AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 28 OF 1981

BETWEEN

1. PROTAS BITAKATAILE
2. YUSTO KATAMA . . . . . APPELLANTS

VERSUS

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Bukoba) (Kisanga, J.) dated the 19th day of February, 1980,

in

Criminal Sessions Case No. 110 of 1976

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

PROTAS BITAKATAILE and YUSTO KATAMA, the first and second appellants, respectively are appealing against their conviction for murder and sentence of death imposed by the High Court sitting at Bukoba. Mr. M. A. Lakha, learned Advocate, argued their appeal before us and Mr. E. S. Uronu, learned State Attorney represented the Republic.

The deceased, MATHIAS NJONGE, was at the material time working as a labourer in the first appellant's shamba at Ruhunga Village, Bukoba District. Sometime in the evening of 19th March, 1975 the first appellant received information that the deceased had stolen a bunch of bananas from his shamba and acting on this information he arrested the deceased and, assisted by other villagers including the second appellant, tied him up with ropes on the waist and hands. This done, the villagers proceeded to administer some beating to the deceased. Although there is conflicting evidence with regard to the extent and degree of the beating, it is clear from the finding of the learned trial judge that the beating administered to the deceased on 19th March, 1975 did not cause any serious hurt to him. On 20th March, 1975 it was decided by the villagers to take the suspected thief to the Katibu Kata who was residing near the Izimba Primary Court, a distance of ten miles from the village. Accordingly, after obtaining a letter from the Ruhunga village ten cell leader, a party of the

...../2.

villagers which included the two appellants, set out from the village to escort the deceased to the Katibu Kata. When the party left the village the deceased according to the finding of the trial court was in good health.

However, a number of witnesses who saw the deceased in the company of the two appellants at about 9.30 A.M. the same day testified that the deceased was in a very poor condition. He was lying down helpless and could not walk unassisted. The deceased died before he could get to Izimbya.

Evidence adduced at the trial could only establish inferentially that the first and the second appellants were involved in roughing up the deceased. But there was no clear evidence to establish how the injuries which caused death could have been inflicted by either or both of the appellants. The doctor in his testimony before the trial court deposed that on . .carrying out an autopsy on the deceased's body on 24th March 1975 he found three depressed fractures of the skull. Death according to him was due to head injuries which in his opinion could have been caused by a blunt weapon. He also opined that the injuries to the head could have been sustained by the deceased if he had been pushed against a hard mud wall. The two appellants denied assaulting the deceased or in any way causing the injuries which led to his death. The learned trial judge rejected the two appellants' defence and held that the two appellants were responsible for causing the death of the deceased. In dealing with the question whether the two appellants had the requisite malice aforethought for the offence of murder, the learned trial judge said:

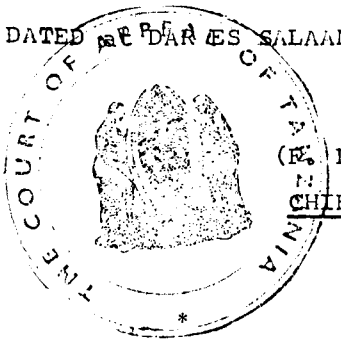
> "It is not known what instrument or instruments were used to inflict the fatal injuries. Indeed there is evidence that the accused persons were seen at different times carrying a panga and a stick, but it is immaterial whether they used these or other weapons to inflict the injuries on the deceased. Considering the nature and extent of the injuries sustained and the part of the body on which they were inflicted there can be no doubt in my mind that the accused persons at least intended to cause grievous bodily harm to the deceased....."

Mr. Lakha has submitted that the learned trial judge's finding that the two appellants had the necessary intent to kill the deceased or cause him grievous bodily harm was wrong.

...../3..

we think there is substance in this complaint. The evidence, as we understand it, shows clearly that the intention of the two appellants and that of their co-villagers was to take the deceased before the Katibu Kata who is a Justice of the Peace. If that were not their intention we cannot see why these villagers should have taken the trouble of taking the deceased ten miles away before killing him. It is, of course, plain on the evidence that the assault on the deceased by the two appellants and other villagers was unlawful and caused the death of the deceased but that in our considered view does not necessarily imply that they intended to kill him or cause him grievous bodily harm. We are accordingly satisfied that the appeal by the two appellants against their conviction for murder is well founded. We allow the appeal, quash their conviction for murder and set aside the sentence of death imposed on them and substitute therefor a conviction for manslaughter. As the appellants have been in custody since 1975 we sentence each appellant to such term of imprisonment as will result in the immediate release from prison of the appellants.

DATED at DAR ES SALAAM this..21st..day of..December...1982.

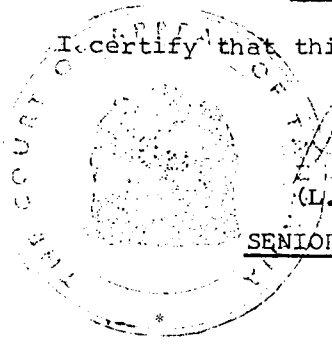


(F. L. NYALALI)
CHIEF JUSTICE

(A. MUSTAFA)
JUSTICE OF APPEAL

(Y. M. M. MWAKASENDO)
JUSTICE OF APPEAL

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



(L. A. A. KYANDO)
SENIOR DEPUTY REGISTRAR.