, amounted to imminent danger and threat of the life of the accused? What reasonable force could have been used by the accused, and why not use the as axe she believed that the deceased was going to use to kill her? What if the deceased could have opened the door and run away? Could that action have been the end of threat or danger? Were the hands of the deceased used to grab the appellant by throat not lethal weapon which could have probably eliminated her before appealing to an axe? Why did the deceased lock the door?

Through all these questions I am of the opinion that self-defence could have been included to explain reasonableness, imminence and that the killing was necessary for her to defend her life. On the other hand the appellant was staying with a murderer, who admitted to have killed their child. He was also a threat to her other children

It was noted that self-defence, also operates in a gender biased way. While self-defence is generally the most appropriate defence for women who kill in a domestic violence context, in practice the courts have not been able to see women's actions as self-defence. This is because self-defence, like provocation, is based on male models of behavior, as it was commented by Kimaro, J.A that;

> ”The law was enacted in absence of women. Therefore these defences cannot really help women. There is a need of redefining the law”.

Use of weapons by women; a reasonable force test

As it is noted in many cases where women kill their intimate abuser, women have been accused of using lethal weapons or excessive force. In responding to the question why women use weapons, the High court Judge interviewed, Robert Makaramba, at Dar es salaam answered;

> “This is because women can take whatever weapon which is available near her at that moment. These are weapons they use during their daily activities, such as knives for kitchen activities, hoes for farming and gardening, axe for fire wood collection.”

The law provides that in exercising the right of self defence or in defence of another or defence of property; a person shall be entitled only to use such reasonable force as may be necessary for that defence.[16] It is further stipulated that a person shall be criminally liable for any offence resulting from excessive force used.[17] Therefore if a person causes the death of another as the result of excessive force used in defence, shall be guilty of manslaughter.[18]One example is the case of ***Magdalena Sanga vs. R*** ,[19] where an accused used an axe to kill her husband,

In reference to that case, is it justifiable that women are being found guilty of manslaughter on the basis of provocation when they should be entitled to a full acquittal for acting in self-defence

[16] S.18B Penal Code
[17] S.18 B (2)
[18] S. 18 C (3)
[19] [1980] T.L.R. 305, see page 28 for the facts of this case.

The law allows deadly force only if there is unsafe avenue of retreat available to the person who resorts to that force to repel an attack. (Tibatemwa, 2005:305) Patricia, Easteal argues that the idea of equal force being defined the same for a woman/man conflict and a male/male conflict is ludicrous given not only the physical differences, but also the gender differentiation in socialization, that is common place (Easteal 1998:8) I further agree with her that many women have survived long term punching, throwing, choking and kicking and that their partner's hands, fists and feet have in fact been dangerous and potentially lethal weapons.(Easteal 1998:8) To borrow an example, is the case of **State v Wanrow** [20], where Wanrow shot an intoxicated, unarmed man whom she knew had a reputation for violence when he approached her in a threatening manner. At the time, Wanrow who was 5 feet 4 inches tall had a broken leg and was using a crutch. The trial court returned a guilty of second degree murder conviction. She used a weapon against an unarmed assailant. On appeal the Washington Supreme Court reversed the conviction on the basis that the use of the 'reasonable man' objective standard of self defence violated Wanrow's right to equal protection of the law because it did not adequately include a woman's perspective. Nor did it reflect women's social reality. The court stated that:

> "The impression that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defence constitutes a misstatement of the law … Women have the right to have their conduct judged in the light of the individual handicaps which are the product of sex discrimination such as denial of training in physical combat, socialization into belief that display of physical aggression is unfeminine and therefore undesirable etc. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants."

As it was noted by a respondent judge, the notion of reasonableness has been judged in accordance with expected male behavior, women are at a disadvantage. It is not reasonable to expect a woman to wait until a physical assault is underway to protect herself as it is likely that she will be killed doing so or experience grievous bodily harm

In the other case the court acquitted a woman after being satisfied that greater force was not used. In the case of ***R. vs. Sophia Hilali***[21] the accused and the deceased were lovers who had separated. At the material time the deceased had gone to the accused's home to try to win her back and then a quarrel developed. During the fight the deceased died of asphylia due to brachial

[20] 88 Wash 2d 221 (1977)
[21] Criminal case no.3 of 1991,H.C at Morogoro

aspiration. The doctor did not detect any marks of violence on the body. It was the vomit which caused asphylia. It was held by Bahati, J that the accused did not use great force in the beating or else the doctor would have seen marks of violence. The accused was absolutely discharged.

In my opinion, if any weapon would have been used then the accused could have been convicted of manslaughter, but she probably ought not to have been.

The requirement of non-use of lethal weapon applies to both women and men. In the following case a man is justified to kill in the cause of defending his wife against being raped. In ***R vs. Self Salum Makanyage*** the deceased had attempted to rape the wife of the accused. In the fight the accused inflicted injuries on the deceased which caused his death. In delivering his judgment, Msumi, Jk, held;

> "It is the deceased who is the cause. The accused had every right to defend his wife against criminal attempt of the deceased to rape her. There is no evidence that accused used any weapon in preventing the deceased from committing the intended rape. I have taken into consideration that the accused had been in custody for over 3 years. This is more than enough punishment. Hence the accused is hereby discharged unconditionally**".**

As the physical body strengths between men and women are different, can the law on self-defense justify the killing by a woman using lethal weapon, trying to defend his husband against any fatal bodily harm or unnatural offence? I therefore reiterate the words of Jones that;

> "We must acknowledge that a 110-pound woman might need a weapon against her 255-pound husband … To a small woman untrained in physical combat, a man's fists and feet appear to be deadly weapons, and in fact they are: many women killed by their husbands are not shot or stabbed but simply beaten and kicked to death. The woman who counters her husband's fists with a gun may in fact be doing no more than meeting deadly force with deadly force" (Jones, 1980: 330)

I would rather think that, there should be a distinction between the physical body ability of men and women in the self defense requirement. But it should also depend on the individuals and the circumstances.

Provocation; sudden and temporary loss of self-control

Provocation is a wrongful act committed at the heat of passion that the offender loses self-control and commits a crime that otherwise would be murder. Provocation is a defence which can be invoked exclusively for a charge of murder.

According to the Tanzanian penal code[22], provocation is defined as;

> "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 his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or 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 order to successfully plead provocation there should be; a wrongful act which could cause any reasonable person a sudden and temporary loss of self control as to induce the accused to react; and that the accused must have reacted immediately after the provocation and that there was no time to cool from heat of passion.[23]

The data from the research findings of cases visited show that in six cases tried; four women pleaded the defence of provocation successfully, and were convicted of manslaughter. On the other hand, in thirteen cases were men were charged, they pleaded provocation successfully in eleven cases. The following table below illustrates.

	CASES ON FEMALE OFFENDERS	CASES ON MALE OFFENDERS	SUCCESSFULLY DEFENCE		DEFENCE DENIED		REASON FOR DENIAL
			F	M	F	M	
CASE AT THE HIGH COURT	4	10	4	9	0	1	No provocation because the wife refused to return home
CASES AT THE COURT OF APPEAL	2	3	0	2	2	1	**For female cases**; there was excessive force of using lethal weapon and that there was no heat of passion at the time, there was time to cool **For male case**; no wrongful act to cause provocation
TOTAL	6	13	4	11	2	2	

FIG; COMPARISON ON THE UTILIZATION OF DEFENCE OF PROVOCATION BETWEEN MALE AND FEMALE OFFENDERS

The law provides that, when a person who unlawfully kills another under circumstances which constitute murder, does the act which causes death in the heat of passion caused by sudden

[22] Cap 16 S. 202(1)
[23] S. 201

provocation, and before there is no time to cool for this person, that person is guilty of manslaughter only.[24]

On the question of temporary loss of self control and sudden reaction, a Court of Appeal Judge Munuo was of the opinion that there is a difference of reaction between women and men. Responding to the question whether women can fit the ingredients of provocation, she said;

> "It is the nature of men to think of immediate solution or to react immediately. Using provocation as a defence one is to act on the spot. If someone reacts later then the act is calculated. Provocation must be immediate. If the act is delayed then this will be termed to be revenge. On the other hand women can't react immediately. They have other means of reacting like crying so as to resolve their anger."

It is evident from the words of Munuo, Justice of Appeal that most women who cannot react at the moment the wrongful act is done to them cannot benefit from this defense. To add something on this statement one can recall the words of Gleeson C.J that,

> "….The law's concession to human frailty was very much, in its practical application, a concession to male frailty…The law developed in days when men frequently wore arms, and fought duels, and when at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood summered, perhaps over a long period and in circumstances at least as worthy of compassion."[25]

It can be noted from the above statement that, men can readily react at the heat of passion and women can take time to react; and thus they can't use the defence of provocation successfully.

No heat of passion; the case of Adventina Alexander[26]

In this case the deceased and appellant were husband and wife respectively having solemnized their Christian marriage in 1960. They were blessed with 7 surviving children. In the night of 20.3.1994 at about 11.00 p.m or 12.00 midnight, the deceased arrived at home drunk. He entered peacefully and declared that he was not going to eat because he was drunk and that he would eat

[24] S.201 Cap 16
[25] Chhay v. R (1994) 72 A Crim R 1 AT 11 Quoted in Victoria Law Reform Commission (VLRC) , "Defences to Homicide; Issues Paper Melbourne,VLRC,2002 AT 7, http//www.courts.qld.gov.an/practice/etbl/main_chap 14_06.htm.
[26] Criminal Appeal No 134 of 2004 (unreported)

on the following day. While he was in bed the appellant picked a hoe, walked stealthily and hacked him on the head. She picked a *panga* and cut him several times in the neck. The deceased died instantly. The appellant ordered her daughter, PW1, who was living with them in the house, to assist her to dress the deceased and throw the body onto a nearby path. She was arrested and admitted the killing. At the trial she raised a defence of provocation which was rejected by the trial judge.

On appeal the defence advocate told the court that the deceased uttered more words than adduced by PW1. He said that the deceased had called the appellant to come and suck his male organ. Therefore it was said that those insults were very provocative especially to the appellant who was a village woman aged 53 years. Another provocative incident cited was that some days before the killing of the deceased, the appellant had found the deceased committing adultery with a woman. It was said that on the fateful day when the deceased called her to suck his male organ, the act rekindled her previous anger over the adultery. After having gone through the evidence the Court of Appeal held;

> "Indeed the words 'come and suck my male organ" are very provocative. But in this case there is nothing indicating that such words were uttered by the deceased……it is true an accused person does not have to prove provocation but only raise a reasonable doubt as to its existence…..but in the instant case there is no doubt in our minds that the alleged provocative words were never uttered by the deceased. About an act of adultery alleged to have been committed by the deceased some day prior to the killing, we hasten to say that there was no evidence about it. Even if it is accepted that such an act took place, that would not afford the appellant the defense of provocation because the killing occurred some days later when the appellant was no longer in the heat of passion as required by s.201 of the penal code Cap.16"

In this case, I would be of the view that courts would have looked on the factors which caused the appellant to kill. What was the story of marriage life from the year 1960 to 1994? The historical pattern of abuse or family life would have explained the appellant's state of mind when she killed. However, our courts take and use the available evidence from the defence when deciding on the matter. Arguably, the adversarial system is aimed at making the State prove its case rather than the search for the truth (Australian women criminal code introduction 2004). In an adversarial system, the parties define the scope of the contest and the evidence, and the power of the court to call witnesses is used sparingly. It is essentially a two-sided contest between the prosecutor and the defendant with the judge as an impartial moderator. The judge has little or no

initiative in relation to the collection of evidence which is chiefly in the hands of the prosecution. Evidence is mainly tendered through the direct oral examination of witnesses with the other party having a right to cross-examination.

All murder cases are prosecuted by state attorneys from the Director of Public Prosecution. In cases of murder the role of prosecution is not to prove its case but to make sure that justice is being done. One state attorney, Sakina Hussein Sinda, commented;

> "It is upon the defence side to come up with good submissions. If the defence is good to shake our evidence, we do not look on conviction but we look for justice"

The court of Appeal judge who was interviewed was of the opinion that the defence lawyers and prosecutors should dig further into the facts of the case so as to come up with a good case for the judge to adjudicate on. She said;

> "The prosecutors and defence lawyers should go in deep to cover the whole story of the case. On the other hand social welfare officers who are now in magistrate courts should be used to look into the history and the life of the accused. The defence lawyers should also dig deep into the facts and other issues to make up the case for the judges to determine."

Unlike the case of **Adventina,** the court in **Lucas Ngalyogela Vs. R**[27] accepted the defence of provocation because it was not contradicted by the prosecution. In that incident case, the family life of the partners was put into consideration. This was the case where the appellant killed his wife and was convicted of murder by the High Court. On appeal the Court of Appeal quashed the conviction of murder and set aside the sentence of death. It was held;

> "After all the time this couple lived together was too long, 22 years, and too peaceful with a gift of eight children which they were blessed with. This has reinforced our belief that this was probably an isolated and unfortunate incident in their lives and had led to such a tragedy. The evidence of the appellant on this provocation was not contravened by the prosecution. The appellant may have attacked the deceased under provocation which was sudden and grave."

[27] Criminal Appeal No. 21 0f 1994

If the judges of Court of Appeal have considered the happy marriage of 22 years without any quarrel, or the history of their lives; would have the case been different if the facts were vice versa? That is, if the deceased was the accused and she had experienced unhappy marriage. It would be my opinion that probably she could not have fitted into the test of sudden and temporary loss of self-control. And what are reasonable provocative acts for women can be different from that of men. Therefore this necessitated this research to examine the reasonable person as an objective test.

