

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 23 OF 1986

KATESIGWA MUCHAGULA.....?APPELLANT

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Mwanza) (Mwalusanya, J.)
dated the 26th day of March, 1986

in

Criminal Sessions Case No. 300 of 1984

JUDGEMENT OF THE COURT

NYALALI, C.J.:

The appellant KATESIGWA MUCHAGULA was charged and convicted in the High Court at Bukoba with the offence of murder contrary to section 196 of the Penal Code and was sentenced to suffer death by hanging. He was aggrieved by the conviction and sentence and hence this appeal to this court. Mr. Rugarabamu, learned advocate, represented the appellant in this appeal, whereas Mr. Ndolezi, learned state attorney, appeared for the respondent Republic.

From the proceedings in the High Court and this court it is apparent that most of the facts relevant to the case are not only undisputed, but are common ground between the prosecution and the defence. It is common ground that during the morning of the 26th June, 1983, the appellant stabbed to death one Cornel s/o Mugaga at the home of one Athanas s/o Banyanga, in Kibale village, Karagwe district. Prior to the fatal stabbing, the appellant and the deceased were among many villagers who had gathered at the home of a fellow villager, that is, the said Athanas s/o Banyanga in connection with the funeral of the latter's child. During the night previous to the fatal incident,

the appellant had been preparing a fire when a spark flew and scorched the deceased on one of his feet. The deceased reacted by abusing the appellant whose apologies were not accepted by the deceased. Instead the deceased threatened to teach the appellant a lesson at an unspecified time. Later during that night, the deceased, who was a reputed thief, was seen to leave the funeral gathering several times before he finally settled down to sleep with his fellow villagers. Later in the morning that day, the dwelling house of the appellant was found to have been burgled and many articles of property belonging to the appellant were stolen therefrom.

The deceased was the primary suspect of the assembled villagers including the appellant. Upon interrogation by his fellow villagers, the deceased denied committing the burglary and theft. Upon being asked to allow the villagers to search his house, appellant arrogantly refused and made it known that he would allow such a search to be made only in the presence of a policeman and the village chairman. Upon hearing such refusal, the appellant went to fetch a knife from his house and came back to stab the deceased with the knife and deceased died on the spot. Subsequent to the death of the deceased, the villagers searched the deceased's house and discovered therein some articles stolen from the appellant's burgled house.

There is only one matter that is in dispute in this case, and that is whether the appellant had malice aforethought in killing the deceased. The Prosecution's contention both at the trial and in this appeal is that the appellant had the necessary intent to kill or cause grievous bodily harm. On the other hand the Defence contends that there was legal provocation under which the appellant acted in killing the deceased.

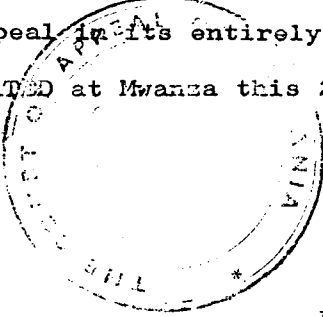
The first issue therefore for consideration and decision is whether there was legal provocation. The learned trial judge - and the assessors who assisted him considered the issue. In their unanimous advice, the three assessors were of the opinion that there was legal provocation arising from the theft of the appellant's property. They consequently advised the trial judge to acquit the appellant on the charge of murder and convict the appellant of the lesser offence of manslaughter. The learned trial judge however disagreed with the assessors mainly because he was of the view that in law theft was a wrong committed against property and on the authority of the case of Yusufu alias Hema s/o Lesso (1952) 19 EACA 249 and the case of R v. Anyambilile (1970) HCD No. 285, such wrong on property would not give rise to legal provocation.

We need not express any opinion on whether theft is covered by the authorities relied upon by the learned trial judge because we are satisfied that the learned trial judge and the assessors misdirected themselves on whether the appellant acted under provocation arising from theft of his property. It is clear that at the time the appellant stabbed the deceased, there was only a strong suspicion of theft against the deceased - a suspicion which the appellant and his fellow villagers wished to confirm or dispel by searching the deceased's home. Undoubtedly, the subsequent search confirmed the suspicion by discovery of appellant's stolen property in the house of the deceased, but that subsequent discovery does not change the position that at the time of the fatal stabbing, it was not yet established to the villagers including the appellant that the deceased was the thief. In other words there was no wrongful act known to the appellant upon which legal provocation could be based. There was only a strong suspicion of theft. We are of the considered opinion that mere suspicion of a wrong however strong, cannot be a basis for legal provocation.

It would seem in the present case that the appellant decided to stab the deceased for his refusal to allow him and the villagers to search his house. But as the learned trial judge correctly held, the deceased was entitled to refuse to be searched, since the villagers had no legal right or authority to conduct the search against his will. The appellant cannot therefore claim legal provocation even on the basis of such refusal as a defence to the charge facing him.

Since we can find no other legal defence available to the appellant, and since the nature of the weapon and injury inflicted by the appellant lead to no other inference but that the appellant intended to kill or cause grievous bodily harm upon the deceased, we are satisfied that the appellant had malice aforethought in killing the deceased. For different reasons therefore we are satisfied, like the trial judge, that the appellant is guilty of the offence charged and we hereby dismiss the appeal in its entirety.

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



F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

af
J. H. KCOFFE
DEPUTY REGISTRAR