

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. 41 OF 1980

BETWEEN

MWALUSAMBO KAOPERA AND OTHERS.....APPELLANTS

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court
of Tanzania at Mbeya (B. A. Samatta, J.) dated
the 19th day of April, 1980,

in

Criminal Sessions No. 36 of 1978

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

ALOIS MJELWA, MICHAEL MKOMAZIWILI and MWALUSAMBO KAOPERA referred to at the trial as the first, second and third accused persons respectively, were jointly charged before the High Court at Mbeya with the murder of SEMBUKA MWAMPAMBA on the 17th day of May, 1977. The first accused was discharged upon the prosecution entering a nolle prosequi under Section 81 of the Criminal Procedure Code and the second accused was acquitted of murder but sentenced to nine months' imprisonment for common assault contrary to section 240 of the Penal Code. Thus only the third accused was convicted as charged and sentenced to death.

The brief facts of the case are as follows. On 12th May, 1977 Alois Mjelwa reported the theft of his clothes to the Chairman of Mlangali Village, one LAISI SHANDU, P.W.1. Maurice, one of the sons of the deceased was suspected to have been involved but a search for him in the village was unsuccessful. SHANDU, the Chairman, therefore, decided on 16th May, 1977 to arrest the suspect's father, the deceased. And the following day, 17th May, 1977, SHANDU directed one NGAYORA MWAVEZA, P.W.2 to escort the deceased, his wife and two sons to the police station at Vwawa. Alois Mjelwa also accompanied the group. On reaching MLOWO river the group was met by KAOPERA and MICHAEL who, on learning that the deceased was being escorted to the police station at Vwawa on suspicion of stealing Alois Mjelwa's clothes, set upon the deceased with sticks and an iron rod. The beating of the deceased which went on for two to three hours was on the evidence on record the cause of the deceased's death. The two sons of the deceased, WILLIAM SEMBUKA, P.W.3 and PIASON MWAMPAMBA, P.W.5, gave somewhat similar accounts of the beating of the deceased by the second

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WILLIAM'S account relating to the beating of the deceased is in

these words:

"The first accused had accompanied us right from the village Chairman's house. He had a stick. The third accused snatched the stick from him. The second accused had no weapon. He looked for a stick from the bush. He got one. The second and third accused persons then started beating the deceased and me with their sticks. The accused persons beat the deceased all over the body, including the head. The third accused also kicked the deceased on the back using his boots..."

PIASON'S account of the incident is as follows:

"When we had reached about eight paces from Mlowo river we met the second and third accused persons. They were standing. The third accused ordered us to stop. We stopped. The second accused untied us. The third accused ordered me to stand aside and then he said that my father and young brother would have to disclose where Maurice had hidden the stolen clothes. The third accused then told the deceased that he was the one supplying Maurice with medicine which he was using for stealing. The second accused was armed with a club. The third accused was armed with an iron rod. He had put on boots. The two accused i.e. the second and third accused, started beating the deceased. It was the third accused who started doing so and the second accused joined in the attack immediately. The third accused hit the deceased on the head and the second accused hit him on the ribs region. The two accused persons used their weapons to hit the deceased. The two accused persons hit the deceased many times. The third accused also kicked the deceased using his boots. The deceased was lying on the ground after having fallen down when he was being attacked. The deceased was attacked for about two hours..."

And then PIASON testified about the two accused persons' departure for their homes in these words:

"About seven paces from the river the second and third accused persons left our group and went away. The second accused said that he and the third accused would come to the Chairman's house on the following day".

From the medical evidence it is clear that the deceased SEMBUKA MWAPAMBA died from injuries inflicted on him by the two accused persons, MICHAEL and KAOPERA. The only issue of dispute at the trial was whether the two accused persons were guilty of murder, manslaughter or some other lesser offence. After the learned trial judge summed up the case to the assessors, the three assessors were unanimous in holding that the two accused persons had no intention to kill the deceased and therefore were not guilty of murder. The first assessor opined: "The two accused persons did not have the intention to kill the deceased. In my opinion the second accused is ^{guilty} of common assault. I say so because the second accused's intention was merely to teach the deceased a lesson so that he could feel some pain.