The test of a reasonable person under the defence of provocation

The expression reasonable person and ordinary person have been used interchangeably. The law defines "an ordinary person to mean an ordinary person of the community to which the accused belongs.[28]The case law has also defined an ordinary person. It was held in the case of **Damian Ferdinand Vs. R[29],** thus;

> "for the defence of provocation to stick, it must pass the objective test of whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances, and the best judges to determine this question are the assessors, for they are "the ordinary persons of the community to which the accused belongs"

If most of the assessors are men, therefore the test is based on a male standard. In commenting on whether this standard can benefit women, Kimaro, J.A, said;

> "There is always a problem from the judges who are presiding over such cases. In most of the cases they are men. In using the defence of provocation, there is a stereotype. This is the thinking of men. Men are using provocation successfully. The defence of provocation is used successfully by me because of the patriarchal system. Even in the court most of assessors are men who are determining whether there was provocation."

The assessors I interviewed were all men. I learnt that some are the respected people in the society and others are ex-civil servants. The assessors belong to the community which is based on patriarchal kind of thinking. Arguably one cannot deny that if the assessors are all men in a case involving a woman as an offender, the test of a reasonable person would be based on male model.

[28] S.202 Cap 16.
[29] [1992]T.L.R 16

It was suggested in the case of **Engelbretch** that the court requires that the reasonable person standard account for gender differences that may affect how women respond to domestic violence, essentially it requires the standard to be infused with women's experiences (Ludsin 2005:193).

If assessors are to be only men in a case where a woman is an offender in homicide trial, I don't doubt that their opinion will be influenced by male experience and perspective. It was said in **Lavallee case**, that women's experience and perspectives may be different from the experience and perspectives of men. (Ludsin, 2005:140)

The opinion of the assessors is not binding on the judge. If the assessors are a measure of an ordinary person in the community to which an accused belongs, and the judge can decide not take their opinions, therefore one can question who the ordinary person is.

The findings from court records show that men benefit from the defence of provocation as their acts pass the test of an ordinary person. Most of the cases men killed under provocation because of alleged adultery on the side of women, love, jealousy, a situation of exchanging words with a woman, and a woman refusing to cook.

In the case of **R. vs. Shabani Mohamed**[30] the court held that the reason that women can be punished and probably be killed requires a strong cause and not flimsy one. In this case the accused killed his wife and pleaded provocation. It was said by Mapigano, J (as he then was), that;

> "The accused and other men who are similarly disposed must be made to understand that the days when men-folk could take pleasure of punishing their wives upon flimsy cause have gone for good. All things considered I send him to jail for a term of 3 years."

Men have been provoked because of love jealousy. In the case of **Benjamini Mwansi Vs. R**[31] the appellant killed his fiancée' because the deceased uttered words, *"Achana na mimi, sina habari na wewe" (leave me alone I am no longer with you).* The charge of murder was reduced to manslaughter after pleading successfully the defence of provocation. The Court of Appeal held;

[30] Criminal cause No. 27 of 1986 (unreported)
[31] [1992]T.L.R 85

> "Now, those words in themselves appear innocent. But if they are looked at with the hindsight of what had transpired they are powerful dynamite sufficient to blow off the faculty of reasoning of the appellant."

In other cases women were killed and the accused was convicted of manslaughter because there was exchanging of words between the couples, or in one incident the wife intervened in men's conversation. In the case of **Lucas Vs. R**[32], where the accused appellant killed his wife, the conviction of murder was reduced to manslaughter because there were exchanges of words which led to provocation. The appellant was imprisoned for 5 years. In another case of **R Vs. Ngoliga**[33] the accused assaulted his wife because she intervened in a discussion which the accused was holding. The accused kicked his wife in the stomach. She died while on the way to hospital because of a lacerated spleen. On trial the accused accepted the charge by saying;

> "It is true. She provoked me. I inflicted a beating on her. She was injured. She was sent to hospital and died there. It was bad lack. I was drunk"

The court convicted the accused of manslaughter and sentenced him to 5 years imprisonment.

The mentioned cases, therefore, show how acts of men can be reasonably justified in the community. This shows that violence is the nature of men and their acts are justifiable by the law under the defence of provocation

Women are considered to react on the long term causes of provocation rather than the short term cause of which men are the beneficiaries. This was commented on by the magistrate's court social worker when he said;

> "On the issues of provocation there are immediate and long term causes. But law considers only the immediate cause of provocation. Human attitude is hereby being used to determine such cases."

Conclusion

From the research findings, the opportunity of women using these defences of self-defense and provocation successfully has been limited in a nature that they apply equally to all men and women without regarding sex, or gender. In many cases men have been able to use these

[32] Criminal Appeal No. 139 of 2002 at Mwanza
[33] Criminal case No. 60 of 1985

defences successfully. However, in some cases the judges show lenience on the part of women but the law forces them to stand by decisions. It was argued that discrimination on the basis of gender comes in different forms such as cumbersome court procedures, content and effect of the law, and the manner in which these laws are interpreted. The narrow interpretation of the law cannot adequately take into account women's perceptions arising from their social reality. This is because homicide defences are based on male behavior practices. (Saupa et al, 1994) I wish to reiterate the words of Jones (1980:311) as follows;

> "The body of the law, made by men, for men, and amassed down through history on their behalf, codifies masculine bias and systematically determines against women by ignoring the women's point of view. Today the law is largely enforced, interpreted and administered by men. So it still works in the interest of men as a group. Women, schooled like men to be good citizenship, accept the law's male bias as objective justice. The women lawyers, judges, and jurors, taught the same rules, usually uphold the same male standard……"34

Therefore the barriers for women benefiting from these defenses outweigh the opportunities. The legislature is not sensitive to women's situation, nor often, are those who apply the law.

[34] Cited and quoted in Tibatemwa,(2005:201)

CHAPTER FOUR

Introduction

In this chapter, the answers from the test case which was conducted among the University of Dar es salaam students, in their 3rd and 4th years of study, will be analyzed and discussed. Findings from this research brought another defence, that of insanity. This is an emerging theme where the defence of insanity was more or less compared with the battered women syndrome.

The case of Amina; response from LLB students

The findings from this case explain the nature of the curriculum the university students of law degree are undergoing and it reflects the probable thinking of practicing lawyers.It also shows the interpretation of the law through the principle of *stare decisis.* However, other students thought other remedies of a person like Amina can resort to. The following are the facts of the case.

Facts

Amina is a woman in Mburahati village. She is 45 year of age. Amina is married to Japhet who is a taxi driver in Dar es salaam city. Amina and Japhet have 3 issue (who were all daughters) of their marriage and they have lived under one roof for 15 years after they had solemnized a Christian marriage.

Amina has lived an unhappy marriage life because of matrimonial quarrels with her husband every time. One day when Japhet was talking to his friend Juma, Amina contributed in the conversation. Japhet was angered and beat Amina to a point of her being admitted to the Hospital. He claimed that a woman is not allowed to interfere in men's talk. On the other time when Japhet was drunk, he would force her into sexual intercourse and sometimes force her to imitate pornographic videos while making love with him.

Amina lived a bitter life and sometimes she attempted to commit suicide because of violence she was getting from her husband. One day she caught her husband in bed with the neighboring woman. When she asked her husband the reasons of him being unfaithful to that extent, she was scared and beaten bitterly and she had a miscarriage. When Amina went to report this to her father, she was later sent back to her husband on the pretext that Japhet paid the bride price and on the reason that their marriage is a Christian one. This being the case she was told that she can't divorce. She had no option but to return home and continue living with her intimate abuser. One day when she deserted the house again,

her husband followed her to his father's house and threatened to do something if she wouldn't come back. She was indeed worried and terrified of living with Japhet again. But for the children, financial support and family pressures she has to go back to her matrimonial house.

It was one day when Japhet came home drunk and he didn't like to eat. During that night he called Amina names and threatened to kill her next time if she causes herself to have a miscarriage and if she wouldn't give birth to a baby boy. She didn't answer back and left for kitchen chores while his husband went in bed. In that midnight when Japhet was half dead because of drunkenness, she picked a hoe and hacked him on a head. He died on the spot. She was charged of murder and in her defence she pleaded provocation and self defence.

The question posed was;

"If you were a Judge, or a Prosecutor, or defence lawyer, can she succeed by using defences of provocation and self-defense? If yes or no give reasons"

The group of respondents was composed of twenty five students, of which fifteen were females and ten were males. After the end of exercise, only twenty students submitted their answers. These were twelve females and eight males. Eight females and four males were of the view that no defence was available to Amina. One male and two females answered that Amina cannot succeed by all defences but she could have opted for divorce before she resorted to kill. Those who answered that there is either provocation or self-defence available for Amina were only two males. Three respondents said that there were no defences, but insanity was available. These were three males.

The table below illustrates the data.

RESPONDENTS ON NO DEFENCES AT ALL		NO DEFENCES BUT SEPARATION OR DIVORCE		NO SELF-DEFENSE BUT PROVOCATION		NO PROVOCATION BUT SELF-DEFENCE		NO DEFENCE BUT INSANITY CAN BE PLEADED	
M	F	M	F	M	F	M	F	M	F
4	8	1	2	1	0	1	O	1	2
12		3		1		1		3	

For the purpose of this research, 1 will discuss these findings in five categories. Firstly, on the part of those who said that there are no any defenses at all, secondly those on no defenses but separation or divorce is an option, thirdly those of no self-defense but provocation. Fourthly those on no provocation but self-defense and fifthly on those where no any defense but insanity could be pleaded.

No defense at all

> Female 3rd year student
>
> I think Amina cannot succeed in her defense of provocation and self defence because; provocation to succeed as a defence, a provoked person should have no time to cool his/her temper i.e. when a person is provoked he/she must take action at the material time when she/he is provoked and not to allow time to pass between the provocation and the taking of action. In our case here Amina cannot succeed on the defence of provocation because when she was provoked she went to the kitchen chores and waited until her husband was half dead (sleeping) because of drunkenness and then she killed him.
>
> Therefore with this issue, Amina had time to cool her temper as she allowed time to pass between the provocation action and the killing action hence she cannot plead provocation. Amina would have succeeded on self defence if there was something to defend against. And this must be at the material time of defending him/herself if there was something threatening life. If you will not defend yourself you will likely lose your life and when defending yourself you must take into account an issue of avoiding greater evil during such defence, and the force you might use must be reasonable when defending. In our case then, Amina was defending herself from nothing because the person she was defending against was asleep (half dead) and at that material time as she was defending, there was nothing threatening her life. Moreover the force she used was unreasonable because she used a hoe to kill her husband, who was asleep. Therefore with all these, Amina must be guilty of murdering her husband and the defence of provocation and self defence cannot help her.

The response is all about reasonable force to be used for a man who is asleep. If Japhet had attempted to kill Amina using his hands causing a miscarriage and the words which he later uttered; why didn't the respondent see the imminent danger the accused was facing in the near future? I would have thought that the respondent being a woman, then she would have come with an argument in favour of Amina. I would rather borrow the words of Jones (1980; 311) that;

> "…Women, schooled like men to good citizenship, accept the law's male bias as objective justice. The women lawyers, judges, and jurors, taught the same rules, usually uphold the same male standard……"

That being the nature of the respondent's training, such rigid requirements of defences of provocation and self-defense, were upheld by her without gender distinction

No defence;separation or divorce was a remedy

> **A male 4th year student**
> The defence of provocation cannot stand unless the accused acted at the heat of passion. According to facts Amina hacked the deceased after a long time had elapsed. Likewise the defence of self defence as provided for under section 18 cap.16 R.E 2002 cannot be accepted as the force used in revenge was not proportionate. Although Amina was several times used to be beaten and mistreated by the deceased she could reasonably and proportionally petition the court for separation or divorce. Alternatively she could have first of all reported the matter to the conciliation board for amicable settlement of dispute under s. 101 of cap 29 R.E 2002

The main concern of the respondent is the wording of a statute on these defences. According to him, law stands as it is and it cannot be interpreted otherwise. The best solution the respondent is thinking is to petition for divorce. The question remains on the issue of why most of battered women do not leave their violent partners. This has been a question where defence lawyers, judges and the assessors see that a woman who is living in violence should avoid such violence by leaving the house. in one of my discussions with judges, Munuo, J, commented on the case of **Adventina Alexander** by saying;

> "…..In such circumstances even if there were problems in marriage, she should have looked for divorce and not to kill. We don't solve marital problems by killing. Someone is not there to kill other person. No spouse can take an advantage. There is a Law of marriage Act to solve the problems"

Family law on divorce and separation means that a woman can put to an end an abusive marriage, but this is not a situation for women who wish their marriage to continue but the violence to end. Women are too ashamed to ask for divorce (when it is socially or culturally unacceptable) because of the wish to preserve the family for the sake of children or in order to maintain an acceptable standard of living.[35]

[35] The theoretical debate on the question of women and violence, Part one, http//www.1900_280229_vio/AgWomUrbnpm-ptlEN.pdf, p.19

No self-defense but provocation

> **Anonymous 3rd year, Male**
>
> The plea of provocation on part of the woman must without any shadow of doubt be accepted by the court. This is because the acts of torture and distress had reached their apex in the midnight where she decided to kill the deceased. The last straw doctrine has to apply in favor of the accused.
> However the plea of self defence should not succeed because the danger was in no way imminent.
> As the facts narrate, the woman has had a very bitter life experience with her husband. The act of hacking the man with the hoe shows the reaction following the cumulative acts of torture, distress and unhappiness against her.
> It goes without saying that the act of hacking would have been avoided if the woman had been allowed to separate from her husband as she had earlier attempted. This was caused by the fact that the family considered bride price by husband as the factor to restrain separation. Equally bride price was considered by the husband as the ground for torturing the woman.
> Knowledge be provided to the community to enhance emancipation of women.
> Bride price is not to be subjecting women to torture. It should be known that the bride price is not that much necessary.

