IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 38 of 1986

DAVID CHACHA MATAYO.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mwanza)(MUNYERA, J.) dated the 15th day of May, 1986

in

Criminal Sessions Case No. 153 of 1984

JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant David Chacha Matayo was charged and convicted in the High Court at Mwanza for 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. In this appeal, the appellant was represented by Mr. Kahangwa, learned advocate, whereas the respondent/Republic was represented by Mr. Teendwa, learned State Attorney.

From the proceedings in this Court and in the High Court, the following primary and secondary facts are not in dispute between the prosecution and the defence: That on the 12th March, 1983, one Lameck s/o Mwita was attacked near a road in Wegita Village in Tarime District when he and one Marwa Mandiga, that is the fourth prosecution witness (P.W.4) went to rescue two women from being raped by two men. These women were Robi Magabe, that is the first prosecution witness (P.W.1) and Maria Marando, that is the second prosecution witness (P.W.2). The said Lameck Mwita died at the scene where he was attacked. A hue and cry

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was raised and many people, including the third prosecution witness (P.W.3), who was the Village Chairman, responded to the hue and cry and came to the scene. Later the police, acting on information, visited the scene and took the dead body of the deceased to the Government Hospital where a postmortem examination was performed. Subsequently, the appellant was apprehended by the police near the Kenya/Tanzania bordar about two days after the incident. It is common ground that when the appellant was arrested and interrogated by the police he admitted killing the deceased.

From the same proceedings, it appears that the following primary and secondary facts are in dispute between the prosecution and the defence. The prosecution contends that the appellant was one of the two men who attempted to rape P.W.1 and P.W.2 and was involved in fatally attacking the deceased. It is part of the prosecution case that when the hue and cry was raised the appellant and his companion managed to escape. Finally, it is the prosecution case that the deceased died as a result of the appellant's attack which was perpetrated with malice aforethought and without justification.

On the other hand, the defence case is an alibi to the effect that the appellant spent the material day and night at his home, and did not go to the scene of crime. Furthermore, it is part of the defence case that the appellant was arrested when he was on an innocent journey to the border area and was threatened to be shot by the police and so had to admit killing the deceased in order to save his life.

The main point for consideration and decision in this case is whether the appellant was involved in attacking the deceased. The learned trial judge considered this point at length and took into account the evidence of P.W.1, P.W.2, P.W.3 and P.W.4 (who was one of the persons who assisted the deceased in rescuing

the two women from the would-be rapists). He correctly noticed material contradictions between the testimony given by P.W.1 and P.W.2 in court and the statements these two women made to the police after the death of the deceased. In their evidence in court, P.W.1 and P.W.2 claimed to have recognised the appellant and his companion as the assailants, but in their statements to the police these two women stated, in effect, that they did not recognise the assailants.

The learned trial judge dealt with these material contradictions and stated in a part of his judgement as follows:

> "I stop here and return to the evidence of the two women. I am of the view that the evidence of the chairman (P.W.3) leaves me with no doubts the women (P.W.1 and P.W.2) told the truth. They said they raised alarm and people came and found them still at the scene, this fact has been confirmed by the chairman. They said they told the people the killer was the accused (and his friend), again this has been confirmed by the chairman and Chacha Nyamhanga (P.W.5), because if the women did not name the accused the chairman could not have sent six youngmen to manhunt him. I join my assessors in finding the women truthful witnesses and ignore whatever the police had written in the statements.".

We do not think that the learned trial judge took the proper approach by ignoring the statements made by P.W.1 and P.W.2 to the police. He was bound to look for an explanation for the apparent contradictions and, if no explanation could be found the learned Judge was bound to treat the evidence of P.W.1 and P.W.2 with caution. We have considered the evidence of P.W.3 and P.W.4 to see whether it lends credence to the testimony of P.W.1 and P.W.2. P.W.3, that is the Village Chairman, testified to the effect that when he and others arrived at the scene in response to the hue and cry, he was informed by P.W.1 and P.W.2 that one Chacha Matayo, that is the appellant, and one Magwe Makorere had killed the deceased. We fail to reconcil the evidence of P.W.3 with the statements made by P.W.1 and P.W.2 to the police. If P.W.1 and P.W.2 really mentioned the appellant and his colleagues,

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why were they unable to mention them in their statements to the police? We cannot find the answer!

With regard to the evidence of P.W.4, that is the gentleman who assisted the deceased in rescuing the two women, it suggests that P.W.4, P.W.1 and P.W.2 did not actually see the deceased being attacked. The evidence is to the effect that after successfully rescuing the women, P.W.4 escorted the women away to safety and while so doing he heard the deceased cry out "Nimechomwa kisu". But under cross-examination, P.W.4 gave a different version as to what he heard. He stated that the deceased cried out: "Kimbia nimepigwa bunduki", it is doubtful if P.W.4 heard the deceased cry out.

We have further considered the admission made by the appellant when he was arrested by the police. In order to make use of this admission, we have to be satisfied that the admission, which, in fact amounts to a confession, was made to a police officer of or above the rank of Corporal in accordance with the provisions of section 27 of the Evidence Act, 1967, read together with the definition of 'policeman' contained in section 3 of the same Act. We can find no evidence to determine the rank of the police officer in the presence of whom the appellant made his confession. In any case, the appellant retracted his confession, and we do not think that his confession, even if admissible, can be used to lend credence to the testimony of P.W.1 and P.W.2, since it also needs corroborative or supportive evidence. Thus the doubtful evidence of P.W.1 and P.W.2 stands alone without supporting credible evidence. In our view, it would be unsafe to base a conviction of the appellant upon such evidence. It follows therefore that we are bound to allow the appeal. But before we do so, there is one matter which requires to be mentioned.

According to the evidence of P.W.1, P.W.2 and P.W.4, there was another person by the name of Magwe Makorere, a teach by profession, who was involved in attempting to rape the two women and finally in killing the deceased. On the evidence he would appear to have administered the fatal blow by cutting the deceased with a panga on the neck. The proceedings show that this person was initially and jointly charged with the appellant but subsequently, on the 27th July, 1984, a nolle prosequi was entered in his favour and he was released as a consequence.

Although we do not question the absolute right of the Director of Public Prosecutions to control prosecutions by way of nolle prosequi, the primary function of this Court to uphold and promote the Rule of law and maintain high standards of the administration of justice in this country, requires us to express our opinion on the matter. The manner in which prosecution was terminated in favour of the teacher Magwe Makorere, and continued against the peasant, who is the appellant in this case, tends to cloud the administration of justice in uncertainty and suspicion. It is a cardinal principle of the administration of justice that justice must not only be done, but must be seen to be done. It is our considered opinion that the action taken on behalf of the DPP is prejudicial to this cardinal principle.

We now return to the decision we have to make in this case. For reasons that we have already stated, we now allow the appeal, quash the conviction, set aside the sentence and direct that the appellant be released from jail forthwith unless detained therein for other lawful cause.

DATED at MWANZA this 2nd day of December, 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

THE COURT OF APPEAL OF TANZANIA

J. H. MSOFFE
DEPUTY REGISTRAR