IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 32 OF 1979

B E T W E E N

1. LUBASHA MADERENYA): : : : : : : : : : : : : : : : APPELLANTS
2. TEGAI LUBASHA)

A N D

THE REPUBLIC : RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Geita) (Lugakingira, J.) dated the 6th day of November, 1978,

IN

Criminal Sessions Case No. 143 of 1977

JUDGMENT OF THE COURT

MAKAME, J.A.:

These two appellants, Father and Son, were condemned to death by the High Court of Tanzania sitting at Geita. They were found to have murdered one KASANDA KUGONDWA, the junior wife of the first appellant. Mr. Butambala, learned advocate, represented them on this appeal which Mr. Mutaki, learned State Attorney, resisted on behalf of the Republic.

The star witness for the Prosecution was P.W.1 TABU MISALABA who was a child of tender years and whose evidence therefore required to be corroborated as a matter of law.

P.W.1 was a grand-daughter of the deceased. In her unsworn statement she told the trial court of how she was sleeping in a house at Rusubi with her grand mother, the deceased, as well as P.W.1's elder sister, Kabula, who has since died. When P.W.1 went out for a short call she found the deceased driving back into the house some cattle which had bolted from the boma. With the help of the light of a 'kikomi', an out-of-doors fireplace, P.W.1 was able to recognize the

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two appellants and to see an axe which was lying on the ground. The second appellant was holding the deceased's arms while the first appellant was throttling her. Then the two appellants dragged the deceased back into the house and placed her close to where P.W.1 was. The first appellant cut the deceased with the axe, saying that if they left him alive she would name them. After the two appellants had left P.W.1 woke up Kabula who was sleeping in another room and told her what had happened. They sobbed throughout the rest of the night, but only softly because they feared that the appellants might still be tarrying in the immediate vicinity of the house.

There was also the account P.W.1 gave to the trial court about what happened on the morrow. According to her, in the morning the first appellant was the first one to arrive. He entered the deceased's bedroom where the deceased was still alive and groaning with pain and, after a brief while, when the first appellant was walking out, P.W.3 NTABURWA LUNYILIJA, P.W.1's aunt and the deceased's daughter-in-law, arrived. P.W.1 told P.W.3 what had happened and just then P.W.2 WILLIAM LUBUSHA, P.W.3's husband and the first appellant's son, arrived. When P.W.2 learnt what had happened and he raised an alarm, the first appellant, who did not join in making the alarm, advised that there was no need for fussing and raising any hue and cry as the deceased would get cured if taken to hospital. There is also evidence that when he heard the news the first appellant did not bother to enter the house to see for himself what had happened. Also, according to both P.W.2 and P.W.3, the second appellant did not join the gathering formed in response to the alarm raised, and this even though, according to P.W.4 ERNEST METHOD, the police officer who participated in investigating the case, the second appellant's house was only some fifty paces from the house in which the deceased was attacked.

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In their unsworn statements both appellants denied the alleged killing and said that they never went to the deceased's house during the material night. The learned trial judge believed the testimony of P.W.1 that she saw the two appellants manhandling the deceased outside the house before dragging her to her bed. The learned judge demonstrated clear appreciation of the fact that convictions in this case could not be founded on the evidence of P.W.1, a child of tender years, unless it was materially corroborated by some other evidence. He found that there was such corroborative evidence and we respectfully agree with him. The first appellant volunteered to P.W.2 and P.W.3 the information that they had been up rounding up cattle at the house the whole night, which gives credence to P.W.1's story which starts with, and includes, the bit about rounding up cattle. She first saw the appellants outside the house where there was a glowing light from the cow-dung fireplace. They are close relatives she knew well. When P.W.3 arrived she made an early report to her regarding what the appellants had done, which shows consistency in her story whose cogency and drift stood up well to Mr. Kuhangwa's vigorous cross-examination. There was, further, the peculiar behaviour of the first appellant the morning after, when P.W.2 and P.W.3 made the sad discovery. He would not enter the house to see for himself what was inside and he refused to join in raising an alarm. He feigned ignorance, whereas, according to P.W.1, the first appellant had already gone into the deceased's room and found her groaning before the arrival of P.W.2 and P.W.3. The first appellant completely lost his balance and composure and, among other things, he saluted his son, P.W.2, in a form which is contrary to established custom. We are also of the considered view that the learned judge was right and entitled to take into account the quarrel and very

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recent fight over the deceased's cattle between the first appellant and the deceased as establishing motive which in turn, in the particular circumstances, strengthens the Prosecution case. We are satisfied that the foregoing are confirmatory circumstances which go to strengthening P.W.1's story and placing it well beyond peradventure.