The respondent has raised a "last straw doctrine" which can be used as a defence. However, the doctrine would need to be introduced by counsel as novel approach. There is no provision in statutes on this doctrine. The cumulative acts of torture and distress against Amina could raise cumulative provocation. But in any case, cumulative provocation is not favored by criminal law. Whether cumulative provocation can be argued in court, a state attorney interviewed responsible for prosecution, commented;

> "On the heat of passion the law is very strict. It doesn't look into women or men. It is not gendered and the defaces are not gendered"

It is from the discussions with the key informants, where it shows that the law on defences lacks some requirements to apply for most women, who do not react immediately in the heat of passion

No provocation but self-defence

A male 3rd year student

The defence of provocation cannot be successful because at the time Amina picked the hoe, the husband was asleep such that there were no words or acts which would have provoked Amina.
Amina had time to cool her temper. She had alternative either to run away from the house or to report the matter to the police.
The defence of self-defence can apply and be successful because it seems that the husband had intention to do something bad to her. That is why even when Amina tried to escape and went back to her parents, the deceased followed her and threatened her that he was going to do something bad to her.
Amina had no support from the parents because of bride price, even where their daughter was living in torture. The time was approaching when the bad thing which was always being said by the husband to happen to her. Therefore it was self-defence

The accused committed murder as the last resort to her problems. She had taken steps to run away from him but she failed. The accused still loved the deceased but he was not treating her as a human being. Amina loved more the children, that is why she came back. Amina committed murder because of love and so I think that even she was not happy herself with the death of her husband. Therefore Amina could not be charged with murder but manslaughter

The respondent gives some explanation why Amina killed her husband. He argues his case that danger threat was imminent and was about to happen. In Tanzania courts engage a rigid application of the imminence requirement in the law of self-defense by looking at a single moment, when the woman actually strikes the fatal blow; rather than looking at a broader spectrum of time and context in which the killing occurred. It is argued that self-defence should be available when there is a previous history of serious physical abuse, the abuser has made a statement of intention to commit a serious assault or killing and that an abuser has taken any action in furtherance of the threat. (Moriarty 2005:5)

I would be of the opinion in such as Amina's case that the threat of danger could be anticipated, and Amina was justified to preempt such danger. Furthermore a battered woman's attempts to

leave may precipitate increased violence as the deceased had previously shown. Thus, even though leaving is often not relevant to self-defense—no one asks the person in a bar fight who defended himself why he did not leave earlier—both assessors and judges often need to have these issues explained by experts. When assessors are instructed that leaving may pose a greater danger than staying, they can begin to see the woman as a rational actor who might have been trying to save her own life.[36]

No other defences but insanity

A female 3rd year student

As for Amina's defences on provocation and self defence, it will be untenable to allow the same since such defences do not fall into the literal construction of the penal code cap 16 of Tanzanian laws. She could raise such defences successfully if the hacking was done there and then at the place of and time of harassment by Japhet to her.
But Amina could successfully defend herself by a defence of insanity, since the beatings from Japhet had become constant and thus it was already inculcated into Amina's mind to the extent of creating a peremptory kind of insanity. The dictum enunciated in the case of Doris Liundi vs Republic [1980]TLR would correlate Amina's situation almost squarely. A woman may be insane by her husband's harassing words. Manslaughter is an offence in this case, not murder.

A male 4th year student

Amina cannot succeed because the two defences cannot apply in her case. First the defence of provocation can apply if the provocative words are the ones which cause one to kill at the spot and the moment they were uttered. This means that time should not have lapsed as is in the case of Amina who was abused in the evening and killed in the midnight. This allowed time for the provocation to cool down and so cannot cause one to kill.
On the other side , self defence can not apply as the danger in which one is defending against should be imminent. It should not be mere fears that a danger might happen as was the case of Amina.
However on my opinion Amina should use the defence of insanity. In this case she should claim that due to the persistent family quarrels caused by her husband, she was psychologically tortured for many years thus causing her mental fatigue which resulted into temporary insanity causing her to kill Japhet without knowing that she was killing as it was in the case of Doris Liundi

[36] Women criminal code introduction, p.27

The arguments above, by the two respondents on the issue of insanity, leads me to discuss a battered women syndrome vis a vis insanity. Mental or psychological distress has been argued by many respondents to be insanity. This is because the concept of a battered woman syndrome is a new concept in Tanzania. Therefore women like Amina in Tanzania can neither fit the defences of provocation, self-defence nor insanity.

Emerging theme

Insanity vis a vis the battered women syndrome

Insanity has been used by many respondents to express the situation of a battered woman. As the concept of the battered women syndrome is a new concept in Tanzania, it is my considered view that these concepts be discussed in order to clear up the confusion.

It is a presumption in criminal liability that every person is of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.[37] If the contrary is proved then the law provides the defence of insanity to murder charges.

Under the defence of insanity the law provides that;

> "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, 0r of knowing that he ought not to do the act or make the omission."[38]

This is drawn from the decision in ***R.vs. Mc Naghten*** [39], which presumes that every person is sane unless it is proven that as a result of a disease of the mind at the material time he was incapable of understanding what he was doing or he was incapable of knowing that what he was doing was wrong

For an accused person to successfully plead insanity there must be an examination by a psychiatrist. Where a plea of insanity is made, a psychiatric examination is generally done to

[37] S.12 Cap 16
[38] S.13
[39] (1843), 10 CL. And F, 200

ascertain whether either the accused is so mentally disordered or defective, so as not to stand trial, or whether he or she was at the time of committing the offence mentally disordered or defective.[40]

If it is established that he or she was insane at the time of committing an offence, and the court is satisfied by such report, it may find that person guilty but mentally disordered.[41] The effect of this finding is that an accused is sent to a mental institution.

In law a battered woman syndrome is not a defense. According to Ludsin legal practitioners defending abused women who kill have used Battered Women Syndrome effectively to explain the following;

1. That the woman's hyper- sensitivity to her abuser's mood and behavior allows her to predict accurately when an attack is imminent.
2. That abuse can result in a slow-burn of emotions, so that a person acting in provocation my not react suddenly.
3. That the reasonableness of the abused woman's behavior in killing in a non-confrontation situation. (Ludsin, 2005:64)

The battered women who kill have no mental disease as is the case in insanity. Rather the battered women syndrome explains why the woman has not reacted suddenly at the heat of passion, why she has killed in a non-confrontational way, why there was necessity in her resorting to killing and why she predicts that the danger was imminent. The usual defences available for murder; i.e. self-defence and provocation, are not available for her. This is because her reaction does not pass the laid down test.

As Rubenstein puts it, the 'battered woman syndrome" describes a pattern of psychological and behavioural symptoms found in women living in battering relationships'. He further advances that the battered woman syndrome is best understood as a subgroup of what the American Psychological Association defines as posttraumatic stress disorder rather than as a form of mental illness[42].

[40] S.220 (2) Criminal Procedure Act, 1985
[41] S.219 (2) ibid
[42] http//divorcenet.com/or/or-art02htmp p.1

From the answers of the test case, it clearly gives a picture how defence lawyers, prosecutors and judges might misconstrue the defense of insanity and a battered women syndrome. What is the defence of a battered woman, who does not either, fit the defense of provocation or self defense? It might appear that if the court orders that she should be sent to a mental institution, the report would not show whether at the time she killed, she did not know that what she was doing was wrong. The jeopardy is that she may be sent to mental institution.

The case of Doris Liundi[43]

This case does not deal directly with a woman who kills her abuser, but rather when a woman kills because of her being subjected to abuse by her husband. This case was being referred here and there during my interviews, that someone can be mentally stressed but legally sane. Therefore I h see it as important to discuss this case so as to explain how a battered women syndrome can be confused with insanity. The issue would have been different if the appellant had killed her husband. If that were the case, the expert evidence could have explained why the appellant killed under provocation or self-defence; and why she didn't leave.

This is a case of what probably should be treated as diminished responsibility, a defence which is not available under the Tanzanian penal laws. Diminished responsibility can be easily confused with insanity and the battered women syndrome. The battered women syndrome is not a defence of itself but it can be used to explain why a woman can react under provocation and self-defence such like in this case if the facts of the case would have been different. Therefore women who fall under the categories of diminished responsibility and the battered women syndrome have no defence at all as the law does not accommodate their situation. A battered woman is not insane because she knows what she is doing that is wrong; but she reacts under cumulative provocation or self-defence as she reasonably believes that there is an imminent danger threatening her life because of persistent violence from her intimate partner.

In this case the accused was charged with three counts of murder. Due to grave matrimonial disharmony and threats by her husband to throw the accused out of the matrimonial home, the accused decided to and did administer poison to her four children and took some herself together

[43] [1980]T.L.R 38 & [1980]T.L.R. 46

with some ground pieces of glass. Three of the children died. The accused and one of her children were saved by doctors. Before the accused administered the poison she wrote 4 letters explaining why she made that decision and that her husband was innocent and should not be punished. During the trial the accused raised the defence of insanity. It was argued on her behalf that she was so mentally stressed that although she knew what she was doing she was not capable of knowing what she was doing was wrong. The prosecution argued that the evidence the court proved that the accused knew what she was doing and what she was doing is wrong. In its judgment, the High Court held;

> "Where the accused raised the defense of insanity it must be shown on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. The burden of proving insanity is on the accused on a balance of probability. The court is not bound to accept a medical expert's evidence if there is good reason for doing so. In this case the accused wrote 4 letters and administered the poison when she was mentally stressed but was legally sane, she knew what she was doing was and that she was doing was wrong"

On appeal, the Court of Appeal upheld the High Court judgment that the appellant knew that what she was doing was wrong. The problem remains for a battered woman who can neither fit in these defences of insanity, provocation nor self defense. Would have the matter been different if the appellant had killed his husband? I would rather argue that, there could have been no defense available for her. If in this case, expert evidence, rather than that of proving insanity, was used, I would contend that probably the two courts would not have convicted her for murder. The judge went further to think of another defence of diminished responsibility, but he found no law to base on. Makame, J (as he then was) commented;

> "….In Tanzania we do not as yet, have such law. It would be dishonest, unprofessional and presumption on my part to go beyond my proper role. If at any stage in the system my opinion is required in this case that will be in a different role which role I shall play accordingly. In the mean time I have this job to do..," [44]

If I have to recall my legal method, there is a practice of the court to use judicial hunching if it is of the national interest or interest of justice to do so. The judge saw that gap of the law but he

[44] [1980]T.L.R 46

hesitated not to open the flood gates. In recognizing this gap the Court of Appeal held *obiter dicta;*

> "It is possible, indeed likely, that our law on the issue of insanity is antiquated and out of date. Parliament, in its wisdom, may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject".[45]

There is therefore a need to redefine the defences on murder charges so as to accommodate women, like battered women who cannot utilize the defenses in their favour. On her response if the battered women syndrome was applicable in Tanzania, Munuo, Judge commented;

> "This can reduce the offence of murder to manslaughter. This can be used to mitigate the sentence. Mental, psychological problems can be used to reduce the charge to manslaughter. In Tanzania we don't call it the Battered Women Syndrome like that. It is a principle of law that each case must be judged on its own. We don't have a concept which can justify women to kill"

I would further argue that many women who suffer from the battered women syndrome, have been convicted of murder as there is no defense available to them. Mwalusanya, Judge (as he then was) once gave caution on judicial errors by saying;

> "The possibility of a judicial error, for whatever reason, assumes ever greater importance because the death penalty is irreversible, it is the end of the matter, and it cannot be corrected. And mind you, convictions for murder in error (after the appeals) are not rare"[46]

Therefore there is a possibility of judicial errors in sentencing battered women to mandatory death sentence.

[45] . Tanzania Law Reports, 46 (1980).
[46] Republic v Mbushuu alias Dominic Mnyaroje and Kalai Sangula (1994) TLR 154.

CHAPTER FIVE

> "Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."
>
> *Eleanor Roosevelt, 1958*[47]

Introduction

This chapter discusses the legal and human rights framework in Tanzania. It is through this analysis where the conclusion will be drawn on the availability of legal and human rights frameworks which can help women in their defense to murder charges as a result of violence from their intimate partners. Recommendations will also be given on legal, policy and structural reforms.

Legal, constitutional and human rights implications

Tanzania is a signatory member state to various instruments on Human rights. For the purpose of this research I will discuss and focus on specific women's instruments such as CEDAW, Women's protocol and the Gender and Development; A Declaration by Heads of states of SADC.

Under article 2 (1) f, of CEDAW Tanzania as a state party is obliged to condemn discrimination against women in all its forms and take all appropriate measures, including legislation, to modify or abolish existing laws, regulation, customs and practice which constitute discrimination against women. Therefore under the existing law on criminal responsibility on murder cases, the defenses of self-defense and provocation have in most cases benefited men as they are based on male model. The penal code (Cap 16), the law of evidence Act, and criminal procedure Act need

[47] She was an advocate who contributed to the adoption of the Universal Declaration of Human Rights

to be modified or amended so as to cover the defense of battered women who kill their intimate abuser so as to be in line with CEDAW

Furthermore, article 3 strengthens article 2 by obliging the state members to guarantee women the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. It is now well understood that the defenses of provocation and self –defense are not gendered. It will be a violation of human rights, if these defenses cannot be used equally between men and women.

Article 15 of CEDAW brings about equality clause so as to oblige the state to modify and amend its laws that women are accorded equal rights before the law as their counterparts the men. The penal code was enacted before the existence of CEDAW in 1979. One cannot argue specially that the law has taken care of women who might lose defenses as the case of a battered woman.

Tanzania is required to put all efforts to ensure de jure and de facto the rights of women. This is not only formal legal equality but also equality of results in real terms. Under such circumstances, neutrality (same treatment) has no legitimacy if it denies women the exercise of all rights on a basis of equality with men in real terms. Because of existing inequality,\laws policies and programmes may have to be different for women and men so that equality of\outcomes could be achieved. Substantive equality includes equity.

