IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., [illegible] J.A., and LUBUVA, J.A.)

CRIMINAL APPEAL NO. 67 OF 1994

BETWEEN

DAUDI SABAYA. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the decision of the
High Court of Tanzania at D'Salaam)

(Mackanja, J.)

dated the 28th day of February, 1994

in

Criminal Sessions Case No. 29 of 1990

JUDGMENT OF THE COURT

LUBUVA, J.A.:

The High Court of Tanzania sitting in Dar es Salaam (Mackanja, J.) convicted the appellant of the offence of murder contrary to section 196 of the Penal Code. He was sentenced to death. From the conviction and sentence, he has appealed to this Court.

As established from the evidence on record, the facts of the case are simple. They may be summarised as follows: The appellant and the deceased lived at Goba, Kinondoni District within the outskirts of Dar es Salaam. The appellant was engaged to guard the farm of one Michael Mushi in which pine apples were grown. On 27.11.1988 at about 8 p.m. before retiring to bed, the appellant went around the farm to inspect and ensure that the security position was in order. In the course of his rounds in the farm, the appellant saw the shadow of a moving object. On approaching the object, it

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downed on the appellant that it was a man who was then running away. The appellant persued the fleeing person shouting "thief! thief". The fleeing thief who is the deceased in this case stopped and then advanced towards the appellant holding a knife in his hand. The appellant hit the deceased with a stick which was wrested from him (appellant) by the deceased. As the deceased still persisted in advancing towards the appellant, fearing for his life, the appellant slashed the deceased with a panga. The deceased sustained serious multiple deep injuries over the shoulders and the back. While on the way to the hospital the deceased died. The appellant was arrested and charged with the offence of murder.

At the trial it was not in dispute that the appellant caused the death of the deceased. The issue was whether the appellant caused the death of the deceased with malice aforethought. It was the appellant's defence that he killed the deceased who was found at the farm stealing. The learned trial judge held that the appellant used excessive force in inflicting several serious cut wounds on the deceased. The appellant was thus convicted of murder.

In this appeal, Miss Mjasiri, learned counsel from the Tanzania Legal Corporation advocated for the appellant and Miss Chinguwile, learned State Attorney appeared for the Respondent, Republic. The memorandum of appeal filed contains three grounds of appeal which in effect boil down to one point of complaint. That is, that the learned trial judge erred in rejecting the appellant's defence of self defence. Arguing on this point Miss Mjasiri, with distinct eloquence addressed us at length on the fact that in the circumstances of the case, the prosecution had failed to prove malice

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aforethought against the appellant. That the appellant should have been convicted of the lesser offence of manslaughter and not murder because the appellant caused the death of the deceased in the course of defending himself (appellant) against the threatening deceased, Miss Mjasiri contended.

In support of her submission, Miss Mjasiri referred us to the case of IPALA s/o IBRAHIM v R (1953) 20 EACA 300 on the basis of which she said, the learned trial judge had resolved to decide the instant case. Unfortunately, she lamented, the learned trial judge came to the conclusion which, in her view was not in accord with the principles set out in that case. Miss Mjasiri, also made further reference to the Privy Council decision in the Australian case of SIGISMUND PALMER (1971) AC 814 which was also considered by the learned trial judge. In her submission, she stressed that even though the correct prirtciples on self defence as restated in this case were taken into account in this case, the learned trial judge failed to distinguish the circumstances of this case from those in the Palmer case. As a result, in the circumstances of the case, she said, the trial judge fell into the error of convicting the appellant of the offence of murder and not manslaughter.

Miss Chinguwile, learned State Attorney, who as already indicated appeared for the Republic conceded to the submission that the appellant should have been convicted of manslaughter and not murder. In view of the fact that in the evidence on record, the deceased was found stealing from the shamba which the appellant was guarding, the trial judge was wrong in rejecting the defence of self defence, Miss Chinguwile contended. She further argued that in view of the provisions section 18A (3)

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of the Penal Code, the appellant having used more force than was reasonably necessary, the appellant should have been convicted of manslaughter.

