

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CORAM: Mustafa, Ag. C.J., Mwakasendo, J.A. and Makame, J...)

CRIMINAL APPEAL NO. 35 OF 1979

B E T W E E N

1. Masho Mtalikidonga)
2. Raphael Wilson Mlyuka)
3. Yohana Chengula) APPELLANTS
4. Pekosi Mtalikidonga)

A N D

THE REPUBLIC RESPONDENT

and

CRIMINAL APPEAL NO. 64 OF 1979

B E T W E E N

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

A N D

ALOIS MWALONGO RESPONDENT

(Appeal from the Conviction and Sentence
of the High Court of Tanzania at Iringa)
(Mwakibete, J.) dated the 14th day of
March, 1978,

in

CRIMINAL SESSIONS CASE NO. 193 OF 1975

JUDGMENT OF THE COURT

MUSTAFA, Ag.C.J.:

Five persons were charged with the murder of one
Abdul Shivji Manji; four of them were convicted as charged,
two were sentenced to death, two were sentenced to be detained
during the President's pleasure, one was acquitted of murder
but sentenced to ten years' imprisonment for shop-breaking
and stealing. The four convicted of murder have appealed,
and so has the Republic against the judgment and order in
respect of the person acquitted of murder and sentenced to
shop-breaking and stealing. We have consolidated all the
appeals for hearing.

For the avoidance of confusion, we will continue to call the parties hereto as they were called at the trial, that is, 1st accused Masho, 2nd accused Raphael, 3rd accused Yohana, 4th accused Aloice and 5th accused Pekosi. The 1st and 5th accused were detained during the President's pleasure, the 2nd and 3rd accused were sentenced to death and the 4th accused was convicted of shop-breaking and theft.

The case against the accused persons stands or falls on the evidence of P.W.1 Chausiku, who is the crucial witness. According to her account the following facts emerge.

P.W.1 was a friend of the deceased, an Asian shopkeeper at Njombe. In the evening of 25th September, 1974, the deceased met P.W.1 at the bar where she worked and made an arrangement with her for her to visit him at his shop-cum residence that night. As he was making that assignation accused 1 and accused 5 entered the bar. Accused 1 was obviously known to the deceased, who asked accused 1 to accompany P.W.1 to his home at about 11.30 p.m. that night. Accused 1 agreed.

At about 11.30 p.m. Accused 1 and Accused 5 came to the bar to take P.W.1 to deceased's shop. On the way they went to a bar and there met Accused 2 and Accused 3. The bar belonged to Accused 3. After a short interval they left for the shop of the deceased, Accused 2 and Accused 3 in Accused 3's pickup and Accused 1 and Accused 5 with P.W.1 on foot. On the way they met Accused 4 and another person, and they all reached the house of the deceased at about the same time. P.W.1 knocked at the door, and the deceased came to open it carrying a hurricane lamp. P.W.1 saw Accused 1 jump on the deceased and sat on him, Accused 2 with a knife and Accused 3 with something like a panga attacking the deceased while Accused 1 was pinning him down -

in fact the deceased's head was severed from his neck, Accused 5 kept a knife at P.W.1's neck to prevent her from raising an alarm, and Accused 4 was outside the shop apparently on guard. After killing the deceased the accused persons decided to burn the body of the deceased and the shop, and they sprinkled some fluid on the body and the premises and set the whole thing alight. After setting fire to the shop they removed the shop contents into the waiting pickup outside, Accused 4 helping in the loading into the pickup. They took the severed head of the deceased and dropped it into a nearby river. They then went to the premises of Accused 3 and P.W.1 was informed in no uncertain terms that if she divulged what she had witnessed she would be killed without doubt, if necessary, by the relatives of the accused persons. P.W.1 was kept a virtual prisoner the whole night, Accused 4 being one of her guards. The following morning she was allowed out; but was again warned of the dire consequences to her if she would divulge what she had seen. The accused persons gave her shs. 100/- and two-pairs of new khangas and after some time warned her to leave Njombe as investigations into the death of the deceased were taking place. P.W.1 went off, apparently still in great fear of her life. She came back after a few days to collect her belongings. In the meantime the police came to know that P.W.1 was a girl friend of the deceased and were looking for her. On her arrival back at Njombe by bus she was picked up by the police. When P.W.1 was assured by the police that she would be protected she immediately divulged what she had seen and known about the death of the deceased to the police. As a result of what she told the police all the accused persons were arrested and duly charged.

P.W.1 had stated that after the killing she was in terror and was under the influence of the threat made against her by the accused persons until the police picked her up and gave her the undertaking that she would be protected. That was the reason why she did not immediately report the matter to the police.