Article 26 of the Vienna Convention on the Law of Treaties (1969) states:

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."*(pact servanda*)

And article 27 states:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

States have a legal responsibility to comply. Failure to do so undermines the basis of international treaty law.

The protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides under article 8(e) that;

> "Women and men are equal before the law and shall have the right to equal protection and benefit of the law. And state parties shall take all appropriate measures to ensure that the law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights"

The protocol also urges member states to integrate gender perspectives in legislations.[48]

It is not a question of having a clause in the constitution that all human rights are equal, but it is a question of equity and gendered interpretation of the law. Justice Mathews observes that;

> "Access to the law means more than being able to get legal assistance or physical access to the courts. Physical access is meaningless, and can be counter-productive, if the individual cannot obtain a fair and just result before the law"(Australian women criminal code introduction 2004: 17).

So, women's access to the law, and access to justice involves issues of physical access to the law, and of fairness and justice both within and under the law. The law on defenses of provocation and self-defense should be fair to women and not the matter of equal treatment before the law.

Under the SADC Declaration on Gender and Development, Tanzania commits itself to ensure gender equality at all levels. Article H (iv) and (vii) states;

> "Members commit themselves, repealing and reforming all laws, constitutions and enacting empowerment gender sensitive laws. And recognizing, protecting and promoting the human rights of women and children".

In order to comply with human rights requirements, gender specific clause should be enacted and modify the existing laws so as o engender the defenses of provocation and self-defense. Courts should also specifically examine women's decision to kill in right of the abuser's violations of their rights.

The Tanzania constitution provides for equality between all human beings and equality before the law.[49] However, the constitution does not specifically state that there should be equality between men and women or equal treatment of the law between men and women. In other provisions the constitution requires to make sure that human dignity, other human rights are respected and protected. Also it requires making sure that all violations and discrimination are

[48] Art. 2(1) c of women's protocol
[49] Art. 12 & 13 the constitution of United Republic of Tanzania,1977(as amended from time to time)

eradicated.[50] It is accepted that all human are equal but not equal in gender and sex and application of the law equally without specific consideration of gender, is the violation of principle of equality.

Conclusion and recommendations

In order to realize the human rights of women various interventions need to be implemented. Firstly there should be a legal reform so as to modify and enact gender sensitive laws. This is to go hand in hand of redefining gender specific crimes in the penal code. As a matter of policy the gender awareness components should be encouraged for the law students, practicing lawyers, prosecutors, assessors and the judges. This should also be accompanied by reviewing curriculums for legal studies so as to equip future lawyers, judges and magistrate to engender the law.

To make intervention seen to be happening, affirmative action is recommended and a specific defense in the case of a battered woman, be introduced. This is termed as positive discrimination so as to bring real equality between women and men.[51]

Structural reforms

Another intervention is structural reforms where composition of the bench should be gender sensitive as well as the assessors in murder case involving women. Expert evidence be allowed without limitation of the law of evidence and these expert to work as judicial officers so as to help the judges, defense lawyers, prosecutors and assessors to reach a fair determination of cases.

Intervention on legal education; a policy issue

Law schools should ensure that the curriculum includes content on how each area of the law in substance and operation affects women and reflects their experiences. In order to harmonize country wide legal education, this should come as a government policy to higher learning

[50] Art. 9 (a), (f) and (h)
[51] Art. 4 CEDAW

institution through the ministry of education and the ministry of constitution and legal affairs. Furthermore the Tanganyika law society should organize and conduct a refresh course or a post-gendered legal training for all lawyers in practice. On the other hand the council for legal education should review its requirements of lawyer's admission to the bar, that they interview the aspiring candidates on gender and law.

Law schools should ensure that feminist legal theory is offered in separate elective subjects or in elective subjects that deal with legal theory. At the University of Dar es salaam there is an optional course of Gender and the law-LW 522. However, there was no lecturer to offer it. Also from the course outline of criminology and penology-LW 517, feminist legal theory is not a component.

All law schools should ensure that in recruiting new staff selection criteria assess an applicant's awareness of gender issues as applicable to the subject area to be taught. This will seek to ensure that all aspects of tertiary legal education, including assessment tasks and course material, employ gender inclusive language and avoid sexist stereotypes of the roles of women and men in society.

At least some of the judges interviewed saw the need of gender awareness education campaigns among all judicial officers, i.e, judges, defense lawyers, prosecutors, magistrates and assessors. In answering whether there is gender awareness on the side of prosecutors, defense lawyers and other judicial officers, Justice Munuo said;

> "There is a need to educate them on gender issues. They take them very lightly. People are not sensitive. The advocates are not sensitive but they need to be sensitized. We have Tanzania Women Judges Association- we train women magistrates on women's issues so that to make sure that they interpret laws in right way to eradicate discrimination in the nation. Assessors and magistrates should be trained so as to be properly directed in cases involving women"

I congratulate the efforts which are already done and urge the government to support the initiatives which are already in place. This should not end up only as training magistrates of lower courts only but also the judges of High court and Court of Appeal because murder cases lie in the jurisdiction of these courts. Professional training in relation to gender issues, the social and psychological effects of violence will enhance the ability of the court to empathize with the

position of women, either as victims or offenders, and to run the court process with less negative impacts upon women.

Law reform

Should there be a different defense?

One suggestion to ensure women's stories are told is to rename or redraft some defenses, so that the real nature of the offence and what is relevant to the case is not camouflaged. The available defenses of provocation and self-defense, though available, cannot be utilized by a battered woman as her reaction does not pass the laid down test.

Therefore to engender defenses, there should be a separate defense which will include elements of cumulative provocation in case of a battered woman. As it was held in the case of ***Ahluwalia***, the subjective element in the defense of provocation could still be satisfied even though there was a delayed reaction, provided that there was at the time of killing a "sudden and temporary loss of self-control" caused by the alleged provocation.[52]

On the other hand the law should state that self-defense is not limited to cases where unlawful violence is imminent or immediate. Rather, the actor must believe that her defensive action is immediately necessary and the unlawful force against which she defends herself must be force that she apprehends will be used on the imminent occasion, but she need not apprehend that it will be used immediately.

Evidential reform

Under the law of evidence Act,[53]expert evidence is permitted when a court has to form opinion upon a point of foreign law, or science or art.[54] Expert evidence would usually be allowed in domestic killing cases if it were to show some form of mental abnormality, but which not insanity is.

[52] Ahluwalia supra
[53] Cap 6 R.E 2002
[54] S. 47

Ludsin suggests four main types of evidence that advocates should provide on behalf of a woman who kills her abuser. These are the history and patterns of abuse in the accused's relationship with the deceased, other violent acts of the abuser of which the accused was aware, social context evidence and evidence of other acts of abuse perpetrated against the accused. (Ludsin, 2005: 187) She continues to contend that abused women who are charged with murder need to provide expert testimony of the psychological effects of abuse on women generally, so as to provide factual foundation for a defence or mitigation of sentence. (Ludsin, 2005: 193) She uses the Witwatersrand Local Division in the case of ***S vs. Engelbrecht*** in which the court quoted the Supreme Court of Canada decision in ***Lavallee vs. Queen*** to explain the importance of expert testimony in abused women who kill cases as it is hereby reiterated;

> "Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or the jury) can be forgiven for asking; why would she continue to live with such a man? Why could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is herself respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so called "battered wife syndrome". We need help to understand it and help is available from trained professionals". (Ludsin,2005: 193)

The rules of evidence tend to limit the story telling in courts to the circumstances that surround the crime in terms of time, location and conduct. The whole context in which a crime occurs should be presented so that judges, magistrates and assessors can properly assess the criminality and seriousness of what occurred. The history and pattern of abuse fall within the category of similar fact evidence. The relevancy of facts forming part of same transaction as it is the case of evidence laws in Tanzania would fall in this category.[55] The section provides that;

> "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and place"

One advantage of calling expert testimony in these cases, however, is that apparently inexplicable behaviour can become comprehensible when understood to be common among

[55] S.8

women who have suffered domestic violence.[56]Finally the defense counsel and trial judge draw connections between the expert evidence and the defenses upon which the defendant is relying.

[56] Women criminal code introduction, p.84

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APPENDICES

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

Criminal Appeal No. 134 of 2002

BETWEEN

ADVENTINA ALEXANDER……. APPELLANT

AND

THE REPUBLIC……. RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Bukoba)

(Masanche, J.)

dated the 4th day of July, 2002in

Criminal Sessions Case No. 20 of 1998

JUDGMENT OF THE COURT

KAJI, J.A.:

The appellant ADVENTINA w/o ALEXANDER was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16. She was sentenced to the mandatory sentence of death by hanging

At the trial it was the prosecution case that the deceased ALEXANDER s/o MTATEMBWA and the appellant were husband and wife respectively having solemnized their Christian marriage in 1960 and having been blessed with seven surviving children.

In the night of 20.3.94 at about 11.00 p.m. or 12.00 midnight the deceased arrived at home drunk. His daughter VENASTINA d/o ALEXANDER (PW1) who was living with her parents in the same house opened the door for him. The deceased entered peacefully and declared that he was not going to eat because he was drunk, and that he would eat on the following day. He never saw the expected day. While in bed the appellant picked a hoe, walked stealthily and hacked him on the head. She (appellant) picked a panga and cut him (deceased) several times in the neck. The deceased died instantly. The appellant ordered PW1 to assist her to dress up the deceased and to throw the body in a nearby path. This they did.

On the following day the appellant was arrested. She admitted the killing. But at the trial she raised a defence of provocation which was rejected by the learned trial judge (Masanche, J.).

Before us in this appeal the appellant was represented by Mr. Matata learned advocate. The respondent Republic was represented By Mr. Feleshi, learned State Attorney.

Mr. Matata raised one ground of appeal, namely that on the evidence on record the trial court ought to have found that PW1 was not a reliable witness, and that she was a witness with a purpose of her own to serve, and that the defence of provocation was available to the appellant.

In elaboration Mr. Matata, learned advocate, stated that the learned trial judge erred in relying heavily on PW1 VENASTINA d/o ALEXANDER who was not a reliable witness. He said PW1 had said that the deceased did not utter any words other than what she had told the court. She had told the court that the deceased had simply said that he was not going to eat as he

was drunk and that he would eat the following day. The deceased had also later on spoken faintly,"Adventina njoo uangalie damu sijui inatoka wapi"

Mr. Matata urged that the deceased uttered more words than what PW1 had said. He said that the deceased had called the appellant to come and suck his male organ. He said that since by then it was around midnight and PW1 was just about 15 years old, she was probably asleep and therefore could not have heard those insults.

Second, PW1 had assisted the appellant to dress up the deceased and to throw the body in a nearby path. In that respect, he said, she was an accomplice who was ready to tell lies to exonerate herself, and that her evidence required corroboration which was lacking.

Third, PW1 did not tell the village chairman PHILLEMON MERKIOLI (PW2) everything she had seen and heard. For example he said, she did not tell him about the conversation she heard between the appellant and the deceased. She also did not tell him that she had assisted the appellant to dress up the deceased and to throw the body in a nearby path, or that she had assisted the appellant in burying some of the deceased's clothes. Mr. Matata urged that had the learned trial judge considered all these he would not have relied heavily on her evidence in convicting the appellant, and that he would have accepted the appellant's defence of provocation.

Mr. Matata further submitted that the appellant was provoked by the deceased's insult for telling her to suck his male organ. He said that those words were very provocative especially to the appellant who was a village old woman aged 53 years. He cited the case of DAMIAN FERDINAND KIULA & CHARLES (1992) TLR 16. In that case this Court held that for the defence of provocation to stick, it must pass the objective test of whether an ordinary man in the community to which the accused belongs would have been provoked in the circumstances.

Mr. Matata further argued that there was also another provocative incident. He stated that some days before the killing of the deceased the appellant had found the deceased committing adultery with a woman. He said that on the fateful day when the deceased called her to suck his male organ this rekindled her previous anger over the adultery. Mr. Matata argued that adultery is a very provocative act capable of reducing the offence of murder to manslaughter. He cited the case of BENJAMIN MWASI V R (1992) ELR 85.

Mr. Matata further submitted that the killing of the deceased was not premeditated and that the learned judge erred in refusing to accept the appellant fs defence of provocation for no reason at all. He said that the appellant had no duty to prove provocation. He cited a persuasive holding in the case of KENGA V R (1991) 1 EA 145. In that case the Court of Appeal of Kenya sitting at Mombasa held that the accused does not have to prove provocation, but only to raise a reasonable doubt as to its existence. Mr. Matata urged that there was no evidence to ground a conviction of murder apart from that of PW1 who was an unreliable witness. It was his submission that had the learned trial judge considered all these factors he would have come to the conclusion that the appellant was provoked, and would have found her guilty of manslaughter.

On the other hand Mr. Feleshi learned State Attorney submitted that the learned trial judge fully considered the veracity of PW1 and found her to be a credible witness. She was not an accomplice. She only participated in assisting the appellant to dress up the deceased and to throw away the body under threat by the appellant herself who was her mother. Mr. Feleshi further stated that PW1 had no interest or purpose to serve because she had not participated in killing the deceased.

As far as provocation is concerned, the learned State Attorney conceded that the words come and suck my male organ are very provocative indeed. But that such words were never uttered by the deceased, otherwise PW1 would have heard them because she was awake and was the one

who opened the door for the deceased. She did not hear them. Mr. Feleshi further argued that there was no evidence that the appellant had previously found the deceased committing adultery. In that respect it was his view that the case of Benjamin (Supra) is inapplicable in this case.

