

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. 49 OF 1979

B E T W E E N

1. ZAVERI KANYIKA )
2. ELIUTER NZALI ) . . . . . APPELLANTS
3. COSMAS CHALAMILA)

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction and sentence  
of the High Court of Tanzania at Mbeya)  
(Samatta, J.) dated the 9th day of July, 1979,

in

Criminal Sessions Case No. 141 of 1977

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The deceased, a suspected thief of a sheep, was arrested and taken to the house of a village chairman at Isakalilo village in Iringa District. While in the custody of the village chairman he was beaten by a number of people and he died as a result. Five persons were arrested following the deceased's death, one of them died while in remand custody, and four were charged with murder in the High Court. Three were convicted of murder and one was convicted of common assault. The one convicted of common assault was sentenced to six months imprisonment. He has not appealed. All those convicted of murder have appealed against their conviction and sentence of death passed on them. The three appellants will be referred to as Accused 1, Accused 2 and Accused 3, as they were at the High Court.

Very briefly, the following facts emerged at the trial. On or about 28th April, 1977, at about 2.00 p.m. P.W.1 Shabani was called by Gashari who was Accused 4 at the trial and who was eventually convicted of common assault, to help Accused 4 tie up

the deceased who allegedly had stolen a sheep belonging to Zaveri, who was the 1st accused at the trial. Accused 4 and P.W.1 took the deceased to the house of the village chairman Eliuter, the second accused at the trial. The deceased's hands were then tied and Accused 4 then hit the deceased with a stick. The second accused at that stage was heard by P.W.1 to say that the deceased had to be taught a lesson. Then Cosmas, the third accused at the trial, turned up, and joined 4th accused in attacking the deceased. The deceased was denying that he had stolen any sheep. At about that time, on the intervention of P.W.1, the second accused ordered the third accused and fourth accused to stop their beating, and third accused and fourth accused obeyed the order. The deceased said that the thief was in fact Omari P.W.3, and Accused 2 then wrote a letter requiring that P.W.3 be brought to him. At about that time P.W.1 left for his home, and on the way he met Zaveri, the 1st accused at the trial going towards 2nd Accused's house.

According to P.W.2 George, a Ministry of Health employee, while on his way home in the village at about 3.00 p.m. he passed by second accused's house and heard noises coming from it. He went in to enquire and he saw third accused and fourth accused and the person who subsequently died in remand custody beating the deceased with sticks all over the body. The second accused was then composing a letter requiring the attendance of P.W.3. P.W.2 and third accused were sent by Accused 2 to deliver the letter to P.W.3's ten cell leader. P.W.2 and third accused left second accused's house with the letter and duly delivered it. When P.W.2 returned to the second accused's house after delivering the letter he found that the deceased was lying on the ground with a fresh wound on the head, and found that P.W.3 had already arrived there. The deceased was seen by P.W.2 to be in a bad condition.

P.W.3 stated that when he arrived at the second accused's house he found the deceased tied with a rubber band and leaning against a tree, presumably outside the house. He saw that the deceased had been beaten up with fresh wounds on his shoulders and back. Accused 1, Accused 2 and Accused 3 were there. P.W.3 denied that he had stolen and the deceased stated that he had only mentioned P.W.3's name in order to avoid punishment. P.W.3 saw first accused lifting the deceased and throwing him on the ground, and in the process the head of the deceased hit the ground. He said the third accused was torturing the deceased by inserting a three-inch nail in the deceased's navel and pricking his eye with a pin. P.W.3 himself was also beaten during that period. He heard the second accused say, when he and the deceased were being beaten, that both he and the deceased should be finished and killed, as they were thieves, and that he, that is, the second accused, was the Government. Later on he said the first accused tied the deceased with a rope and dragged him along the ground for a distance estimated at 27 paces to and fro. The deceased and P.W.3 stayed that night in a room at the second accused's house. The deceased was in a critical condition and died the following morning. P.W.3 himself was admitted into hospital where he stayed a few days.

P.W.4 William, a watchman at the National Milling Corporation, heard of the arrest of a thief, and at about 7.30 p.m. went to the second accused's house to enquire. He saw the deceased lying outside the second accused's house; he appeared to have been beaten. He also saw P.W.3 there, who also appeared to have been beaten. He saw first accused, second accused and third accused there. The second accused, when told by P.W.4 to send the two badly beaten men to hospital, said, "These two are thieves, their medicine is death". He saw the third accused dragging the deceased, corroborating the evidence of P.W.3 on this score. P.W.4 left for home and heard the following morning that the deceased had died.

P.W.6 Shabani identified the deceased's dead body and also stated that he examined the deceased and was of the view that his eyes had been pricked and that there was an injury near the navel.

According to P.W.7 Dr. Moshi, the cause of death of the deceased was cerebral haemorrhage and brain damage due to a fractured skull. The frontal bone was fractured. So was the right parietal bone. There was contusion on the right and left side of the head and bruises on the elbow arm and knee. He was of the opinion that the fractures could have been caused by the head being struck with a blunt instrument, like a stick, with great force, or by the deceased falling twice on strong ground, or by the head being banged against the ground with great force. He said he could have missed the small injury to the navel, but he did not see any injury to the eye. He thought that because the frontal part of the head was swollen, a lay man could have mistakenly thought that the eyes were damaged.

1st Accused gave an unsworn statement and denied that he beat the deceased. He did not see anybody else beating the deceased. When he arrived at the village chairman's house, that is, second accused's house, he found that the deceased had already been injured.