The trial judge, and the assessors as well, accepted her explanation as to why she did not report the matter to the police immediately. The judge held that she was not an accomplice. The trial judge was satisfied that she was at the scene when the killing took place. P.W.1 had known all the five accused persons well before the incident, as they were all residents of Njombe. She spent a number of hours with them, before, during and after the incident, and could not possibly have been mistaken. She had said that the deceased came out with a hurricane lamp, and the remains of a hurricane lamp were found at the burnt out shop; she said the assailants threw down and cut the deceased near the door in front of the counter; the police found the dead body there; she said the assailants cut the deceased with knives, the deceased suffered many stab wounds; she said the deceased's head was severed; the deceased's body was minus a head; she said after killing the deceased and removing the shop goods the accused persons locked the front door with a lock; the police on arriving at the burnt out shop found such a lock on the front door. Accused 1, Accused 2, Accused 4 and Accused 5 stated that there was no grudge between them and P.W.1; only Accused 3 alleged that he had dismissed her as a bar maid two years before the incident.

All the five accused persons pleaded alibis. Accused 1, Accused 2 and Accused 3 said that on the material night they were drinking and then left for home to sleep. Accused 4 said

he was on the material night at his work as a watchman of the Bora Shoe shop. Accused 5 alleged that he was at another place on the material night 55 miles away. In fact Accused 5 said he was not at Njombe for the whole of September 1974.

The trial judge reviewed the evidence of the accused persons and their witnesses in great detail and came to the conclusion, on a consideration of all the evidence adduced, that all the five accused persons were lying. We have ourselves reassessed the evidence, and we agree with the trial judge that the alibis of the five accused persons were false.

As we said earlier, the trial judge held that P.W.1 was not an accomplice. She was merely a passive and unwilling spectator of the killing, and she was in mortal terror at the threats made against her. She was in no way a party to the crime. The trial judge stated that even if she was held to be an accomplice, then her involvement was minimal and he was prepared to accept her evidence without corroboration, as it was so reliable and cogent, and would constitute one of those exceptional cases where accomplice evidence can be accepted without corroboration.

On our part, we are satisfied that she was not an accomplice. Like the trial court, we are satisfied that she was a truthful and reliable witness. We are satisfied that she clearly saw and knew all the accused persons, and that they played the roles she said they did on the material night.

In our view the trial court was justified in convicting Accused 1, Accused 2, Accused 3 and Accused 5 of murder. The sentences of death pronounced on Accused 2 and Accused 3 are correct.

As regards the sentences pronounced on Accused 1 and Accused 5, that is, to be detained during the President's pleasure, we are of the view that the trial judge erred.

According to the medical examination reports produced at the trial Accused 1 Masho was apparently twenty-two years old as on 7th March, 1978; Accused 5 Pekosi was twenty years old as on 7th March, 1978. The offence was committed on 25th September, 1974. It seems that the trial judge took the ages of Accused 1 as below eighteen as on 25th September, 1974, the date of the offence, and the same applied to Accused 5 Pekosi.

However, section 26(2) of the Penal Code reads:

"Sentence of death shall not be pronounced on or recorded against any person, who in the opinion of the court is under 18 years of age ..."

This Court has ruled that the age to be taken into account is as at the date on which judgment is pronounced - See

Criminal Appeal No. 32 of 1979 at Mwanza - Lubasha Maderanya and Another v. R. As on 7th March, 1978, when the trial

judge pronounced sentence both Accused 1 and Accused 5 were over eighteen, and the mandatory sentence to be imposed on each of them would be the sentence of death. We accordingly set aside the sentence of detention during the President's pleasure, and substitute, in the case of Accused 1, a sentence of death, and in the case of Accused 5, a sentence of death.

As regards the Republic's appeal in respect of Accused 4, we are satisfied that Accused 4 was a party to the robbing and killing of the deceased, as he aided and abetted the other accused persons in terms of section 22(c) of the Penal Code. He was also guilty of the offence of murder under section 23 of the Penal Code as he clearly had a common intention with the other accused persons to prosecute an unlawful purpose armed with lethal weapons, and in the prosecution of which death could be expected to and did result. We accordingly quash the conviction of Accused 4 for shop-breaking and theft and substitute therefor a conviction of murder and we sentence him to death.

In the result the appeals of Accused 1, Accused 2, Accused 3 and Accused 5 are dismissed, and the sentences of Accused 1 and Accused 5 are altered and amended as above stated. The appeal by the Republic in respect of Accused 4 is allowed and Accused 4 is convicted of murder and sentenced to death.

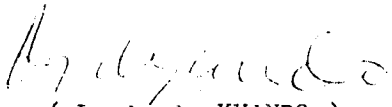
DATED at DODOMA this 22nd day of May, 1980.

A. MUSTAFA
ACTING CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

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


(L. A. A. KYANDO)
DEPUTY REGISTRAR