Mr. Butambala, learned counsel for the appellants also complained that in any event there is no unity between the events alleged to have taken place outside the house and the alleged assault inside the house such as would connect the second appellant with the alleged killing. The learned trial judge gave careful thought to that issue and came to the conclusion, with which we concur, that the brutal assault by the first appellant inside the house was an anticipated continuation of the unlawful assault outside the house and a prosecution of the same unlawful act. We respectfully agree that common intention was established and that it was quite proper to find the second appellant also guilty. We therefore dismiss both appeals.

The learned judge sentenced the second appellant to be detained during the President's pleasure. He said that he was doing that because "capital punishment cannot be pronounced on a person who was below 18 years of age at the commission of the offence.". With great respect, we are of the view that the learned judge bent over backwards in so handling the second appellant and that he erred. The record shows that the second appellant's age was given as 17 years when he was charged in April 1977 with a murder he was said to have committed the previous month. He was not convicted and sentenced until November 1978, when he was therefore already over 18. Evidently the learned judge purported to act under

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Section 26(2) of the Penal Code Cap. 16 which reads:-

> "Sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is under eighteen years of age, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affairs may direct, and whilst so detained shall be deemed to be in legal custody.".

The operative word is clearly the word 'is' in the Clause 'Is under eighteen years of age' which, in the context, must imply 'is under eighteen etc.' when the sentence of death would but for that be 'pronounced on or recorded against any person etc.'. The word clearly imports the present continuous tense. It is our view that to hold, as did the learned judge, that what was intended was to avoid condemning to death persons who are under the age of eighteen years at the time of committing the offence even though they are over eighteen at the time of conviction would be to deform the clear wording of section 26(2) of the Penal Code. We are not unaware of decisions which appear to hold different views. One such case is that of TURON v. REPUBLIC 1967 E.A. 788 in which the Court of Appeal held that under section 25 of the Penal Code of Kenya the sentence of death shall not be pronounced on a person who was under the age of eighteen years when he committed the offence. That decision is not in necessary conflict with our present view, for the simple reason that the wording of Section 25(2) of the Penal Code of Kenya is significantly different from its would-be equivalent in Tanzania, that is, Section 26(2). The Konya version goes thus:

> "Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years ..... ".
> (Emphasis provided).

Similarly the English Homicide Act of 1957, Section 9 provides:-

> "Sentence of death shall not be pronounced on or recorded against a person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed.".

It must follow therefore that decisions made on that aspect and based on the Kenya and English versions of the relevant section cannot be of necessary persuasive authority to this Court.

The Court of Appeal for Eastern Africa had a number of occasions to deal with this issue. See for example REX v. MVULA IROVE 1944 11 E.A.C.A. 112 and again R. v. JOHN NGONA, HATIBU JAMAA, and POJO MWINYIMKONDO 1944 11 E.A.C.A. 119, both emanating from Tanganyika. In both these cases the Court of Appeal clearly held that the relevant time was the time of conviction, not the time the offence was committed.

In a recent case, MELKIOR SAMBUA v. R. Criminal Appeal No. 3 of 1977 (unreported), the Court of Appeal appeared to hold a view contrary to the above-quoted authorities. This was obiter and the above-mentioned authorities were neither considered nor referred to. As we have already indicated, we are satisfied that a proper constructions of section 26(2) of our Penal Code, as it is currently worded, cannot reasonably accommodate the interpretation put in Sambua's case.

We therefore set aside the order on the second appellant and sentence him to death.

DATED at MWANZA this 29th day of March, 1980.

(F. L. NYALALI)

CHIEF JUSTICE

(Y.M.M. MWAKASENDO)

JUSTICE OF APPEAL

(L. M. MAKAME)

JUSTICE OF APPEAL

certify that this is a true copy
of the original

(G. A. RWELENGERA)

DEPUTY REGISTRAR