

IN THE COURT OF APPEAL OF TANZANIA

AT KIWANZA

CORAM: NYALALI, C.J., MAKAME, J.A., and KIROGGA, J.A.

CRIMINAL APPEAL NO. 21 OF 1986

- 1. PASCAL NTAKIJE )
- 2. HERMAN SHAGAGA ) .....APPELLANTS
- 3. KALENEC SHAGAGA )

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Kwanza) (KOROSSO, J.) dated the 19th day of March, 1986

in

Criminal sessions Case No. 123 of 1985

JUDGMENT OF THE COURT

MAKAME, J.A.:

These three appellants were each sentenced to suffer death, consequent upon their conviction for the murder of RADISLAUS or RADISTANISLAUS NTAKIJE, a half brother of the first appellant PASCAL NTAKIJE. Before us they are appealing against that decision by Korosso, J. and they are represented by Mr. Katabalwa, learned counsel. Mr. Ndolezi, learned Senior State Attorney, supported the convictions on behalf of the Respondent Republic.

On Christmas Day 1985 the deceased was at his home at Kumlambo Village in Ngara District. He was drinking beer and with him were, among others, his two wives, P.W.3 GRACE and P.W.4 NATHALIA, as well as his two daughters, P.W.5 GENEROSA and another, MARIA, who did not testify.

According to the evidence of P.W.3, while they were thus drinking there arrived at their homestead the three appellants who asked for some beer. One of them, the third appellant, asked the deceased to go outside. The deceased did, whereupon the three appellants set upon him and assaulted him with fists and sticks. The assault was fairly prolonged and at one stage

the second accused stabbed the girl Maria near the right eye, and P.W.3 too was assaulted. P.W.3 prevaricated somewhat: At first she said she actually also saw the same second accused stabbing the deceased, but in answer to the second assessor, she owned that she had not seen the stabbing. At that stage they were already hiding themselves and she only thought it must be the second accused who stabbed the deceased as the second accused was carrying a knife.

P.W.4's testimony is much in the same vein as P.W.3's and she adds that she was herself hit with a stick by the third appellant: The second accused stabbed Maria, but when the Deceased was stabbed she and the others were already hiding themselves, so she did not actually see the deceased being stabbed.

Generoza's evidence was basically similar, except she said that at that time the sun was sinking, unlike the other two who put the time at around 3 p.m.

In defence all the three appellants denied the charge and each furnished the trial court with an alibi - a similar of albeit being in the company of the other two, but also in that of other people - including witnesses who came to give evidence - carousing and drinking with them from one place to another as it was Christmas Day. D.W.1 FELIXCH NTAKIJE, a half brother of both the deceased and the first appellant, said that he and other people were with the appellants up to 5 p.m. D.W.2 DOMINIC NTAKIJE, the first appellant's full brother testified to being with the appellants up to 7.30 p.m. after D.W.1 had left them at 5 p.m. D.W.3 SILVESTER FELIMCH, a nephew of the deceased, told the court that he was in the company of the appellants "until evening time".

The learned trial judge was satisfied that the appellant's guilt had been established. Neither assessor was so impressed.

Mr. Katabalwa complained that the alibis could have raised doubt as to the appellant's guilt. He also submitted that there were some curious features in the prosecution case. The ladies do not seem to have made an immediate report to anyone; it was incredible that they could have hidden in a banana grove, a mere fifty paces from the scene, throughout the night, without feeling reassured after seeing relatives and neighbours converging upon the scene. Learned Counsel also found it mysterious as to who moved the dead body before people arrived at the deceased's homestead. Mr. Katabalwa also complained, though without much articulation, that the learned trial judge relied on the testimony of P.W.7 THOMAS NTAKIJE who was a hostile witness. Lastly Mr. Katabalwa asked the court to consider that the appellants had been drinking so that, if they did kill the deceased, there was no indication that they did so with malice aforethought.

We have closely looked at the evidence to see if Mr. Katabalwa's complaints are justified. Regarding the old man P.W.7, whose evidence the learned trial judge relied on as buttressing that of P.W.3, P.W.4 and P.W.5 about the appellants being at the scene, and as confirming the alleged assault on the deceased, at least by the third appellant, we have our reservations. True P.W.7 was not properly handled by the prosecuting attorney as well as by the learned trial judge, but in the end he really ought to have been treated as a hostile witness. The learned trial judge did not make a specific ruling on the prosecution to treat the witness as hostile, but the answers the witness gave in examination in chief just before the application and the fact that the court admitted his statement to the police left one in no doubt that the witness was hostile. The effect of this should have been to ignore all that the witness said in court and in Exhibit P2, as being completely worthless.

Without P.W.7's evidence we are thus left with only the evidence of three ladies, posed against a solid alibi. Along with that we have to look at the witnesses' failure to disclose to people, until the following morning, who the deceased's assailants were, and the not-so-convincing reason given for the appellants not being taken to task and arrested if they were indeed implicated at the scene the following day. We would hesitate to go as far as the second gentlemen assessor went, that the deceased's own family might be involved in the killing, but we share the assessors' fears that the appellants' guilt was not established beyond reasonable doubt. There are features which make one feel that not the whole truth really came out. For example, the mystery remains why the one apparently independent witness, P.W.6, says P.W.5 told him that they had spent the night at the house of one JOSEPH 'quite a distance from the deceased' and not in the banana plantation close by, as asserted by P.W.3, P.W.4 and P.W.5.

We are unable to uphold the convictions. We thus allow the appeal, quash the convictions, and set aside the sentences. If the appellants are not otherwise lawfully in custody they should forthwith be released.

DATED at KUMBA this 29th day of November, 1986.

F. L. KHALALI  
CHIEF JUSTICE

L. M. KHALABI  
JUDGE OF APPEAL

R. H. KHALABI  
JUDGE OF APPEAL



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

*J. H. McCord*  
J. H. MCCORD  
DEPUTY REGISTRAR