From the record of this case before the High Court and the oral submissions before us at the hearing of this appeal, it is apparent that the essential facts are not disputed. The main question in this appeal is whether the defence of self defence could in the circumstances of this case be sustained. On this, Miss Chinguwile, the learned State Attorney while in agreement with Miss Msajiri learned Counsel for the appellant that the appellant used excessive force, categorically asserted that the trial judge should have found the appellant guilty of manslaughter because, she said, the defence of self defence could not be discounted. In order to resolve this issue it is imperative first to have a clear perception of the law as it stands in Tanzania today. This, it appears to us the learned trial judge sufficiently addressed himself on in the judgment in which reference was made to sections 18, 18A and 18B of the Penal Code. These are the provisions which, it should be noted, provide for circumstances in which the right to defend one self or one's property or others against any unlawful act of seizure, destruction or violence. However, the right of defence provided for under section 18A of the Penal Code is subject to the limitations set out under Section 18B which provides:

> 18B: (1) In exercising the right of self defence of property, a person shall be entitled only to use such reasonable force as may be necessary for that defence,

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(2) Every person shall be crimirally liable for any offence resulting from excessive force used in self defence or in defence of another or in defence of property.

(3) Any person who causes the death of another as the result of excessive force used in defence, shall be guilty of manslaughter.

Apart from these clear statutory provisions on the defence of self defence in Tanzania, and as correctly pointed out by the learned trial judge, case law is another important source of guidance in deciding cases of this nature in Tanzania. In the instant case, the main evidence from which the sequence of events leading to the death of the deceased is reflected in the extra judicial statement of the appellant. This was a statement made by the appellant before a magistrate as a justice of the peace on 3.12.1988, six days after the incident (27.11.1988). This was, to our minds recent enough for the appellant's memory to recount vividly what happened before the death of the deceased. In the statement, the appellant among others said:

"... Mara niliona kama mtu amekaa. Nikaanza kumsogelea na kabla sijamfikia hatua 3 hivi akaanza kukimbia mimi huku namfukuza na kupiga kelele za mwizi, mwizi ...

Mara katika kufukuzana huko nilimkuta nikampiga fimbo mbili ubavuni mara marehemu alininyang'anya fimbo na akatoa kisu na kukiweka mkononi ili anijeruhi juu ya mali yangu. (emphasis supplied) Kwa bahati mkono wa kushoto nilikuwa na panga hivyo kabla hajaanza

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> kunikata nilimuwahi na kuanza kumkata
> kwa kuwa kulikuwa giza sikujua nimemkata
> sehemu gani kwani marehemu alikuwa
> anataka kunirudishia."

As already pointed out, the learned trial judge accepted the evidence of the appellant as the only witness who could tell how the cut wounds on the back of the deceased were inflicted. On this evidence and as the extra judicial statement extracted above shows, it is evident that the appellant while in pursuit of the fleeing deceased from the shamba as a suspected thief, inflicted two blows on the deceased by use of a stick. Thereafter, in the process of the pursuit, according to the appellant's statement, the deceased having wrested the stick from the appellant held out a knife while advancing to attack the appellant. In these circumstances which were believed by the learned trial judge as truthful, could the appellant avail himself of the right of self defence. The learned trial judge rejected the defence of self defence when he said:

> "It could be said that the accused was
> also entitled to arrest the deceased
> and that he was also entitled to use
> all reasonable force to subdue the
> deceased. But it is now clear that
> the deceased did not resist the
> arrest through any violence. In my
> view the two blows which the accused
> inflicted on the deceased were
> unlawful and the deceased was
> entitled to defend himself. In the
> circumstances of this case the first
> two blows were a series of unlawful
> attacks on the deceased which were
> committed out of no legal justification."

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From this it is apparent to us that the learned trial judge while accepting and relying on the extra judicial statement of the appellant, the analysis and conclusion reached are based on parts of the statement and not the statement taken as a whole. This, Miss Mjasiri, learned Counsel for the appellant submitted was not proper on the part of the learned trial judge because it resulted in the rejection of the defence of self defence raised. Referring to the case of IPALALA s/o IBRAHIM v R (1953) 20 EACA 300 the learned trial judge resolved to decide this case on the basis of the principles set out in that case. Applying the principle in the IPALALA case to the circumstances of this case, the trial judge held that as was the case in the IPALALA case the right of self defence was not established because no unlawful act had been established which from the beginning had posed imminent danger to the appellant.