2nd Accused also made an unsworn statement. He said when the deceased and P.W.3 were at his house suspected of stealing a sheep, a group of people assaulted them. He failed to prevent the people from attacking the deceased. He could not say who had beaten up the deceased and P.W.3. He had brought in the deceased who was injured to his house, and kept him there during the night, and before he could take the deceased to the hospital, the deceased had died of his wounds. He denied he ever uttered words that the deceased should be beaten or punished and stated that P.W.1 was a liar as P.W.1 had a grudge against him.

The third accused also made an unsworn statement. He denied he ever assaulted the deceased, or pricked his eyes or drove a nail into his navel. In fact he attempted to rescue the deceased from those attacking him. The evidence implicating him was untrue.

None of the three appellants called witnesses in support.

The trial judge believed P.W.1 and P.W.4 to be truthful witnesses. As regards P.W.2, he was of the view that P.W.2 was not reliable. He thought that P.W.2 gave conflicting accounts as to the events which happened at the second accused's house, as for instance whether the deceased was tied when he arrived there or was being tied when he arrived. He would accept P.W.2's evidence where it was corroborated. He accepted P.W.3 as a truthful witness, but because he was a victim of beating, P.W.3's evidence would be viewed with great caution. P.W.3's sight was impaired by the beating and he was also under stress and pain.

The trial judge was of the view that death was caused solely by the 1st accused banging the deceased's head on the ground.

P.W.1 did not say that he saw the deceased being struck on the head, nor did P.W.3. However, P.W.2 did say that he saw accused 3 and accused 4 beating the deceased with sticks all over the body.

It is quite clear that the deceased was seen being beaten with sticks, and it was most probable that he was also struck on the head, even if no one had said that he had seen the head being struck. If blows by sticks were rained on him, and according to the evidence that was probably the case, it would be remarkable indeed if no blows fell on his head. It has not been suggested

that those raining blows on the deceased were deliberately keeping away from the deceased's head. The head fractures could have been caused by sticks, as they could have been caused by the head being banged on the ground. The trial judge apparently ruled out blows on the head by the sticks, and concluded that death was solely caused by the 1st accused banging the deceased's head on the ground. We think that was too narrow a finding

in view of the evidence adduced. We cannot say that the fractures could not have been caused by sticks, or partly by sticks and partly by the head banging.

Indeed according to P.W.2, when he called at the second accused's house, he saw third accused, fourth accused and the person who subsequently died in remand custody hitting the deceased with sticks. P.W.2 was sent to fetch P.W.3. On his return to the second accused's house he found P.W.3 already there. At that time there was no beating. He then saw the deceased lying on the ground with a fresh wound on the head. He did not mention that first accused was there. P.W.1 met first accused going towards second accused's house while P.W.1 was going home after having left second accused's house. It was very likely that there was a gap in time when the deceased was beaten, which caused the head wound, before the first accused arrived on the scene. That would further strengthen the proposition that the sticks could have caused or contributed to the head fractures.

In our view, the head fractures were caused during a period of time when the deceased was subjected to beating, by first accused, and third accused and the person who died in remand custody and possibly the fourth accused. The fractures were due to the cumulative effect of the beating, the head banging being one of the causes. If that were so the head banging need not necessarily be of great force to cause a fracture, if the skull had already been cracked by the sticks. The deceased was being attacked from the time he was arrested, at about 2.00 p.m. to about 8.00 p.m., by different persons, off and on. We think that all those persons who took part in the attack collectively caused the deceased's death. We are unable to say that any single act by any single individual caused the head fractures resulting in the deceased's death. In those circumstances it is not possible to say that any one attack was intended to cause death or grievous harm.

There did not appear to have been any intention to cause death by any attacker, otherwise the deceased would have died in the space of a very short time indeed. We are not satisfied that malice aforethought has been established against the first accused. His acts were part of a series of acts which cumulatively brought about the deceased's death; his acts by themselves could not necessarily cause death or grievous harm.

The trial judge came to the conclusion that the first accused caused the deceased's death by banging his head on the ground. He held that such banging was intended to cause at least grievous harm. He therefore held that malice aforethought was established against the first accused. The third accused was with the first accused and attacked the deceased when the first accused was banging the head of the deceased on the ground. The third accused therefore acted with a common intention with the first accused in causing the deceased's death. The second accused also was present with the first accused during the head banging operation, and by his conduct and words abetted the first accused. The trial judge therefore found the first accused, and the third accused guilty of murder, and the second accused also guilty by virtue of section 22 of the Penal Code.

We are however satisfied that the head banging operation was not necessarily the sole cause of death. We think that the first accused and the third accused, together with at least one other person, attacked the deceased, and as a result the deceased died. The attacks were unlawful. Both are guilty of manslaughter as we are not satisfied that malice aforethought has been established against them.

As regards the second accused, we are satisfied that he had uttered the words testified to by P.W.1, P.W.3 and P.W.4, words which approved of and encouraged the attacks on the deceased.

deceased. He is, in our view, also guilty of manslaughter in terms of section 22(c) of the Penal Code, in that he abetted first accused and third accused in their offence of unlawfully killing the deceased.

We allow the appeals of the three appellants, quash the convictions of murder against them and set aside the sentences of death passed, and substitute therefor a conviction of manslaughter against each of the three appellants - first accused Zavery, second accused Eliuter and third accused Cosmas. We sentence each of them to ten (10) years' imprisonment. Such sentences to date from the date of their conviction in the High Court.

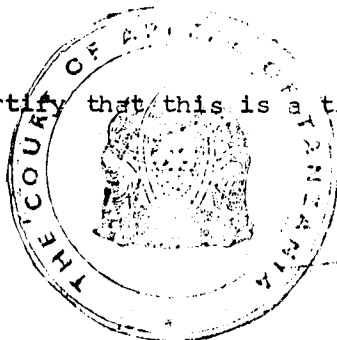
DATED at DAR ES SALAAM this 31st day of July, 1981.

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