

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: RAMADHANI, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 32 OF 1995

BETWEEN

1. EVA d/o SALINGO	. . . APPELLANTS
2. MT. 62421 PTE PETER MAGOTI	
3. MT. 62218 PASCAL s/o MGAWA	

AND

THE REPUBLIC. RESPONDENT

(Appeal from the Conviction and Sentence
of the High Court of Tanzania at Iringa)

(Mchome, J.)

dated the 10th day of September, 1993

in

Criminal Sessions Case No. 173 of 1991

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

The second appellant, MT. 62421 PTE PETER MAGOTI and the third appellant, MT. 62218 PTE PASCHAL s/o MGAWA were charged in the first count with the murder of the deceased, SAID s/o MLONGANILE. In the second count, the first appellant, EVA d/o SALINGO was charged as an accessory after the fact. Both were convicted as charged. The first and third appellants were sentenced by the High Court sitting at Iringa (Mchome, J.) to death. The first appellant was sentenced to five years imprisonment.

Initially each of the above named appellants had lodged an appeal against the conviction and sentence. However, we were notified at the hearing of the appeal that the third appellant

died in prison on 1.4.1994. So, the appeal is proceeded with only in so far as the first and second appellants are concerned. In this appeal, we shall refer to the third appellant, the deceased, as the third accused.

The tragic death of the deceased took place at Makambako on 15.2.1990. The first appellant, Eva d/o Salingo owned a pombe shop where RUTI d/o FILANGALI (PW.3) was employed in selling pombe. It would appear that the first appellant had love relationship with both the deceased and the second appellant. It was the prosecution case that on 15.2.1990 at about 8 p.m. the second appellant accompanied by the 3rd accused came to the pombe shop for a drink. PW.3 was then on duty at the pombe shop. At about 10.00 p.m., the deceased also came to the pombe shop where he sat at the counter with the first appellant. As it was closing time for the bar, the first and second appellants together with the deceased got out of the pombe shop towards the house of the first appellant. When PW.3 was taking the pressure lamp from the pombe shop to the house of the first appellant about 30 paces from the pombe shop, she saw the second appellant and the 3rd accused in hot exchange of words over the first appellant. Then the second appellant and the 3rd accused held the deceased by the collar of his shirt outside the pombe shop. From the first appellant's house door, PW.3 saw the second appellant and the 3rd accused still beating the deceased with their boots. Then they dragged the deceased to a place she (PW.3) did not know.

For the rest of that night, PW.3 did not see the 2nd appellant, the 3rd accused and the first appellant until the next morning at 5.00 a.m. when the first appellant returned to her house and shortly left for Njombe. It was in the morning following the night of the incident when the first appellant had left for Njombe that PW.3 learnt of the deceased's death. She went to see the dead body lying by the road side near the CCM Office. PW.3 identified the dead body as that of the deceased. Following the death of the deceased, a number of suspected people were arrested including RUTI d/o FILANGALI (PW.3), SAUDA NYELENGE (PW.4), ESTER SANGA (PW.3) and the first appellant. While in police lock-up, the first appellant threatened PW.3 not to disclose to anybody about the fight that took place at the pombe shop where the deceased was beaten. If she (PW.3) revealed, the first appellant threatened, PW.3 would be bewitched by the first appellant's mother. PW.4 and PW.5 who also heard this threat notified the police (PW.6). Investigations were carried out and as a result, on 6.3.1990, the second appellant and the 3rd accused were arrested and charged together with the first appellant.

In her defence at the trial, the first appellant Eva d/o Salingo virtually denied everything. She did not know the second appellant and the 3rd accused. On the fateful night, she did not see the second appellant or the deceased at the pombe shop. She did not witness any fight taking place at her pombe shop that night. Though she knew the deceased but she did not have love relationship with him. She further stated that

after she had returned the lamps from the pombe shop she went to bed. The following morning, she left for Njombe to attend to a civil case. She denied threatening PW.3.

The second appellant raised the defence of an alibi. He claimed that he did not visit the pombe shop but remained at the barracks on the material night. He also maintained that he was not identified at the identification parade in which he took part. This, he insisted, showed that he was not in any way involved in the killing of the deceased.