In my opinion the third accused is guilty of manslaughter. I say so because the accused person had no intention to kill and did not realise that he would cause the deceased's death.

The second assessor gave her view of the matter in these words: "The two accused persons had no common intention. Each was beating the deceased independently. The second accused used a small stick to beat the deceased. His intention was to teach the deceased a small lesson before the deceased was taken to the police station. The second accused had no intention to hurt the deceased..... In my opinion the second accused is only guilty of common assault.... The third accused is guilty of manslaughter".

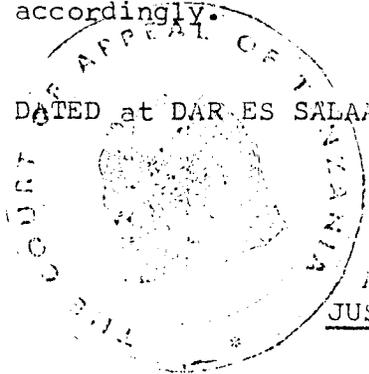
And the third assessor's opinion was that - "the two accused persons shared a common intention to assault the deceased. Their acts were unlawful. The accused had no justification to beat the deceased. Both the accused persons had the intention to do grievous harm to the deceased. They did not intent to kill him..... In my opinion the second accused is guilty of manslaughter. Similarly, in my opinion the third accused is guilty of manslaughter".

The learned trial judge in a careful and balanced judgment accepted the assessors' majority opinion on the second accused. However, as regards the third accused, the learned trial judge was of the opinion that the third accused was guilty as charged and accordingly convicted him of murder and sentenced him to death. Mr. Said El-Maamry, the learned Counsel for the appellant, ~~deceased~~ KAOPEKA, has complained about this finding. We think this complaint is well founded. The learned trial judge for the reasons not apparent on the record accepted the opinion of the third assessor that the two accused persons shared a common intention to do grievous harm to the deceased. We cannot see how on the evidence on record the two accused persons could be said to have been acting in concert or to use the judge's own words - to have shared a common intention to do grievous harm to the deceased. If both the second and the third accused had shared a common intention to do grievous harm, then the verdict of the trial judge was inconsistent, for in that event both the accused would have been guilty of the same offence. But here one was convicted of common assault and the other of murder.

On consideration of the evidence on record, particularly, the testimony by WILLIAM and PIASON, the two sons of the deceased, ~~was~~ are satisfied that there is no material on record to establish that

the two accused persons had or shared a common purpose or intent to do grievous harm to the deceased. In the event, we think each accused person was responsible for his own actions and the case of the third accused person should have ~~been so considered~~. Further, we are satisfied that if the learned trial judge had adopted this approach in considering the evidence against the third accused person he would have found that the third accused person had no intention to kill the deceased or cause him grievous harm and could therefore in the circumstances be only guilty of manslaughter. Mr. Uronu, the learned State Attorney agrees with this conclusion of the matter. We quash the conviction of the appellant for murder, set aside the sentence of death and substitute therefor a conviction for manslaughter contrary to section 195 of the Penal Code and sentence him to eight years imprisonment. We order accordingly.

DATED at DAR ES SALAAM this 1st day of August, 1983.

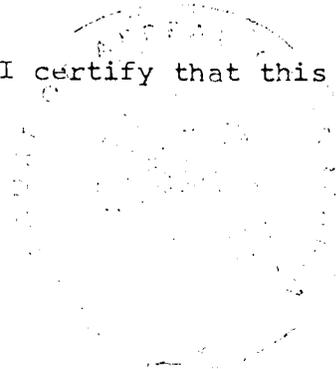


A. Mustafa
JUSTICE OF APPEAL

Y.M.M. Mwakasendo
JUSTICE OF APPEAL

L. M. Makame
JUSTICE OF APPEAL

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



L. A. A. Kyando
L. A. A. Kyando
SENIOR DEPUTY REGISTRAR