IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Makame, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 42 OF 1986

B E T W E E N

MARAMBE s/o NYAMUTABILA . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Mwanza)
(Munyera, J.)
dated the 29th day of May, 1986
in
Criminal Sessions Case No. 341 of 1985

JUDGMENT OF THE COURT

MAKAME, J.A.:

The High Court sitting at Musoma, Munyera, J., found the appellant MARAMBE NYAMUTABILA guilty of murder on two counts and accordingly condemned him to suffer death. He was found to have murdered two persons, a woman called BADI BULAYI and a man called SHIWA KIDANHO. Mr. Rutakolezibwa, learned counsel, has advocated for him before us, whereas Mr. Ndolezi, learned Senior State Attorney, appeared for the respondent Republic.

At his trial the appellant denied that he and the deceased woman were friends at all. However, the trial court found, and that is our view also, that the appellant and the deceased woman were lovers. Mr. Rutakolezibwa has conceded as much. . . . .

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The second deceased arrived at Butuguri Village in Musoma District, on the fateful day. According to P.W.1 SUZANA SUMBUKA, the deceased Bayi's daughter, the male deceased was the female deceased's grandson. We have our own doubts about the alleged relationship, but that is besides the point. Be it as it may, Kidanho found his way to Bayi's house and some time later that day the two went out for a drink. The following day P.W.1 found their dead bodies in a pool of blood in Bayi's house. They had obviously been killed most violently and P.W.1 found her younger brother, P.W.2 BULAYI MUKARA, still cowering inside the house. He told her that the appellant had come the previous night and killed their mother and the male visitor.

Following what appears to be a voir dire during the trial, P.W.2 gave evidence without taking the oath. He was said to be fourteen years during the trial and as the murders had been committed some four years earlier P.W.2 must have been only ten at the material time. He gave a detailed account of how the appellant, a man who used to come and sleep in their house, came during the material night, cut the rope securing the door, entered, and, without saying anything, assaulted P.W.2's mother and the male visitor who were drunk and sleeping on one bed. If the boy's story is rightly accepted and believed, the alleged murders would certainly have been proved.

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Mr. Rutakolezibwa has submitted that visibility in the room must have been poor and that the single eye-witness did not have good opportunity to see what was going on and who the assailant really was. He also pointed out that the boy had made a statement to the Police in which he said he saw the happenings with the aid of a fire light whereas in court he said it was a koroboi lamp which illuminated the room.

As remarked earlier on, the appellant denied being friends with the deceased woman. The appellant also put up an alibi - that during the material night he was at home in bed with his senior wife. He called his son D.W.2 WILLIAM MARAMBE to support his alibi, but D.W.2's testimony did not succeed in doing this.

There was some evidence by P.W.3 MASHALA JUMA, Suzana's husband, that when he passed by his mother-in-law's house at about 8 that evening, he found the appellant and Bayi quarrelling. The appellant was objecting to the presence of the visitor whom he suspected to be Bayi's paramour. The appellant demanded from Bayi, and was given by her, his bottle of pombe before going away.

Both assessors who sat at the trial expressed the opinion that the boy P.W.2 told the truth that he saw the killings and the learned trial judge also relied on that evidence, chiefly, to find the appelant guilty.

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We appreciate that P.W.3's evidence goes to establish that the appellant was at Bayi's place that evening and that there was some quarrel between them. The appellant was angry and he took away his liquour. It can be argued with convincing force that that could be taken to indicate that the appellant felt he was through with Bayi and would not wish to go back to her. Or it could equally be taken to suggest that because of the quarrel the appellant would have had a motive to go back to the house and kill the deceased. So it could be argued either way really, and cannot be conclusive one way or the other.

P.W.2's evidence is the pivotal testimony really. We have experienced some difficulty over it. The learned trial judge dismissed the alleged discrepancy between what P.W.2 told the court regarding the source of light that enabled him to see the assault, and what he was alleged to have said in his police statement about the matter - whether it was a koroboi or a fire. The learned trial judge resolved the conflict by asserting not only that the contradiction did not matter but also that "there is no guarantee that the policeman did not misquote the boy". We find this cavalier approach rather disconcerting: If there was indeed such a conflict the way to resolve it should have been more judicial. If the approach is merely to say there was no 'guarantee' that the Police did not misquote the boy, what guarantee is there that the Police misquoted the boy?

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We are happily saved the task of having to resolve this one because, on the record, the alleged statement was not produced and the witness never admitted that he told the Police about a fire. He was merely asked the question by learned counsel, Mr. Sandhu, in cross-examination, and he denied. There is another reference of a fire by Mr. Sandhu in his final address to the trial court but no concession about it by Mr. Malamsha, learned State Attorney. We are therefore at a loss as to where from the learned trial judge got this bit about a fire. Not in the evidence on record!

Going by the record, we therefore find in favour of the Republic, that P.W.2 did not contradict himself on the issue of the source of light - it was merely a koroboi. Having said that, however, our problem is that the boy said "When he started slaughtering the two deceased the koroboi went out". If that was so, and we must assume it was, it is difficult to visualize how the boy could have seen the progress of the assault as detailed by him. The details consisted of the cutting of the visitor with a knife, the striking of Bayi with a club on the head, cutting her neck, the appellant going out and coming back again and stabbing the guest some more. It is difficult to conceive this if the light went off at the beginning of the assault as the boy said. Then there was also the fact that "During all these happenings I was hiding myself under the bed", whereas the two victims

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were on the bed above him. The intrusion and savage attack at night must have been a traumatic experience for the boy and we cannot confidently say that from where he was, under the bed, the witness had an ideal opportunity to see what he said he saw. He was so afraid that even when his sister arrived at the house the following morning the poor boy was still "in my hiding".

We find that Mr. Rutakolezibwa's complaints have merit. We cannot feel certain that P.W.2's identification of the appellant as the assailant was watertight. Our doubt is further deepened by the fact that the injuries on the deceased persons, as reported by the ~~w~~ doctor who performed the autopsies, do not correspond with the ones one would have expected to be found if the boy had really told the truth.

Our view is that the appellant's guilt was not established beyond reasonable doubt and so we allow the appeal. We accordingly quash the conviction and set aside the sentence of death. If the appellant is not otherwise lawfully held he should forthwith be released.

We wish to make two remarks before we finish: First, the learned trial judge should have considered the appellant's alibi, even if only to reject it. Learned Defence Counsel quite justly complained that the learned trial judge did not touch on the alibi at all, not even in his summing up to the assessors. Secondly, we are anxious that trial courts should confine themselves to the evidence on record when recapitulating it. In the present case, P.W.3's evidence

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was that the appellant asked for and, was given, his bottle of pombe. The learned trial judge asserted that the appellant asked for his bottle of moshi. We think the two words do not mean the same thing.

DATED at MWANZA this 1st day of December, 1986.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

F. H. KISANGA
JUSTICE OF APPEAL

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

(J. H. MSOFFE)
DEPUTY REGISTRAR