We have carefully considered Mr. Matata's submission as to why he believes that PW1 was not a reliable witness, together with the appellant's defence of provocation. We have equally carefully considered the learned State Attorney's reply thereat. With respect to the learned advocate, we are unable to agree with him that PW1 was an unreliable witness for the following reasons:-

First, the appellant and the deceased were her parents. By the death of the deceased PW1 was deprived of one of her parents. She was left with only one parent, the appellant, who could provide her with parental love. By all means and in ordinary life she would definitely not wish to lose both parents. It is highly unlikely that she would be willing to give incriminating evidence against her mother, who would be hanged thereby losing both parents. But with all this dilemma lingering in her mind she decided to tell the truth. She told the truth.

Second, PW1 told the Village Chairman Phillemon (PW2) everything in respect of the whole event. This was said by Phillemon (PW2) himself in his examination-in-chief.

Third, PW1 did not participate criminally in the killing of the deceased either as a principal or an accessory before or after the fact. She had simply been ordered through threat by her mother, the appellant, to assist her to dress the deceased and to throw the body in a nearby path. Under the circumstances we are satisfied that she was not an accomplice. In a persuasive case of DAVIES V DPP (1954) 1 ALL E.R. 507 at page 514 the House of Lords defined the word gaccomplice h as follows:-

The definition of the term ”accomplice’ covers participe criminis in respect of the actual crime charged, whether as principals or as accessories before or after the fact

This view was adopted by the Court of Appeal for Eastern Africa in the case of JETHWA & ANOTHER V R (1969) EA 459.. We adopt the same view.

The learned trial judge who saw PW1 giving evidence was satisfied she was truthful. We have found nothing to fault him on this. In the case of ALI ABDALLAH RAJABU V SAADA ABDALLAH RAJABU & OTHERS (1994) TLR 132 this Court held, *inter alia* that where the decision of a case is wholly based on the credibility of the witness, then it is the trial court which is better placed to assess their credibility than an appellate Court which merely reads the transcript of the record . Also in the case of OMARI AHMED V R (1983) TLR 52 this Court held, *inter alia,* that the trial court’s finding as to credibility of witnesses is usually binding on an appeal Court unless there are circumstances on the record which call for a reassessment of their credibility. In the instant case there are no such circumstances.

We now turn to Mr. Matata’s second complaint, that is, provocation. Indeed the words come and suck my male organ are very provocative.

But in this case there is nothing indicating that such words were ever uttered by the deceased. Had they been uttered by the deceased, PW1 would have heard them because she was in the same house. She was not asleep because she was the one who had just opened the door for the deceased, and after a short time she heard rattling noises whereby she asked some questions followed by the actual killing of the deceased by the appellant, and a threatening order to assist the appellant to dress the deceased and to remove the body. It is true an accused person does not have to prove provocation but only to raise a reasonable doubt as to its existence as held in the KENGA case (Supra). But in the instant case there is no doubt whatsoever in our minds that the

alleged provocative words were never uttered by the deceased. They never existed. Therefore the cases of DAMIAN and KENGA cited by Mr. Matata learned advocate for the appellant are inapplicable in this case.

Mr. Matata complained also about an act of adultery alleged to have been committed by the deceased some days prior to the killing. We hasten to say that there was no evidence about it. Even if it is accepted that such an act took place, that would not afford the appellant the defence of provocation because the killing occurred some days later when the appellant was no longer in the heat of passion as required by Section 201 of the Penal Code, Cap 16. Therefore the case of BENJAMIN cited by the learned advocate is inapplicable in this case.

In the event, and for the reasons stated above we dismiss the appeal in its entirety.

DATED at DAR ES SALAAM this 15th day of July, 2004.

D.Z. LUBUVA

JUSTICE OF APPEAL

J.A. MROSO

JUSTICE OF APPEAL

S.N. KAJI

JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)

SENIOR DEPUTY REGISTRAR

Annexure

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Finally, the seventh ground of appeal. Mr. Lakha has submitted on this ground of appeal that the learned first appellate judge was wrong in law in confirming the order of costs on mesne profits because according to counsel the two appellants in this case tendered a cheque as payment for rent due to the plaintiff. I am unable to agree that the position in law is as urged upon us by learned Counsel. In Osborn, The Concise Law Dictionary, Fourth Edition p.329 the word 'Tender' is defined as "an offer; e.g., by a debtor to his creditor of the exact amount of the debt; the offer must be in money, which must be actually produced to the creditor, unless by words or acts he waives production. If a debtor has made a tender and continues to be ready to pay, he is exonerated from liability for the non-payment, but the debt is not discharged. Therefore if he is sued he should plead the tender and pay the money into court." In this respect see also the provisions of the Civil Procedure Code 1966 relating to Payment into Court, Order XXIV, r.1. As in this case the two appellants made no payment into Court in full satisfaction of the respondent's claim for mesne profits, the learned first appellate judge was perfectly entitled to affirm the trial Court's order of costs on mesne profits. Thus this ground of appeal also fails.

I would accordingly dismiss the appeal.

Appeal dismissed.

REPUBLIC v. AGNES DORIS LIUNDI (MAKAME, J.)

REPUBLIC v. AGNES DORIS LIUNDI

[HIGH COURT OF TANZANIA AT DAR ES SALAAM (MAKAME, J.)]

CRIMINAL CASE 46 OF 1978

Evidence—Defence of Insanity—Burden and Standard of proof.
Evidence—Insanity—Evidence of medical expert—Court not bound to accept it.
Insanity—Mental stress—Whether constitutes insanity in law.

The accused was charged with three counts of murder. Due to grave matrimonial disharmony and threats by husband to throw the accused out of the matrimonial home, the accused decided to and did administer poison to her four children and took some herself together with some ground pieces of glass. Three of the children died. The accused and one of her children were saved by doctors. Before the accused administered the poison she wrote four letters explaining why she made that decision and that her husband was innocent and should not be punished. During the trial the accused raised the defence of insanity. It was argued on her behalf that she was so mentally stressed that although she knew what she was doing she was not capable of knowing what she was doing was wrong. The prosecution argued that the evidence before the court proved that the accused knew what she was doing and her letters showed that she knew what she was doing was wrong.

Held: (i) where an accused raises the defence of insanity it must be shown on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely;

(ii) the burden of proving insanity is on the accused on a balance of probability;

(iii) the court is not bound to accept a medical expert's evidence if there is good reason for doing so;

(iv) in this case the accused wrote the four letters and administered the poison when she was mentally stressed, but was legally sane; she knew what she was doing and that what she was doing was wrong.

Accused found guilty of murder on each of the three counts.

Cases referred to:

(1) Nyinge Siwato v. R. [1959] E.A. 974.
(2) Mbelukie v. R. [1971] E.A. 479.
(3) Regina v. Walden [1951] 1 W.L.R. 1008.

F.H. Uzanda for the Republic.
P.J. Jadeja for the Accused.

February 28, 1979. MAKAME, J.: The accused Agnes Doris Liundi is charged on three counts of murder. She is alleged to have murdered her three children Lona, Pili, and Iweni Liundi at their house at Keko Juu in Dar es Salaam on 21st February, 1978. She has on each count pleaded Not Guilty.

It is contended by the Republic, and controverted by the accused, that on the date aforementioned the accused gave some poison to all her four children, the other one being Taji, the eldest, who survived, and that her intention in doing so was so that they might die or suffer grievous bodily harm.

I am convinced that it is true the three children Lona, Pili, and Iweni are dead. I am persuaded to believe this because of the evidence of three people: P.W.4 George Liundi who told the court that the three children were his and the accused's and that he identified their dead bodies to a Dr. Kombe; P.W.10—Ali Kombe who says it is true and that the identification was done to him in the presence of a policeman called Narcis; and P.W.9 Narcis Sakayo, a police constable, who told this court that he was present at the mortuary, Muhimbili Hospital, when on 23rd February, 1978 the accused's husband identified to Dr. Kombe the dead bodies of his three children.

The chain of evidence satisfies me that the three bodies Dr. Kombe performed postmortem examination on are the same ones from which were obtained portions and materials which were examined at the Government Chemist's by P.W.6 Felicia Luiza Dias who wrote her findings in three reports, Exhibits 6, 7 and 8 one for each child. These three exhibits and the three postmortem examination reports composed by Dr. Kombe, as well as the oral testimony of the said doctor and that of P.W.6 Dias, the chemist, cause me to believe that the findings related were indeed made and to accept the opinion that the three children died of poisoning. According to Dr. Kombe on examining each body, he found that the stomach had a liquid with a distinct unsual smell, rather like that of an insecticide or burnt mosquito coil; and he formed the opinion that death was because of poisoning. He sent the stomach, the contents of the stomach, the liver and the kidneys of each child for toxicological investigation. P.W.9 told this court that he personally took to the Government Chemist the internal organs Dr. Kombe gave him in sealed boxes, and I have no doubt it was these things P.W.6 examined. According to Dias, she found in each lot organic sulphur, and organic phosphorous. For Pili and Lona there were also traces of Chloroquine and organic nitrogen. The three chemicals found are all chemical substances not naturally found in that form in the human body. A combination of these substances is normally used in the preparation of such insecticides as Diazone and Parathion. Large quantities of such insecticides, depending on the quantitative constitution of the particular insecticide, are fatal.

The alleged events at the house of the Liundis on the material day before the accused and her four children were taken to Muhimbili Hospital are testified to by four people; P.W.1 Rashidi Mlowola, a domestic servant of the Liundis; P.W.2 Bibie Liundi, who said she is the daughter of George Liundi's full sister; P. W. 3 Anna Chisenga, the accused's maternal cousin, once removed; and P. W. 4 George Liundi himself, the husband of the accused.

P.W. 1 said that he arrived at the house at 6.15 that morning and that, when he did, he found all the ten people in the household, at home. These were the two Liundis and their four children to make six; two other children, Kapinga and Andrew; Bibie; and Anna. At 11 a.m. the accused went away with three of her own four children: Taji, Pili and Iweni. Mr. Liundi had left at 8.30 a.m. after P.W.1 had already made tea and was going on with other domestic chores. The accused and the three children returned about half an hour later, and the accused had with her a bottle of orange squash which the witness put in the refrigerator. At about half an hour past midday P.W.1 got ready some sour milk to give to the children but the accused prevented this. It is contended by the Republic that this action by the accused had pregnant significance in that, knowing that she was going to administer poison to her children, the accused did not wish them to drink the milk lest it reduced the potency of the poison. After the accused had prevented the children from drinking the milk she called into her bedroom only her own four children, not Kapinga and Andrew, and closed the door, but not until she had fetched the bottle of orange squash and got some cups. A while later P.W.1 heard Baby Iweni crying and these cries were joined by those of the other children in the bedroom. At the request of the accused, Bibie took Iweni, now purging and vomiting, and went to wash him. The baby continued to purge and vomit even after it had been washed. P.W.1 and Bibie made to telephone Mr. Liundi to inform him what was happening but Bibie had to go and make the call from the house of a neighbour because the accused would not let them. The accused left her own bedroom, the one with the four children, and went to the bedroom ordinarily used by Bibie and Anna, and this was after she had returned empty—handed to her bedroom after she had gone into the toilet with some cups. The accused going to the other bedroom afforded P.W.1 the opportunity to go into the accused's bedroom to see what had happended to the children. There the witness found them in a sorry condition, vomiting and purging.

with the bedsheets soiled. The witness decided to go out to seek neighbours' assistance and when he returned he went to the Anna—Bibie bedroom, hereinafter referred to as the second bedroom, to ask the accused what was up. He asked the accused; whose reply was "Rashidi, leave me to die with my children because Baba Taji does not like me". Now using the house telephone, P.W.1 rang up Mr. Liundi as well as the Police. In a motor vehicle P.W.1, Bibie, and neighbour by the name of Mama Hellena, took the four children to hospital via the Police Station Chang'ombe, and the Temeke Dispensary. Iweni had already expired by then and, on arrival at Muhimbili Hospital, two more children, Lona and Pili, were pronounced dead. A Police vehicle arrived shortly afterwards, carrying the accused and her husband.

Bibie too says that after her uncle had left, the accused drove off taking with her three of her children and that when she returned she was carrying a bottle of orange squash. She says also that when P.W.1 offered sour milk to the children she, the witness, heard them say that their mother had told them not to take it. She adds also that she asked Lona to undo her hair so that she might plat it but Lona said mother had said she would herself do it. She corroborates Rashidi about Iweni crying, purging, and vomiting while the four children were inside the bedroom with their mother and about the accused saying that they should not telephone Mr. Liundi and so she, Bibie, had to go to a neighbour's house to telephone her uncle. When she returned from telephoning is when the witness noticed that the other children were also in a bad condition. By the time they reached Muhimbili three of the children were dead.

Anna told a similar story, basically, but she did not mention the bit about the accused preventing the children from taking sour milk.

The last of the four witnesses was the accused's husband, who told the court of how he got out of bed late that morning, at about 7.30 a.m., and started cursing people. Rashid was unusually late and had not yet arrived; and neither his wife, who was unwell, nor any of the two big girls, Anna and Bibie, had made tea for him to take with him to work. He went off at 8.30 a.m. in a raging temper, leaving his sickly wife crying after he had threatened to throw out the wife, Bibie and Anna, if they persisted in not serving him. Later while at work he got two telephone calls, one from Bibie and the other from Rashidi both telling him about the children's condition at home and urging him to go thither. He eventually got there in the company of two women, Zoe Rebello and Mrs. Suleiman from Dr. Khalif Khan's dispensary, who gave first aid to his wife who was lying on the floor in the second bedroom and who appeared to be on the throes of death. He learned that the children had already been taken away and when he reached Muhimbili with the accused he found Taji in an awful condition. He was also shown the dead bodies of the other three children.