The learned trial judge after a careful analysis of the evidence came to the conclusion that PW.3, PW.4 and PW.5 were honest and truthful witnesses. The judge further held that both the appellants had told the court a pack of lies. Consequently, the second appellant was found guilty of murder and was sentenced to death. The first appellant was convicted as an accessory after the fact for which she was sentenced to five years imprisonment.

Mr. Ndibalema, learned Counsel represented the appellants in this appeal. He raised two points. Namely, that the learned trial judge erred in convicting the second appellant of murder because there was a fight. And that as regards the first appellant, the sentence of five years imprisonment was excessive.

From the outset, we wish to make it clear that it is our view that the main issue in this appeal is the identification of the appellants. Arguing the appeal on behalf of the second appellant, Mr. Ndibalema's brief submission was that as

Stephen Kihanga, (PW.1) the investigating officer mentioned in his evidence of a fight and quarrel taking place at Msafiri pombe shop, it was possible that as a result of such a quarrel and fight, the appellant was forced to retaliate against the deceased. In that case, Mr. Ndibalema charged, the second appellant should have been convicted of manslaughter and not murder. In connection with the identification of the second appellant, it is relevant to mention at this juncture that at the hearing of this appeal, in a rather unusual and dramatic manner, the second appellant who was present in Court sought to conduct his appeal on his own. This was after Mr. Ndibalema, learned Counsel had finished his submission for both the appellants. We allowed him to address the Court. The essence of his address to us was that he was not involved in the murder of the deceased. This, he said, was so because he was not identified at the identification parade held at the barracks in which he took part. He discredited PW.3 as an unreliable witness. He handed over to the Court copies of the police statements by some of the witnesses for the prosecution to show how inconsistent they had been in identifying him (2nd appellant).

On the issue of identification, the crucial evidence is that of RUTI FILANGALI (PW.3). From the record, it is evident that on the fateful night, she was on duty at Msafiri Pombe shop from 8.00 p.m. to 10.00 p.m. the closing hour. She was the employee of the first appellant. PW.3, in her evidence firmly stated to have seen the second appellant and the 3rd accused at the pombe shop at the material time. That, her

employer, the first appellant, was also present there seated at the counter with the deceased. It is also in her evidence that both the appellants and the deceased were not new to her. She had seen them on a number of occasions before at the pombe shop in company with the first appellant. There is therefore, no reason why she should have mistaken the identity of these people that day. With the aid of a pressure lamp, '(Karabai)' which sufficiently provided light at the pombe shop, she was able to see the appellants and the deceased inside the pombe shop. Outside the pombe shop, she again saw the second appellant and the 3rd accused beating the deceased. The first appellant was also present. From the threshold of the door of the first appellant, PW.3 saw the second appellant in the company of the 3rd accused still beating and kicking the deceased who had fallen down a few paces away from the pombe shop. From there, PW.3 also saw the deceased being dragged by the road side to a place she did not know. The following morning, the dead body of the deceased was found lying by the road side naked. The learned trial judge was convinced that PW.3 identified the second appellant sufficiently. Addressing himself on this issue he stated:

"The issue is whether PW.3 identified those who were fighting. She says she knew both 2nd and 3rd accused persons and the deceased well before. They were the 1st accused's lovers. They came into the pombe early and drunk. At closing time their quarrel over 1st accused started inside.
..... I am therefore convinced that PW.3 identified those who beat

up the deceased clearly. I find PW.3
to be an honest and truthful girl....."

And PW.3 in her evidence inter alia had stated:

"..... I saw 2nd and 3rd accused
beating the deceased with their boots.
We went to Eva's house and stood at
the door. We watched their beating
the deceased. They said we would
never leave you this woman. We
feared to come close. We watched
through the door. They continued
beating him. We were about 30
paces from the pombe shop at Eva's
house. They dragged the deceased to
I (Sic) do not know where and Eva
returned at 5.00 a.m."

