

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Makame, J.A. and Kisanga, J. A.,)

CRIMINAL APPEAL NO. 21 OF 1981

B E T W E E N

1. VALERIAN MICHAEL)
2. ALOIS NABAKU) APPELLANTS
3. MATEI KWAYI)

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction and sentence
of the High Court of Tanzania at Moshi)
(Makame, J.A.) dated the 19th day of March, 1981,

Criminal Sessions Case No. 91 of 1980

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The deceased, Peter Hamisi, was killed when a number of people broke into his house at about 11.00 p.m. one night in October, 1976. Five persons were charged with murder at the High Court. Two were acquitted after a trial, and three persons, the present three appellants, were convicted of murder. We will continue, for convenience, to refer to Appellant Valerian Michael as Accused 2, to Appellant Alois Nabaku as Accused 3, and Appellant Matei Kwayi as Accused 4.

P.W.2 Agnes testified that she was the mother of the deceased. She lived at Singu in the Kilimono area, and her house was a few paces from that occupied by the deceased. On the night in question she heard a noise of a house door being knocked and a lot of noise. It was about 11.00 p.m. She came out and heard exchanges between people outside the house of the deceased and the deceased. There was a crowd of people. However, she recognised five of the crowd, among whom were the three appellants. She had known the three appellants from their childhood; they were all co-villagers.

She saw the house door of the deceased being broken down. She saw that Accused 3 was carrying an axe and Accused 2 and Accused 4 carrying sticks. She saw them with others breaking down the door. She said she easily recognised them as there was moonlight and the people had torches. She started to cry and Accused 2 then beat her on the chest with a stick. Accused 4 also beat her when she raised an alarm. She heard Accused 3 telling the deceased to start praying as the deceased was going to die. She saw Accused 3 strike the deceased on the jaw with an axe, and she saw the other appellants, with several others, beating the deceased with sticks. She went across the road to call a neighbour, a short distance away. She returned to the deceased's house and discovered that he had been taken away. She found the deceased lying naked just outside the village shop, dead. She saw all the three appellants, with others, near the body. She raised an alarm shouting that her son had been killed. Accused 3 threatened to kill her and Accused 2 started chasing her. Accused 2 hit her with the side of a panga and she fell into a ditch. She begged Accused 2 to stop beating her. Accused 4 and another person took off her khangas and covered the deceased's body with it.

P.W.1 Suleman, a police officer, testified that on the morning following the killing he received a report from the village authorities that the village shop had been broken into and the thief captured, and that the thief had been assaulted. He went to the site and saw the dead body of the deceased; it was covered with a khangas. He noticed that the body had cut wounds and bruises all over it. The body was lying outside the village shop. Near it was a box containing assorted shop goods. According to the medical evidence death was due to multiple injuries.

There were a number of head injuries including two head fractures. The upper and lower jaws were also fractured, the left femur was fractured and three ribs were broken, the spleen was ruptured and the left lung had collapsed.

Accused 2 who was the village shop salesman and also acted as its watchman showed P.W.1 a broken window on which an iron bar had been bent to enlarge an aperture allegedly with a view to gain entry into the shop. Accused 4 told P.W.1 that he, Accused 4 was present when the deceased was being arrested. These two persons, that is, Accused 2 and Accused 4, were trying to tell P.W.1 that the thief had entered the shop through the open window. However, P.W.1 examined the window and formed the opinion that a person could not have entered the shop through the window opening. It was far too small. While he was still there he saw P.W.2 arriving there crying and claiming that the deceased was not killed near the shop but at his house, about 400 paces away. P.W.1 went to the house and examined various places where he saw, about 40 paces from the Arusha/Kibosho road, a pool of blood, and five paces from it, a club stained with blood, and another 8 paces away, another pool of blood. He saw that the deceased's house door had been removed by its hinges and was lying 7 paces from the house. He saw traces of blood just outside the door frame. All the three appellants, with others, were with him during his examination of the area. It was clear that the deceased had been killed or attacked at his house and his body was dragged to the shop to simulate a shop breaking and his arrest and apprehension and his death resulting therefrom.

Another witness P.W.5 Anna, a neighbour of the deceased, said she heard an alarm on the material night, and went to answer it. She said she met a number of people and she was chased away.

She said she recognised Accused 3 and Accused 4 as the persons who chased her away. She was in fact hit on the back with the side of a panga. She had known Accused 3 and Accused 4 since their childhood.

P.W.8 Pius, another neighbour, also answered an alarm, but it was much later, at about 3.00 a.m. in the morning. He saw a number of people at the door of the deceased's house. He had a torch and he flashed it about. The people there flashed their torches at him and he was ordered to go away, otherwise P.W.8 would be killed. It was Accused 3 who told him that if he did not go away he would be killed.

The deceased was a notorious thief, having been in and out of prison frequently. He was perhaps not very welcome in the village where he was staying.

In his defence Accused 2 said that he went to the shop early in the morning and found a group of people gathered there. He saw a broken window in the shop and a dead body lying outside it. He said Accused 3 was there and Accused 3 told him that the deceased was caught stealing. He denied killing the deceased.

Accused 3 said he saw the dead body of the deceased when he visited the shop on the material morning and he was shocked. He said all those witnesses who allegedly identified him as one of those involved in the attack on the deceased had told lies.

Accused 4 also said he only saw the dead body of the deceased when he visited the shop on the material morning. He denied any part in the attack on the deceased.

The trial judge believed the evidence of P.W.2 Agnes; he found her truthful and reliable. He also found that all those who took part in the attack on the deceased and caused his death acted with a common intention. He found that the three appellants had attacked the deceased and caused his death and he found each of them

guilty of murder.

In our view, the issue at the appeal is that of identification. Like the trial judge, we accept the evidence of P.W.2 Agnes as truthful. She had had ample opportunities of identifying the three appellants since she knew them since childhood and she came in contact with them at the material night. Accused 2 beat her with a stick, so did Accused 4. She saw Accused 3 with an axe and saw him actually striking the deceased with it. She could not have been mistaken in her identification. She saw these three appellants at the house of the deceased and at the site of the shop where the deceased's body was taken. P.W.5 Anna corroborated her as far as Accused 3 and Accused 4 were concerned. P.W.5 saw and identified these two appellants when she answered the alarm on the material night. P.W.8 stated that he was threatened by Accused 3 that night or early morning. P.W.1 had testified that Accused 2 and Accused 4 had attempted to mislead him to make him believe that the deceased was arrested while stealing and killed in consequence.

We are satisfied that P.W.2 Agnes' identification of the three appellants, Accused 2, Accused 3 and Accused 4 was amply corroborated by other prosecution witnesses, who were, in our view honest and truthful. Like the trial judge, we believe that all the three appellants were principal offenders of the offence in terms of section 22 of the Penal Code or had acted with a common intention. They had killed or joined in killing the deceased, and they did so with malice aforethought.

We are satisfied that the three appellants were properly convicted and their appeals are dismissed.


DATED at DAR ES SALAAM this 11th day of August, 1981.

M. MUSTAFA
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

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


J. L. MWALUSANYA
SENIOR DEPUTY REGISTRAR