Two policemen, P.W.5 Christopher Tenga and P.W.9 say that they went to the scene of the alleged crimes. They went there together and, according to P.W.5, before getting there they became aware that all the people who had allegedly taken poison had already been carried away. When they got to the house they were shown round by Anna. P.W.5 says that in the second bedroom he found some vomit which he put in a bottle and in the other bedroom he found four letters, and these are Exhibits 1—4. Exhibit 1 is addressed to 'Ndugu', Exhibit 2 to 'CCM', Exhibit 3 to 'Usalama', while Exhibit 4 was addressed to Sizya. The contents of these letters were read out in court. According to Exhibit 1 the writer was saying that the decision the writer had taken was permanent. Because the writer was referring to 'My husband' I suppose it can safely be assumed that the writer was a woman. The letter was pleading that no action should be taken against George, the writer's husband, and that she was taking the children with her because she did not want them to suffer like she had done. It is purportedly signed by "Mrs. A.D. Liundi." The second letter, the one in an envelope to 'CCM' is very much in the same vein as the first, and it too is purportedly signed by 'Mrs. A.D. Liundi'. Exhibit3, the one to 'Usalama', is substantially similar to the first two and, like those first two and Exhibit 4, it is dated 21st February, 1978, the day of the alleged murders. The writer's address in the first three letters is 'c/o Box 9050 Dar es Salaam.' I take judicial notice of the fact Box 9050 is the letter box number for the Ministry of Justice where P.W.4, the accused's husband, is employed.

The letter Exhibit 4, the one addressed to 'Mrs. M.F. Sizya' on the cover, is addressed to Mama Gaudensia and the writer's address is Keko No. 60. I note that this is the number of the house where the accused is alleged to have committed the offences. It says that Mama Gaudensia was one of the writer's few friends indeed, and asks the addressee to pray for the writer 'just in case the way I have taken is never a short cut....Pray for the kids....Pray for your shemeji, he was my husband. You witnessed my wedding and I loved him (?) the cost of my own life." It goes on "Don't cry dada, please pray. The horizon is closing on me very fast—now with all my kids to make maintenance (sic) problems easy for anyone concerned." This one purports to be signed by 'Mama Taji', 'Agnes' and the actual signature legend is, in my view, similar to those in the other three letters.

P.W.5 went on to tell this court that he also found in the toilet a bottle labelled 'iodine', a tumbler, and

pieces of broken glass. These, together with the vomit, the witness sent to the Government Chemist by hand of Detective Narcis who is, I am satisfied, P.W.9 Narcis Sakayo. P.W.9 too talked of the same thing P.W.5 says they found in the toilet but, according to this witness, there were in fact two sets of vomit, one in each bedroom, and the letters were six, not four. We shall return to the letters later. For the time being, both witnesses say the other things were sent to the Government Chemist, which takes us to another witness, Anastazio Mascarenhas, P.W.7. He told the court that he is a chemist at the Government Chemist's and he has been there for some thirteen years now. His evidence, taken together with that of P.W.5 and P.W.9, leaves me in no doubt that Exhibit 5, the report Mascarenhas says he wrote, relates to the same things, other than the letters which both P.W.5 and P.W.9 say they collected from the house.

According to Exhibit 5, the bottle labelled 'iodine' had no poison while the tumbler had some iodine. The vomit had organic sulphur, organic nitrogen and organic phosphorus which, he said, like the other chemist Dias said, are chemicals used in the preparation of insecticides. Examination of the pieces of glass revealed the presence of camoquine.

P.W.8 Andrew Nali told the court that he is a Primary Court Magistrate and he testified to recording an extrajudicial statement made to him by the accused in April 1978. This is a longish statement in which the accused tells of the death of her mother soon after her own birth and relates her unhappy childhood. She got married early, at the age of 20, in February, 1967, having finished Form IV only the previous year. She made that decision so as to get herself some security for she felt she would otherwise have no one to turn to in the event of her father's death. The first two years or so of marriage were happy, but trouble started in 1969 when she went to train as a teacher at a Teacher's College at Morogoro. She was raped by someone there and apparently contracted a venereal disease which in turn she passed on to her husband when she came to Dar es Salaam on a weekend. Soon after the rape she decided not to tell anyone about it, not even her husband, because she felt that no one would believe her as her ravisher had managed to lure her to his house. She therefore had no explanation to offer to her husband who kept on nagging her about the infection she had given him. Her husband returned to this matter every-time they quarrelled, so eventually, in 1973, some four years after the event, she decided to spill the beans. The husband was not impressed and he said that the alleged rapist must have been the accused's boyfriend. Sometimes when the couple quarrelled the husband would chase away the accused with the children and as recently as 1977 she had to recruit the counsel of the husband's two uncles to resolve the on-going dispute.

That appeared to contain the husband somewhat. One week before the children's deaths the accused and her husband went to a party thrown by the Chairman of the Board of Directors, Posts and Telecommunications, where an incident, the details of which it is not immediately necessary to delve into, sparked off a quarrel between the spouses and during the course of this the rape story was resurrected. The following day the husband told the accused that he, the husband, would write a memorandum which she, the accused, would have to sign. He wrote that he, Liundi, had lived in the shadow of the rapist for seven years and was now fed up so he was leaving the matrimonial home. When he asked her to sign she asked him for time to digest the contents of the document but when he pleaded with her to sign she wrote that she was signing under duress, then she signed and dated the document which she then returned to Liundi. When Liundi read what the accused had written he tore up the document into pieces and said that as she had not properly signed the document he would not leave the house; instead she would. He told her to pack and take away from the house anything she wanted. He repeatedly told her, in extreme anger, that if he found her still at home upon his return from work he would whip her and throw her out naked. The husband left and the accused's mind was thrown into a whirl. She remembered her unhappy childhood and how lonesome she was as her father had died in 1972. She cried very much and did not know where to go. There was no one to rely on among her parents' people, and, on her husband's side there was only a younger brother who was a drunkard and in bad terms with the accused's husband. She drove into town with the children so as to calm herself. She went to a Chemist and bought three bottles of insecticide and went back home where she unsuccessfully tried to get some sleep. She made a mixture of drops of the insecticide and some orange squash and decided to take her life.

She felt that if she left the children behind they would suffer like she had done in her childhood. She took her children into her bedroom, closed the door, and told them that they were setting off for an unknown destination. She and the children kissed one another, and shook hands. She gave the mixture to each child in a cup, and she drank her share from a glass. They vomited. For good measure she drank some iodine and swallowed some pieces of ground glass. She went to shut herself up in another bedroom and when she came round she found herself at Muhimbili Hospital and she was told that three of her children had died. She concludes the statement by saying that she did not intend to kill her children but she did so so that the

might not suffer in future.

In her defence the accused made an unsworn statement, which she was of course entitled to do, and she called three witnesses on her behalf. These were D.W.3 Johnson Haule, a Specialist Psychiatrist; a family friend Dr. Conrad Mmuni D.W.1; and D.W.2 Sylevester Kaweni, a distant nephew of the accused's husband. We shall start with the accused's own brief story from the dock.

In court the accused told of her lonesome childhood and of her unhappy married life preceded by only two or three years of happiness in marriage. During their quarrels her husband would chase her and the children away and this made her anxious. Besides, she was not keeping good health: Amongst other ailments she had constant headaches, blood pressure, and heart trouble. On 21/2/78, that is the day she is alleged to have murdered her children, she and the husband quarrelled and he chased her. She became anxious and felt lonesome. What happened she does not know but she later found herself at Muhimbili Hospital where she was told that three of her children had died. Sometime after that, while at the Chang'ombe Police Station, she asked to be taken to a doctor, which was done, and at the doctor's she was asked some questions about her problems. She is now surprised to hear that she was taken to a magistrate. If I understood the accused correctly, and I think I did, but of course I could not check with her because she was not testifying on oath, I think the accused is suggesting that if she did make the statement produced in court she thought she was doing so in the presence of a doctor.

The essence of Dr. Mmuni's evidence was that he is a close family friend of the Liundis and that he had occasion to reconcile the couple. This was in 1975 when the accused appealed to him to prevail on her husband not to chase her as she had nowhere to go to. After a long conference Liundi withdrew his intention to chase away the wife and it seemed to the witness that the husband had made a hasty decision in the first place.

Kaweni, D.W.2, told the court that one day in 1977 he and a person called Mohamed Amiri Mtau had a discussion with the accused and her husband, and tried to sort out their marital misunderstanding. This touched on the venereal disease story and the two men counselled the husband to be more tolerant and the wife more faithful.

There was also the testimony of the Psychiatrist Dr. Haule whose sojourn in the witness box was not very short. He expressed the opinion that at the material time, the time of the alleged offences, the accused was insane. He started treating the accused in February, 1978, that is the same month she is alleged to have killed her children, and, at first, talking to the accused was, to use the Specialist's own words, "as if I was talking to a tree." It was the doctor's view that the accused knew what she was doing but she did not know she was doing any wrong, legally or morally. This witness was subjected to some vigorous questioning by Mr. Uzanda, learned Prosecution Counsel. He said that the decision the accused made was that of a mentally sick person and after admission the accused showed symptoms of depression. Among other things, she was bad tempered, not sleeping or eating well, and was complaining of tiredness and pains. Both in his report, Exh. 17, and here in court, the witness expressed the view that the accused believed that her husband was ordering her to kill herself and the children.

I am most grateful to both learned Counsel, Mr. Uzanda for the Prosecution and Mr. Jadeja for the Defence, for their useful help throughout the trial, including their erudite and lucid addresses at the end.

I promised that we would return to the letters which I now turn to. Mr. Liundi, the accused's husband, was asked various questions about these letters. His answers were to the effect that, in his opinion, the letters were written and signed by his wife. Martha Sizya, P.W. 11, a friend of the accused, who was at Secondary School with the accused for four years, from Form I to Form IV, and who told the court that she used to receive letters from the accused, told this court that the accused's hand writing keeps on changing and that she did not have the faintest idea as to who wrote Exhibit 4, the letter apparently to her. The same witness told this court that she did not remember what she said to the two police officers who visited her at home on 12th March, 1978, that is less than three weeks after the alleged murders were committed, and who accosted her with Exhibit 4. Well, it cannot be too often that the witness has been visited by policemen on such a mission and she would need to have an unusually bad memory to forget what transpired, if at all she was telling the truth. I am satisfied, beyond any doubt, that Martha Sizya furnished this court with deliberate untruths and that she is an unblushing and unabashed liar. Watching her performing in the witness box left me in no doubt that she was quite familiar with the accused's handwriting and that she recognized the handwriting Exhibit 4 as that of her friend and former class-mate, the accused. The only important little truths she conceded to, I am satisfied, are that she would ordinarily refer to the accused's husband as 'Shemeji' and that her first daughter is called Gaudensia. These little concessions on the part of the witness are important in the import, contents, and alleged authorship of Exhibit 4 and they buttress me in the view

that Exhibit 4 was addressed to, and intended for, Martha Sizya.

I am positively impressed by the testimony of P.W.4, the accused's husband, on the question of the authorship of the four letters. I find that they were all written by the accused, and on the very fateful day, and that they were intended to communicate the contents to the various addressees. P.W.9 said that the letters found in the house were six, whereas Tenga P.W.5, the superior police officer P.W.9's accompanied and who took custody of the letters, said that they were merely four. I am satisfied that P.W.9's recollection on this was faulty and that the letters were in fact only four, the ones produced in court, as P.W. 5 said. I do not place much significance on the disharmony regarding the number of vomits.

Substantially, Rashidi, Bibie, and Anna told the same story about what allegedly happened at the house before the accused and her children were carted away to hospital. One wants to appreciate that this was at first just one other morning at Keko Juu, when no one in the Liundi household had any particular reason to make meticulous note of all the comings and goings, not until the children started purging and vomiting, as I am satisfied they did. I am convinced it is true that the accused went away with three of the children sometime after her husband had gone off to work and that when she returned she had a bottle of orange squash with her as alleged. Although Anna does not say so, I am persuaded to believe that the accused did say the children should not take the sour milk and that soon after that, leaving out the other two children who were not hers, Kapinga and Andrew, she closed herself in with her off-spring, and the sequence of events leaves me in no doubt that what caused the children to vomit and purge shortly afterwards happened to them while inside the accused's bedroom. Nothing untoward about them had been noticed before they were taken in by the accused. The three children died of poisoning and it is in my view eminently reasonable to hold as I do, that they took the poison while they were inside their mother's bedroom, with the accused. The accused did move to the second bedroom, I am satisfied it is true, and that her husband found her there when he arrived. This shifting from the first bedroom to the second one when the children were already in a bad condition is not a usual thing for a mother to do and, in my opinion, such conduct is pregnant with significance.

The Defence objected to the alleged extrajudicial statement, first because, Mr. Jadeja said it was made by a person whose mind was not sound; and secondly on the ground that, on the face of it, the usual formalities had not been complied with. For reasons I gave, I said that the issue of insanity could be brought up as a general defence; and on the second score I was satisfied that even though the Justice of the Peace might not have expressed himself very precisely and elegantly, he sufficiently complied with the necessary formalities. I am satisfied that he did tell the maker he would record what the maker had to say and that this did not create in the mind of the maker of that statement the impression that that person had no choice but to make a statement. Nali says he told the maker she did not have to make a statement if she did not wish to do so, and I am satisfied that this is true.

I have no doubt in my mind that the person who made that statement is the accused in the dock. I believe that she knew who she was before and I am unable to accept her invitation to believe that she thought she was relating things to a doctor. I agree she might have had sessions with doctors, including the Psychiatrist, but I feel certain that this one was different and that she knew it.

