

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 38 OF 1980

B E T W E E N

1.MGANGA MATONYA)
2.MYEYA MNYANJALA) APPELLANTS

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction and sentence
of the High Court of Tanzania at Dodoma)
(Chipeta, J.) dated the 10th day of May, 1980,

in

Criminal Sessions Case No. 7) of 1977

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The deceased was herding cattle when he was attacked by a gang. The deceased was found dead with cut wounds and a fractured skull and died of damaged brain tissues. His hands and legs were tied. 17 head of cattle were stolen.

A few days later several persons were trying to sell six head of cattle in a village. The Chairman of the village (P.W.9) who had had previous warning of the loss of cattle, met the persons who had wanted to sell the cattle. P.W.9 asked them about a permit for the cattle, and the persons, unable to produce any, ran off. However, three of them were chased and arrested. However they managed to break jail but four persons were eventually arrested. The four were duly charged with the murder of the deceased. Accused 1 and Accused 2, the present appellants, were convicted of murder and the other two, Accused 3 and Accused 4, were acquitted.

The six head of cattle were properly identified as among those stolen from the deceased. Accused 1 and Accused 2 were properly recognised as among those who had brought the cattle to P.W.9 for sale.

Accused 1 and Accused 2 were in possession of cattle recently stolen from the deceased who was killed during the theft.

Accused 1 made an extra-judicial statement which was admitted in court without objection. In it he stated inter alia:-

"We went to steal cattle ... My colleagues and I caught him and another companion drove off the cattle. ... the other two remained behind still holding the deceased ...".

In court he made an unsworn statement which in no way challenged the extra-judicial statement. The trial judge after a careful consideration, found that the extra-judicial statement was voluntary and he accepted it as true. The trial judge was satisfied that Accused 1 was a member of the gang which robbed the deceased of cattle, and killing the deceased in the process.

Accused 2 had also made an extra-judicial statement which was admitted without objection. In it he said inter alia:-

"... we caught up with a herd of cattle and we decided to steal them ... Madeje hit the herdsman with a stick ... We stole the cattle and went away. ... took 6 herd of cattle. ... We were arrested ... escaped at night. ...".

However, in court he made an unsworn statement in which he alleged that while in police custody he was beaten and tortured and he therefore admitted taking part in the cattle raid and theft. He called no evidence.

The trial judge was satisfied that Accused 2 was among the group which took part in the cattle theft in which the deceased was killed. He carefully considered the extra-judicial statement and the unsworn statement of Accused and treated the unsworn statement as a retraction of the confession in the extra-judicial statement. He referred to a number of authorities, including *Tuwamoi v. Uganda* (1967) E.A. 84 at 91, and analysed the contents of the extra-judicial statement. He came to the conclusion, in our view, rightly, that the extra-judicial statement could not but be true.

We think that the trial judge was right in accepting the extra-judicial statements of Accused 1 and Accused 2, as being made voluntarily and as true. These two statements were corroborated by Accused 1 and Accused 2 being found in possession of stolen cattle of the deceased a few days after they were stolen. Accused 1 and Accused² were clearly in a group which took part in a cattle raid during which the deceased was tied up, cut and killed. All those who took part in the transaction were equally guilty in terms of section 23 of the Penal Code. There was no evidence of dissociation by either Accused 1 or Accused 2 from the deed.

We can find no misdirection by the trial judge in law or on the facts and we are satisfied that the conviction of Accused 1 and Accused 2 of murder was sound.

We dismiss the appeals of Accused 1 and Accused 2.

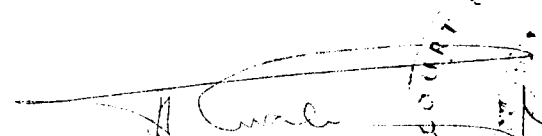
DATED at DAR ES SALAAM this 23rd day of July, 1981.

A. MUSTAFA
JUSTICE OF APPEAL

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

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


(J. L. MWALUSANYA)
SENIOR DEPUTY REGISTRAR