On the basis of this evidence, the learned trial judge came
to the conclusion that the second appellant and the 3rd
accused were the ones who beat the deceased and strangled
him to death. This is supported by the postmortem
examination report Exhibit P.IV which indicates the cause
of death as asphyriation following strangulation. The
acceptance of the evidence of PW.3 was a question of fact
which the learned trial judge was entitled to as correctly
submitted by Mr. Mbise, learned Senior State Attorney. It
goes without saying that the judge was in a better position
to see the demeanour and assess the credibility of the witness
(PW.3) than an appellate court. We see no reason for
faulting the trial judge on this point. The credibility of

PW.3 is strengthened even further by PW.4 and PW.5. In their evidence they support PW.3 in her evidence that while in police lockup the 1st appellant, threatened her (PW.3) not to reveal to anybody about the fight that had taken place outside the pombe shop near the 1st appellant's house. The threat was that if she (PW.3) did so, she (PW.3) would be bewitched by the 1st appellant's mother. The threat was heard by PW.4 and PW.5 who were also in police lock-up. It was PW.4 and PW.5 who informed the police about the threat and as a result, the investigation against the 1st appellant was intensified. This again, in our view, reinforces the fact that PW.3 was a witness of truth as found by the trial judge.

With the evidence of PW.3 accepted by the trial judge as credible, Mr. Ndibalema's claim that the death was a result of a fight between the deceased and the second appellant together with the 3rd accused has no leg to stand on. It is clear from the evidence of PW.3 that the deceased did not initiate the fight apart from pleading that the 1st appellant was, for a long time, his wife. Instead, the evidence showed that all along, it was the second appellant and the 3rd accused who were beating and kicking the deceased. The deceased was dragged away to the place, where, the next morning he was found dead. We agree with Mr. Mbise's submission that this ground has no merit.

Next, we intend to deal with the identification parade. As regards the complaint raised by Mr. Ndibalema, the learned

advocate and the second appellant himself in his address in court on identification, we hardly need to say much on it. This is because, as observed, once the evidence of PW.3 is accepted as truthful as found by the trial court, there is no room for doubting the identification of the second and first appellants. We have already pointed out that there was plausible evidence to show that the appellants were not strangers to PW.3 and that the circumstances at the time were favourable for unmistakable identity. We agree with Mr. Mbise that the identification of the appellant was watertight.

Then there is the issue raised by the second appellant that PW.3 was unreliable since she could not identify him at an identification parade held at the barracks in Makambako in which he participated. On this again, we must say at once that the record is loud and clear. The evidence of PW.3 does not support this claim. In her evidence, she clearly states that on the day the identification parade was held at Idofi barracks, the second appellant and the 3rd accused were not among those who took part in the parade. So, she did not identify the second appellant and third accused in that parade for the obvious reason that they were not there. To our minds, this cannot be taken as a failure on the part of PW.3 to identify the 2nd appellant, as he claimed at the hearing of the appeal. Even then, from the record, at the next earliest opportunity when PW.3 saw the 2nd appellant and the 3rd accused at Msafiri Pombe Shop, without any delay, she alerted the police (PW.6) who arrested them. This again, in our considered view, is a

clear testimony of PW.3's firm and unmistakable identification of the second appellant and the 3rd accused as the assailants of the deceased. The trial judge was entitled in his finding that PW.3's identification of the second appellant was conclusive. The complaint on the identification of the appellants is to our minds, groundless.

As for the 1st appellant, like the case of the 2nd appellant, the evidence of PW.3 fully supported her conviction. We have sufficiently demonstrated that it being a question of credibility, she was properly convicted. Mr. Ndibalema's complaint against the sentence of five years imprisonment as being excessive because she had stayed in remand prison for 4 years is, with respect, untenable. In any case, this was an aspect which was duly taken into account by the trial judge who, rightly observed that the offence involved was a very serious one. She was centrally involved in enticing the deceased and the 2nd appellant into the rivalry that resulted to the tragic death of the deceased for which death penalty has been imposed against the 2nd appellant. We think that the sentence of 5 years imprisonment, is by any stretch of the imagination not excessive in the circumstances of the case. We see no reason to interfere with the sentence.

For these reasons, we dismiss both appeals in their entirety.

DATED at MBEYA this 23rd day of August, 1995.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

L.M. MFALILA
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