That the accused was at all material times insane is very central to the accused's defence. D.W.3, the Psychiatrist, supports this contention, which did not positively impress the first gentleman assessor who opined that the accused is guilty of murder, but it did find favour with the second gentleman assessor. Dr. Haule appears to me to be an experienced and highly qualified Psychiatrist. He is, among other things, a Member of Royal College of Psychiatrists and has a Diploma in Psychiatric Medicine (England). I would therefore pay due respect to his professional views and would accordingly be slow to reject his evidence. I am also alive to the fact that even though it is for an accused person to show that he was at the material time insane "it is enough if he shows this on a mere balance of probability. The accused must show, on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. The settled authority for this is the oft-quoted case of Nyinge Siwato v.R. [1959] E.A. 974, followed so many times, including in Mbelukie v.R. [1971] E.A 479. That said however, I have also to keep in mind that, as WINDHAM, J.A., as he then was, said in Siwato's case, "The Court is not bound to accept medical testimony if there is good reason for not doing so." At the end of the day, that is, it remains the duty of the trial court to make a finding and, in doing so, it is incumbent upon it to look at, and assess, the totality of the evidence before it, including that of medical experts.

I regard Dr. Haule's testimony as an important input but I must warn myself, as I do, that it would be wrong and most improper to feel bound by Dr. Haule's evidence, and wrong also, to consider it in isolation.

Mr. Uzanda has suggested that Dr. Haule's report, Exhibit 17, was in effect contributed to by some other

person. I was myself at first intrigued by the gulf of difference between Exhibit 17 and an earlier document Dr. Haule wrote regarding the accused. I pointed this out to the witness and he conceded that the earlier document was not so elegantly composed and he gave some explanation. Whatever might have crossed my mind at that stage was only for a fleeting moment and I must confess that it failed to crystalize in the crucible of certitude. It would appear that, for his part, Mr. Uzanda felt more positively and he urged the view quite seriously. Speaking for myself, upon further reflection, I came to the view that it is not necessarily impossible that Exhibit 17 is entirely the workmanship of Dr. Haule who, as a Specialist Psychiatrist, can safely be presumed to be familiar with not only the medical definition of insanity but also with the legal definition of the said affliction. If one may go further, Dr. Haule was perhaps no more than conforming to the idea Prof. Eric Lucas has of an educated man: 'a person who has not only travelled an appreciable distance in his chosen field of learning but who can also demonstrate respectable familiarity with some of the intellectual highways of other people. ('WHAT IS A MAN?' — A Symposium from Makerere, 1962).

Although the Defence has suggested that the possibility that the accused did not kill her children as alleged cannot be ruled out, I am satisfied beyond reasonable doubt that she, it was, who gave the children some poison, which she herself also took, and that it is this poison which caused three of her children to die. The letters and her reply to P.W.1 "Rashidi, leave me to die with my children because Baba Taji does not like me", her preparation of the mixture, and her preventing people from reaching her husband on the telephone, are among the factors which reinforce my view that the accused contemplated and intended her children's death.

I have to consider the defence of alleged insanity at three different stages: At the time she wrote the letters as I am satisfied she did, at the time she administered some poison to the children and took some herself as I feel certain is true, and at the time she made the extrajudicial statement to Nali as I have no doubt she did. The letters, all in clear hand, are sensible and understandable as far as they go, and they seek to explain why the accused was going to do what she was about to do. The reason given for killing the children is altruistic and, in the background of the grave marital discord, it is not necessarily surprising. They show a keen appreciation of the consequences even to the accused's husband, and in the one to her friend, Martha Sizya, the accused even mentions the possibility of failure — just in case what she is about to do is not short cut. As it turned out, the accused's life was saved by doctors. She therefore did not go the short cut she had in mind. She merely peeled an onion — she removed one leaf, only to find another.

I have carefully searched the letters, and even tried to read between the lines, but I have not been able to glean wherein one could reasonably come out with the view held by Dr. Haule that the accused was not only over-dependent on her husband but she also was under the delusion that the husband was ordering her to kill herself and the children. On all the evidence I am satisfied that the accused was Compos mentis, of sound mind, when she wrote the four letters, which letters she intended should communicate what she had decided to do. The writing of the four letters and her administering the poison to her children are very much related in point of time and I might just as well pause here to say this, what is at the moment foremost in my mind. The accused did these things when she was mentally stressed, I agree, but was she insane — in the sense that she either did not know what she was doing, or that if she did know what she was doing she did not know that what she was doing was legally wrong? The facts speak for themselves: The preparation and premeditation were there, the malice aforethought was evident, and the desire that help should not reach the children was shown. I am of course here using 'Malice Aforethought' as a term of art — I am not talking of the accused's acts being wicked, 'badhearted', or spiteful. The decisions might have been irrational or abnormal, but what murder, I ask, is ever rational or normal? By definition it is not, and murders have been known to be committed by desperate, despondent people who have abandoned hope. The accused did kill her three children, and the background to the event attract pity and sympathy, rather than condemnation, one may say. Witness for example the heart-rending farewell episode in which trusting children asked where they and mother were going to, and mother's reply, T kissing and the hand shaking. For a mother to snuff off the lives she gave could not have been an easy and happy decision and, as I have said the accused's reasons might have been altruistic, in her own mind, but not every mental abnormality constitutes insanity, and in the present case I am of the carefully considered view that the accused was legally sane. I respectfully share the opinion of the first gentleman assessor who found that the accused was legally sane at the material time. This necessary finding causes me personal anguish, but my powers and my interpretative role are circumscribed by the law. I have to take the law as it is, not as I might personally wish it to be. I have my legal training and professional ethics to be true to, my oath of office to be faithful to, and, at the end of the day my conscience to live with. As William Shakespeare puts it, "So does conscience make cowards of us all."

This problem judges have in this regard, and one can quite properly argue that it is in the interest of society that judges should be confronted with this problem, for Justice must be, and continue to be, according to the law, and judges must never feel free to act on whims, is expressed with characteristic clarity and contemplative depth by Mr. Justice CARDOZO in "The Nature of Judicial Process" (1921) when he says:

> The Judge, even when free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.

I think Sir GARFIELD BARWICK (Lionel Cohen Lecture: Precedent in The Southern Hemisphere, 1970) had the same thing exercising his mind when he said that.... [The] judge is [not] at liberty to give effect to his own personal view of what is right and just in the particular circumstance. His decision must be according to the principles of the law which, it must be conceded, can at times work less than justice.

The defence has urged that the accused was also insane when she made the statement. I am convinced that this is not true and I do not propose to dwell long on this one. The coherence and detail of the contents, and the fact that the relevant portions give credence to the accounts given by P.Ws.1, 2, 3 and 4 leaves me in no doubt that the accused voluntarily made the statement while she was sane. I am also satisfied that she told the truth in the basic relevant essentials. My answer in conclusion is that the accused was legally sane at all the material times, that is when she composed the letters; when she gave the poisonous substance to the children after deliberately excluding Kapinga and Andrew; as well as when she made the extrajudicial statement to the Justice of the Peace. I accept Dr. Haule's evidence that at first he found the accused not so communicative but I do not agree that, that was because the accused was legally insane. I would say rather, that was because the accused was stunned by her own failure to die and by the consequent anticipated ordeal of having to answer the charges, the remorse at what she had succeeded to do, and the disconcert at realizing that Taji's eyes would always tax her with, and accuse her of, the killing of her siblings.

Liundi, the accused's husband, told the court of how, in effect, he had been harsh and inconsiderate to his wife. I am not qualified to pass moral judgment on him, for one thing because he was not in the dock, and for another because this is not a forum for moral judgment. He is probably in a better position than this court is, to say how much of this tragedy could be attributed to him. I say in a better position for it seems very likely that not all the details of their marital vicissitudes had to be brought out or were brought out in this case. Looking back he may perhaps wish to say with NGUGI WA THING'O ('PETALS OF BLOOD', at p. 45):

> Perhaps... perhaps this or that.... What I might have done or might not have done... these things we always turn in our minds at the post-mortem of a deed which cannot now be undone. Peace my soul.

I think it was La ROCHEFOUCAULD who said: "We pardon in proportion as we love" and, according to GEORGE SIMS, in his book 'SLEEP NO MORE', "Love is a gradual accumulation of sympathetic detail about another person with the mutual acceptance of faults." As Mr. Liundi emerges from the tunnel he will no doubt increasingly realize that the canvas of life is large enough to contain man in his divers and diverse dimensions.

One is tempted to add, before going back to the accused, that in his professional position, Mr. Liundi hardly needed to be guided by legal advice to be able to appreciate that there were such other avenues as judicial separation and divorce open to him. But then I am digressing.

The accused had an unhappy and unstable childhood and that perhaps has contributed to her particular 'underlying personality' which I believe has something to do with one's degree of conflict-and-stress tolerance. Otherwise one possible way of looking at her situation could have been this: "For all practical purposes I never had a mother and I did not enjoy the advantage of a happy and carefree childhood. And the same, despite heavy odds, I survived, got education up to Form IV, and managed to find myself a husband. There is this marital problem and my husband is being impossible. It is not the happiest thing to do but I shall go off on my own, continue with my teaching job, rear my little kids the best I can, and give them a chance." I am saying that could have been the accused's reaction, the reaction of many a woman in the accused's sorry situation, but it was not the accused's reaction. She chose the reaction she chose and however pitiable it is, the hard fact still remains that she committed three crimes, three crimes proved beyond

reasonable doubt. Incidentially the rape-venereal disease issue seems to have loomed large and dominated the couple's domestic scene. If it is true that the accused infected her husband with the disease she would know the real truth as to how she herself contracted it.

I am now thinking aloud: I am interpreting the law as it currently is, but there is my that other role–the role His Excellency SHRIDATH S. RAMPHAL, the Commonwealth Secretary General, himself a lawyer I am told, calls a lawyer's Creative social role ('To Deserve To Be Wanted: Opportunities And Challenges for Commonwealth Lawyers', Edinburgh, July 1977), which one would argue involves also the task of identifying and pointing out to Society, such areas in the law as 'The People' in their great wisdom, might wish to introduce appropriate changes in, without necessarily opening the flood – gates. In the instant case I have in mind 'Diminished Responsibility'. To borrow from Paull, J. in **Regina v. Walden** (See [1951] 1 W.L.R. 1008), "There are some cases, you may think, where a man has nearly got to that condition where he is wandering on the border–line between being insane and sane, where you can say to yourself 'well, really, it may be he is not insane, but he is on the borderline poor fellow. He is not really fully responsible for what he has done,.....!"

I am not saying that the present case is necessarily one such case. I am merely illustrating a point in the above theme. They sorted out this problem in England twenty two years ago when they passed the Homicide Act 1957 which, under s.2, recognised Diminished Responsibility as a defence to a charge of murder.

One is reminded of the recent case of **Julia Overton** at Cambridge. Mrs. Overton, 27, the wife of a Cambridge University Lecturer, killed their two small sons, Mathew 3, and Jonathan 2, by putting a plastic bag over their heads after her husband had told her that he wanted a separation. She told the court that she killed them because she did not see any future for them and did not want them to turn out like most fatherless children do. In her case Diminished Responsibility was found and she was placed on probation for three years. In Tanzania we do not as yet, have such a law. It would be dishonest, unprofessional and presumptious on my part to go beyond my proper role. If at any other stage in the system my opinion is required in this case that will be in a different role which role I shall play accordingly. In the meantime I have this job to do.

The second gentleman assessor expressed the view, not shared by the first gentleman assessor, that the accused was at the material time insane. I do not accept this view and I am also unable to agree with the Psychiatrist on this. For reasons I have explained I respectfully agree with the first gentleman assessor and with equal respect I disagree with the second one. I find the accused guilty of murder on each of the three counts and accordingly convict her.

Accused found guilty of murder.

AGNES DORIS LIUNDI v. REPUBLIC (MUSTAFA, J.A.)

AGNES DORIS LIUNDI v. REPUBLIC

[COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (Mustafa, Mwakasendo and Kisanga, JJJ.A.)]

CRIMINAL APPEAL 82 OF 1979

Evidence—Insanity—Mental stress—Letters imply innocence and punishment relating to the killings—Whether appellant did not know what she was doing was wrong.

Sentence—Of death—To be passed on one count

The appellant was charged with and convicted of the murder of three of her children by the High Court. On appeal it was argued on her behalf that the trial judge did not give adequate consideration to the point raised by the defence that the appellant did not know that what she was doing was wrong although she knew what she was doing.

Held: (i) the plea in the four letters left behind by Accused that the police should not take action against her husband, that he should not be punished and was innocent clearly implied that the appellant knew what she was doing was wrong, and she wanted to make clear that her husband had nothing to do with her wrongful act, which was hers alone;

(ii) sentence of death should only have been passed on one count, the convictions on the other two counts being allowed to remain in the record.

Appeal dismissed.

Cases referred to:

(1) **Nyinge Siwato v. R** [1959] E.A. 974.
(2) **Mbelukie v. R** [1971] E.A. 479

Judeja for the appellant.

March 10, 1980. MUSTAFA, J.A., read the following considered judgment of the court: This is a tragic case. The appellant was charged with and convicted of the murder of her three children by the High Court at Dar es Salaam and is now appealing against the conviction.

The facts, briefly, and they are not now in dispute, are as follows. The appellant was married to Goerge Liundi in February, 1967, and after about two years of happy married life, their mutual relationship deteriorated and there was constant acrimonious bickering. One reason for the bickering was the obsessional belief by her husband that the appellant had perhaps been unfaithful to him. During such domestic strife the appellant had been chased out of the matrimonial home. The appellant had an unhappy and insecure childhood as her mother died when she was very young, and she developed a high sense of insecurity from a very early age. About a week before the killing there was a party which was attended by both the appellant and her husband. At that party the husband met an individual whom he suspected had been the appellant's lover. The old antagonisms were revived and serious quarrel erupted between the appellant and her husband. The result was that on the morning of 21st February, 1978, the husband told the appellant to leave the matrimonial home, and that if on his return from work she was still there, he would throw her out naked. Her four children were with her at the house. After her husband's departure she drove to town and purchased some bottles of insecticide. She called her four children into her bed room and administered to each of them a drink made up of orange squash and insecticide. She had closed her bed room door. Her domestic helper P.W.1 Ramadhani and another person Bibie, heard the children crying. Shortly thereafter the appellant opened the bed room door, and she asked Bibie to wash the youngest child who was vomiting, retching and purging. The appellant refused permission to P.W.1 and Bibie to use the house telephone to inform her husband of the situation. P.W.1 then saw the other three children vomiting and purging and in a bad way. The appellant in the meantime had gone off to another room. When neighbours came in response to P.W.1's call for assistance, P.W.1 went to the room where the appellant was and asked the appellant what had happened. She said "Ramadhani, leave me to die with my children because Baba Taji [her husband] does not like me." It transpired that she had also drunk the poisonous concoction she had given to her children. They were all rushed to hospital, and three of her children died, but she and her eldest child were saved by the doctors. It was medically established that the three children had died of poisoning, as a result of the drink administered to them by the appellant.