It should be noted that the circumstances and facts in the IPALALA case are different from those in the instant case. In the IPALALA case, the appellant killed the deceased who at the time was struggling with the appellant's companion. The appellant hit the deceased from behind with a stick which he (appellant) had fetched. The blows caused grievous injury and death to the deceased. In defence, it was submitted that the appellant had acted in defence of his companion's person in that the appellant had reasonably feared that the deceased was attempting to kill his companion. Dismissing the appeal, the Court of Appeal for Eastern Africa re-affirmed the principle that killing of another is justifiable where an accused person acts without vindictive feeling and believes, and has reasonable grounds that a person's life is in imminent peril and that his action is absolutely necessary for the preservation of life.

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The Court further held that there was no basis upon which it could be inferred that the appellant honestly and reasonably believed that his friend's life was in imminent peril and that his action in hitting the deceased on the head was absolutely necessary for the preservation of life. In the instant case, however, with respect, we agree with Miss Mjasiri, learned Counsel that the circumstances are distinguishable. Here, as the evidence in the extra-judicial statement shows, unlike in the IPALALA case, the life of the appellant himself was threatened and not his companion's. Furthermore, taking into account the sequence of events as revealed from the extra-judicial statement as a whole and not in portions as the learned trial judge did, it seems reasonable to us that the life of the appellant was in imminent peril when the deceased advanced towards him (appellant) threatening to attack (him) with a knife in hand. In that situation, we think it was reasonable for the appellant to take such action as was necessary for the preservation of his life against the deceased's threatened act of violence to his (appellant) body. From this point of view, it seems to us that the first two blows inflicted on the deceased by the appellant were rather more of an action on the part of the appellant taken as a reasonable means to prevent the commission of theft by the deceased at the shamba and not as a series of unlawful acts on the part of the deceased as the trial judge held. In our considered opinion, such are the circumstances in which the defence of self defence could properly be called in.

Having taken the view that the circumstances and the evidence of the case as a whole warranted the invocation of self defence which is enough to dispose of this appeal, we do not think it necessary to address ourselves any further on the case of SIGISMUND PALMER v R (1971) A.C. 814. Our attention was

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drawn to this case by the learned Counsel for the appellant. The learned trial judge relied on the decision of that case for the proposition of the law that if resistance exceeds the bounds of mere defence and prevention, the defender would himself become an aggressor. With respect, we think this is an overstatement of the law on self defence because in deciding whether it was reasonably necessary to have used as much force as was used, regard must be had to all the circumstances of the case. That is, each case in which excessive force is used, must be taken on its own individual merit and not on a generalised basis. That is the general principle which was underscored in the PALMER case in which the defence of self defence was extensively discussed.

Though as already indicated, there was evidence in support of self defence, it is no gainsay that the force used was excessive. The post mortem examination report bears this out. It shows that the deceased sustained multiple deep cut wounds over the shoulder and on the back with amputated index and middle fingers.

In Tanzania, the law is clearly spelled out under the Penal Code for a person who causes the death of another as a result of excessive force used in defence. For an offence committed under these circumstances, Section 18B (3) of the Penal Code provides for a conviction of manslaughter. In the instant case, we agree with Miss Mjasiri, learned Counsel for the appellant supported by the learned State Attorney that having regard to all the circumstances of the case as a whole, the defence of self defence was properly founded. We also agree with both the learned Counsel that as the appellant used greater degree of force than was necessary in the circumstances,

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he should have been found guilty of Manslaughter and not murder. Had the learned trial judge considered the sequence of events leading to the death of the deceased as a whole and not in phases, no doubt he would well have come to the same conclusion.

For these reasons, we set aside the conviction for murder and sentence of death. In substitution thereof, we enter a conviction for Manslaughter. Taking into account that relevant factors and circumstances of the case we sentence the appellant to five (5) years imprisonment effective from the date of his conviction before the High Court.

DATED AT DAR ES SALAAM THIS 23rd DAY OF May, 1995.

R.H. KISANGA
JUSTICE OF APPEAL

A.M.A. OMAR
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR