IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KISANGA, J.A., MNZAVAS, J.A., And MFALILA, J.A.)

CRIMINAL APPEAL NO. 99 OF 1994

BETWEEN

MOSES MUNGASIANI LAIZER @ CHICHI. . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Arusha)

(Mushi, J.)

dated the 4th day of September, 1992

in

Criminal Sessions Case No. 16 of 1991

JUDGEMENT OF THE COURT

MNZAVAS, J.A.:

The appellant, Moses Mungasiani Laizer @ Chichi, was charged with and convicted of murder c/s 196 of the Penal Code and sentenced to death. Dissatisfied with the decision of the High Court he has come to this Court.

Mr. Mwale, learned advocate, appeared for the appellant while Mr. Mwaimu, learned State Attorney advocated for the Republic.

Mr. Mwale essentially argued that on the evidence before the High Court the learned trial judge should have convicted the appellant not of murder but of the lesser offence of manslaughter c/s 195 of the Penal Code as, it was submitted, there was a fight between the deceased and the appellant before the latter fatally attacked the former. The learned State Attorney on the other hand supported the conviction for murder arguing that the appellant had ambushed the deceased, PW.1 and PW.2 in an attempt to commit the offence of robbery.

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In this case the conviction of the appellant for the murder of the deceased stands or falls on the evidence of PW.1 and PW.2.

According to the evidence of PW.1 on 28/7/91 he at about 9 p.m., was in the company of the deceased and one, Florida Ndosi (PW.2) at Kivulini bar quenching their thirst. They remained there for a while and left to Tanta bar. As they were on their way to Tanta bar the deceased and himself were assaulted by two people whom they identified as Chichi, the appellant, and one, Simon Alfayo. When they asked their assaillants why they were attacking them the assaillants attacked them all the more and the appellant took a knife from inside the pocket of his jacket. At this juncture the witness told the trial Court that he ran away to enlist assistance from his watchman, (PW.3) - And added "I left the accused fighting with the deceased while holding a knife.

PW.2's testimony was to the effect that after Kivulini bar they left to PW.1's place of work and that as they were going two young men came from the side of the path and slapped the deceased on the shoulder. The deceased asked the young men why they assaulted him and a reply came from one of them - "Tunataka kukunyang'anya pesa".

The appellant said in his defence given on oath that he was also at Kivulini bar on the material evening drinking. From Kivulini bar he went to "Baa ya John Lema" where he drank beer. From there he proceeded to a hotel of Mama Elizer. Thereafter he went home accompanied by one, Simon Alfayo. On the way they met three people, two gentlemen and a lady walking at close-range; the lady being in the middle. He recognized one of the men as Elibariki, (PW.1). According to his defence he greeted them in a perfectly proper manner - "Jamani habari ya saa hizi" but they did not reply. He all the same touched the lady's shoulder and said to her - "Naona leo uko na akina Niko". PW.1 is said to

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have replied - "Kwani unamfahamu huyu mwanamke", jumped on the appellant and held him by his shirt and at the same time the deceased hit him with his fist and fell him on the ground and held him by the neck. According to his defence it was when he was being held on the ground that he pulled his knife and stabbed the deceased in self-defence.

In finding the appellant guilty of the offence of murder the learned judge said inter alia:

> ---"In other words the accused cannot be heard to say that he was overpowered and therefore justified to stab the deceased so as to reduce the act of killing to that of manslaughter as found by the assessors in their opinions. It will be an extremely bad precedent to allow someone to deliberately and with unknown motive to attack another person and in the course of the ensuing struggle the attacker should be heard to say that he has been overpowered and thus entitled to kill the other person."

In this case both the evidence of the prosecution and the defence case is ad idem that the appellant, PW.1 and the deceased were drinking at Kivulini bar. It is also clearly brought out from the prosecution case and the defence that the deceased and the appellant fought on the material night. As for the learned State Attorney's submission that the appellant ambushed the deceased and his companions and that he committed the offence of murder as he was attempting to commit the offence of robbery we are far from being persuaded by this argument. If the appellant had in fact decided to commit robbery he could not have been so naive as to say to his victim - "Tunataka kukunyang'anya pesa"

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bearing in mind that the appellant, the deceased and PW.1 were fellow villagers. That he would have decided to expose himself in such manner is, to say the least beyond our comprehension. If he in fact said so it was, in our view, more of a drunken froth than an intent of malice.

Coming back to the question of the appellant and the deceased having fought it was, in our view, a misdirection on the part of the learned trial judge when he said:

> "Even if I was to find that the deceased's death was caused under the circumstances described by the accused, I would still hold that the death of the deceased was murder. This is because the accused having been the one who started the fight he cannot turn round and say that he was acting in self-defence."

This was a misdirection because if appellant's version was accepted the defence of self-defence would have been available to him.

It has been said times without number, and we would like to reiterate that where death is caused as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder. See the decision in R v JOHN WIMAANA (1968) HCD 49. May be it is not irrelevant to mention if only in passing the defence case that the lady, (PW.2), in some ways sparked the fight between the deceased and the appellant. This defence was apparently not adverted to by the learned judge in his judgement. After our close review of the evidence tendered before the High Court we are satisfied that the question of appellant's guilt regarding the charge of murder "is so complicated and uncertain that the Court of first instance ought to have felt some doubt about it" - R v RAMZAN AHMED JAMAL - (1955) 22 EACA 504. On the evidence we are not surprised that the assessors were

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unanimous that the appellant was only guilty of the lesser offence of manslaughter c/s 195 of the Penal Code.

In the event the conviction for murder is hereby quashed and the sentence of death is set aside. In substitution therefor the appellant is convicted of the lesser offence of manslaughter c/s 195 of the Penal Code.

As for the sentence to be imposed the appellant used a knife in killing the deceased. The use of a knife in a fight is always a telling factor against an accused person. The appellant is sentenced to 10 years imprisonment.

DATED at ARUSHA this 28th day of November, 1994.

R.H. KISANGA
JUSTICE OF APPEAL

N.S. MNZAVAS
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

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

(E.J. NYAMASAGARA)
DEPUTY REGISTRAR