The appellant had written four letters all dated 21st February, 1978, and left them in the house, clearly just before or at the time she administered the poison to her children. These letters were recovered by the police and exhibited in court. Three letters were worded identically and addressed "To whom it may concern" and one was to one Mama Gaudensia, a friend of the appellant. We think it will be convenient to set out a letter (one of the identical three) in full. It reads:—

c/o Box 9050,
DAR ES SALAAM
21/2/1978

TO WHOM IT MAY CONCERN

The decision I had taken is a permanent one, George my husband should not be disturbed or tortured, or confronted in any way because I loved him. I had taken

the children because I didn't want them to suffer like I had suffered. Solitariness frightens. George my husband you didn't know how much I loved you when I was alive. But now you understand.

TO POLICE OFFICER

Please don't take any action against my husband because he is innocent.

After her arrest the appellant was under the medical care of Dr. Haule, a well qualified medical psychiatrist attached to the Muhimbili Hospital. He submitted a medical report on the appellant's condition and testified in court. In brief his opinion was that at the time of the act the appellant knew what she was doing, that is, that she knew she was killing her children by administering poison, but that she did not know that she was doing wrong.

It will be convenient at this stage to set out the provisions of ss. 12 and 13 of the Penal Code which relate to the issue of insanity. They read as follows:—

> **S. 12.** Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.
>
> **S. 13.** A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.
>
> But a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

Dr. Haule in his evidence and medical report, made the following points. When he first saw the appellant shortly after the incident, the appellant was abnormal and did not seem to care. "It was as if I was talking to a tree", Dr. Haule said. In his opinion it was possible that the appellant was abnormal two weeks or so before the incident, and that the appellant knew what she was doing when she administered poison to her children, but did not know she was doing wrong. He referred to the marital strife she went through, the sort of person she was and her upbringing and her almost pathological dependency on and obedience to her husband. He was of the view that when she took action to kill herself and her children she believed she was ordered to do so by her husband. He said he had read the letters she had left behind, but they did not change his views on this score. At one stage he said she was not suffering from delusion, but later on he said she was in that, he said "She was deluded, that is she felt what she was doing was morally acceptable". He said that at the time of the trial in the High Court, about a year after the event, the appellant's condition had improved, in that she would know what she did was wrong, but that she was still under psychiatric treatment.

The appellant had made a long extra-judicial statement which was admitted at the trial. It was made on 3rd April, 1978, about two months after the event. In it she gave a history of her childhood, the difficulties she went through as a result of the death of her mother and the bad treatment metted out to her by her step-mother and the loneliness she experienced. She talked of the two-year period of happiness of her marriage and of the later trouble. She said the trouble started after she alleged she had been raped by a brother of one of her friends, resulting apparently in her infecting her husband with V.D. She dared not tell her husband of the rape incident for a long time but eventually did so. She recounted the resulting domestic bickering culminating in the flare up on 21st February, 1978. When her husband left that morning she got confused and started thinking of her childhood and felt she had nowhere to go. She saw her husband as her mother, father, brother and sister and that she felt her whole life depended on him. She went out and bought some insecticide and returned home. She tried to sleep but failed, and still could not find a solution to her problem. She then decided to drink the insecticide. She said, inter alia:—

> I was angry and anxious about the problems between me and my husband. Indeed I thought whether these problems were mere threats as he had even reached a stage of chasing me out. A thought came to me that I should finish (kill) myself and leave the children alive. But again I tried to remember how I got problems during my childhood where I led lonesome life and questioned myself whether my children were again going to lead such life staying with a step mother. Since my husband said if I left I should not leave the children I took them to my bedroom and locked the door. And I told them 'We are leaving'. They asked 'Where are we going'? I answered them 'We are travelling but where we are going we do not know'. I kissed them and they also kissed me, shook hands and bid good-bye to everyone. I gave to each child that mixture, each in his own cup, and I took mine from a glass. We then vomited. Because of that I decided to take (drink) some iodine, I took also some ground bottles and locked myself in another bedroom. From that time I became unconscious, knew nothing about what happened immediately thereafter.

The trial Judge dealt with the defence of insanity put forward at the trial. He analysed the evidence adduced for the prosecution and the defence, especially the evidence of Dr. Haule. He came to the conclusion that the appellant, when she committed the offence, although under great stress, was of sound mind and legally sane, that is, she knew what she was doing and knew that she ought not to have done the act.

Mr. Jadeja for the appellant, has attacked the trial Judge's conclusion. He concedes that at the time of the commission of the act, the appellant knew what she was doing. He submitted that at that time she did not know she was doing wrong. He relies primarily on the opinion of Dr. Haule. He submitted that the trial Judge over-emphasized one aspect of the issue of insanity—that the appellant knew what she was doing, but gave no or no sufficient consideration to the other aspect, whether she knew she was doing wrong. He submitted that an insane person can rationally carry out all the steps to cause death as the appellant had done, and yet would not know that the act was wrong. He contended that the trial Judge was only directing his mind to the question of malice aforethought, preparation and premeditation and awareness on the part of the appellant that the administration of poison to the children would cause death. All these factors go to show the aspect that the appellant knew what she was doing, not necessarily that she knew was doing wrong.

However the trial Judge was clearly influenced by the contents of the four letters left behind by the appellant, and which were written contemporaneously with the action she took on 21st February, 1978. The letters clearly indicate that she knew she was doing wrong, doing something she ought not to do. In the letter we have quoted earlier in the judgment, she pleaded that her husband should not be punished or tortured for what she did; indeed there was a plea to the police not to take action against her husband because he was innocent. The idea of punishment and innocence in the letter clearly implies that she knew what she was doing was wrong, and she wanted to make clear that her husband had nothing to do with her wrongful act, which was hers alone. She knew that if her husband was associated with her action, he would suffer punishment, punishment for doing a wrongful act.

It is true that Dr. Haule had stated that despite the letters he was of the view that the appellant did not know she was doing wrong. He testified that the letters indicated to him that the appellant was over-dependent on her husband, an almost pathological relationship. If we understand Dr. Haule correctly he was perhaps saying that the letters had some connection with the appellant's belief that she was being ordered to kill herself and her children by the husband. Incidentally the appellant never said she had that belief; it was a deduction made by Dr. Haule. Even if the letters indicate over-dependence on her husband, they still show knowledge on the part of the appellant that the action was wrong, as inviting punishment. Like the trial Judge, we however are unable to connect the letters with the belief or delusion that Dr. Haule said the appellant had of being ordered by her husband to kill herself and her children.

The trial Judge in his judgment, stated inter alia:—

> Dr. Haule appears to me to be an experienced and highly qualified psychiatrist. He is, among other things, a Member of Royal College of Psychiatrists and has a Diploma in Psychiatric Medicine (England). I would therefore pay due respect to his professional views and would accordingly be slow to reject his evidence. I am also live to the fact that even though it is for an accused person to show that he was at the material time insane it is enough if he shows this on a mere balance of probability. The accused must show, on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. The settled authority for this is the oft—quoted case of Nyinge Siwato v. R., [1959] E.A. 974, followed so many times, including

in Mbeluke v. R. [1971] E.A. 479. That said however, I have also to keep in mind that, as Windham J.A., as he then was, said in **Siwato's** case, 'The Court is not bound to accept medical testimony if there is good reason for not doing so'. At the end of the day, that is, it remains the duty of the trial Court to make a finding and, in doing so, it is incumbent upon it to look at, and assess, the totality of the evidence before it, including that of medical experts.

With respect, we are in agreement with the views expressed in that passage. The trial Judge then analysed the evidence and concluded that the appellant was sane.

It is possible, indeed likely, that our law on the issue of insanity is antiquated and out of date. Dr. Haule in evidence said that in modern psychiatry the distinction between insanity and diminished responsibility is under controversy because it is imprecise. Parliament, in its wisdom, may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject. Other jurisdictions, including one at least in East Africa, have done so. But as the law now stands, we are of opinion that the trial Judge has come to the right conclusion.

The appellant was convicted on three counts of murder. Sentence of death should only have been passed on one count, the convictions on the other two counts being allowed to remain in the record.

We accordingly amend the sentence to refer to the conviction on the first count only.

Apart from the above correction, we dismiss the appeal.

Appeal dismissed.

RAJABU RAMADHANI v. REPUBLIC

[High Court of Tanzania at Dodoma (Chipeta, J.)]

Criminal Appeal 81 of 1978

Criminal Practice and Procedure—Accused pleads guilty but in mitigation exculpates himself—Procedure trial court to follow.

Criminal Practice and Procedure—When court becomes functus officio.

Criminal Practice and Procedure—Circumstances under which court to order re-trial.

The appellant was convicted on a purported plea of guilty to a charge of cattle theft. When called upon to plead he pleaded guilty and after the facts were read over to him he said they were correct. However, in mitigation he said, "I was invited by some people who told me that the cow was theirs".

On appeal the appellant complained that he did not in fact plead guilty to the charge.

Held: (i) where an accused person pleads guilty to a charge but in mitigation exculpates himself that amounts to a recantation of his earlier plea. **Kamundi v. R.** [1973] E.A. 540 overruling **Maumba v. R.** [1966] E.A. 167, followed;

(ii) a court becomes **functus officio** when it has disposed of a case by a verdict of not guilty or by passing sentence or making some orders finally disposing of the case;

(iii) in general a retrial will be ordered when the original trial was illegal or defective and should only be made where the interests of justice require it; it should not be ordered where (it is likely to cause an injustice to the accused person) the accused had already served a substantial portion of the sentence;

(iv) it was in the interest of justice in this case that, since the appellant had served only 10 months out of a minimum sentence of 5 years, there be a retrial.

Proceedings before trial Court set aside, a retrial ordered.

Cases referred to:

(1) **Kamundi v. R.** [1973] E.A. 540.
(2) **Maumba v. R.** [1966] E.A. 167.
(3) **Joseph Ogola v. R.** 20 E.A.C.A. 171.

(4) **Manji v. Republic** [1966] E.A. 343.
(5) **Francis s/o Pastory v. Republic** [1973] L.R.T. n.25
(6) **Manchester City Recorder** (?)

Appellant absent and unrepresented.

V.K.D. Lyimo for the Republic.

November 23, 1978. CHIPETA, J.: The appellant, Rajabu Ramadhani, was convicted on a purported plea of "guilty" to a charge of cattle theft c/ss 268 and 265 of the Penal Code, and was sentenced to five (5) years imprisonment under the Minimum Sentences Act, 1972. He now appeals.

What transpired is clearly brought out by the proceedings in the trial court, the relevant part of which I quote:

> Charge read over and explained to Accused who is asked to plead.
> **Accused plea:** "I admit I stole the head of cattle. "Entered as a plea of guilty.
> Sgd. ???—District Magistrate
> 1/2/78

FACTS

The accused is a resident of Unahe village in Singida.

On 30/11/78 at night the accused went to the cattle boma of Mohamed Mtunduu and opened the kraal. Mohamed was awakened by some noises and found out that the gate to the kraal was open. He noticed that four head of cattle were missing. He raised an alarm and in response many villagers came and helped to look for the cattle. They managed to get three who (sic) had escaped the driver leaving one cow. They further followed the footmarks of the missing cow till the morning when they met the accused with a slaughtered cow. He was then skinning it. They caught him and reported to the police and P.C. Shabani visited the scene. The accused had confessed to the villagers to have stolen the cow. He was taken to police station with the slaughtered cow which is now being skinned and examined by veterinary authorities. The accused was then charged.

> **Accused:** The facts are correct.
> **Court:** Accused is convicted on own plea of guilty.
> Sgd. ???—District Magistrate
> 1/2/78

"**Record:** First offender

Accused in mitigation: I was invited by some people who told me that the cow was theirs".

Thereafter the court sentenced the appellant to five (5) years imprisonment.

As soon as the sentence was passed the public prosecutor informed the trial court that efforts were being made to track down more culprits.

In his memorandum of appeal, the appellant complains that he did not, in fact, plead guilty to the charge.

It is certainly true that the facts as narrated by the public prosecutor and admitted by the appellant without qualification did, **prima facie**, and all things being equal constitute the offence charged and justified entering a conviction against the appellant at the stage. But what the appellant said in mitigation clearly changed the situation. His statement in mitigation was a clear indication that he had not committed the offence but merely and innocently lent assistance to the real culprits who had claimed the cow to be their property.

In those circumstances, what should the learned trial district magistrate have done? In my view, the proper course for the learned magistrate to have taken at that stage would have been to take the statement of the appellant in mitigation as a recantation of his earlier admission, and then record a plea of "not guilty" to the charge. Thereafter the case would have proceeded to a full trial in the usual way.

I am reinforced in this view by a recent decision of the Court of Appeal for East Africa in the case of **Kamundi v. R.** [1973] E.A. 540. The facts there were that the appellant and others were convicted of robbery with violence on purported pleas of guilty. After conviciting, the magistrate adjourned to allow the prosecution to produce the criminal records of the accused persons. On resumption of the trial,