IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MNZAVAS, J.A., KALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 44 OF 1994

BETWEEN

MSITEGWA KADAGWA . . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

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

(Mwipopo, J.)

dated the 23rd day of February, 1994

in

Criminal Sessions Case No. 25 of 1991

JUDGEMENT OF THE COURT

MNZAVAS, J.A.:

The appellant Msitegwa Kadagwa was sentenced to death by the High Court sitting in Iringa (Mwipopo, J.), upon his conviction for the murder of one, Mbena d/o Sembete on or about the 30th day of April 1990 at Idodi Village within the district and Region of Iringa.

Mr. Mbise, learned advocate argued the appeal before us in behalf of the appellant while Mr. Mulokozi, learned State Attorney, argued in support of the High Court decision. Mr. Mbise, learned advocate submitted and argued four grounds of appeal together; that the learned trial judge erred in coming to the conclusion that it was the appellant who killed the deceased when there was no sufficient evidence to prove it. It was the learned Counsel's submission that the trial Court should not have believed the testimony of Letisia Mgowa (PW.1) which was to the effect that on the material day she was attending a call of nature when she heard the deceased, her great grand-mother, crying - she hurriedly returned to the deceased's hut to see what was happening. As she was doing so she met the appellant coming out from the deceased's hut where she (deceased) was crying. It was Letisia's evidence that on entering the house she found the deceased suffering from three head

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injuries which were bleeding. The deceased told her that the appellant had hit her three times with a stone. It was argued that the learned judge erred in believing the testimony of Letisia without taking into account material contradictions in her evidence.

Mr. Mbise finally submitted that the High Court erred in relying on the dying declaration of the deceased that it was the appellant who had assaulted her. The learned defence Counsel argued that as the deceased's head had been "crushed" she must have been in a critical condition when she gave her dying declaration and that in such circumstances the learned judge should not have relied on the dying declaration.

In rebuttal Mr. Mulokozi, learned State Attorney, supported the conviction. It was his submission that at the time the deceased mentioned the appellant as her assaillant she was mentally alert and in full control of her mental faculties. As for the contradictions in the evidence of Letisia, (PW.1), Mr. Mulokozi argued that such contradiction could be explained by the fact that the witness was testifying on events which took place over three years. The learned State Attorney told the Court that as village authorities were preparing to send the appellant to the Ward Secretary to be locked up he escaped from lawful custody. That the appellant escaped from lawful custody the Court was referred to the evidence of the Village Secretary, (PW.5).

In coming to the conclusion that the appellant was guilty of the offence of murder the learned judge said inter alia:

> "When they, PW.3, PW.4 and the cell-leader took the accused to the deceased the accused confessed to have hit the deceased and prayed for release from custody so that he could help in treating and taking care of the deceased. The accused's confession shows his knowledge of the assault he had done. With the defence of not knowing

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what happened impliedly raises the defence of insanity through intoxication. The accused drank the sacrificial pombe which had been prepared by a neighbour —— of both the accused and the deceased. The liquor was for public consumption and free of charge. Was he intoxicated? Most likely yes for at one stage —— the accused too played in some traditional dances called "kiduwo". How much he drank and to what degree he was intoxicated is a question which has been answered by the prosecution witnesses who were drinking with him and dealt with him at the time of the incident. PW.3 who was drinking with the accused when cross-examined by the defence Counsel, the learned Mr. Mshokorwa, testified as follows:-

> —— There was not much pombe, but we were drinking slowly with traditional dances being played. The accused started playing "kiduwo" at around 2 p.m., he was getting a bit drunk but not much, just a little.

The other witnesses, PW.4 and PW.5 who dealt with the accused prior to or after the incident have all assessed the accused as having not been drunk though he drank the ritual pombe —— The normal way the accused danced "kiduwo", walked home returning rushing back to the pombe, talking refutting the accusations or confessing to the assault tend to add weight to the witnesses' (PW.1, PW.3, PW.4 and PW.5) assessment of the accused's intoxication as having been mild. He was capable of knowing what he was doing and of knowing that what he was doing was wrong and unlawful. That is why he later escaped with ropes tied around his hands".

After the learned judge had summed up the whole evidence to the three lady and gentlemen assessors they were all of the unanimous opinion that the appellant was guilty of the charge of murder as charged.

We have minutely examined the evidence tendered before the Court of first instance and have come to the conclusion that at the time the deceased gave her dying declaration that it was the appellant who, without rhyme or reason, attacked her she was in full control of her

Looking at the totality of the evidence we are satisfied in our own minds that the learned trial judge was right in convicting the appellant of the offence of murder as c

senses. Her head had not been "crushed" as Mr. Mbise, learned defence Counsel, would have us to believe. Doctor's post-mortem report - Exh.P1 is to the effect that the deceased had a fractured skull. The undisputed fact that the deceased survived the injuries for two days before she died goes a long way to show that she could not have mistaken the identity of her assailant. As for the learned Counsel's submission that the trial Court erred in believing the testimony of PW.1 when she said that she saw the appellant going out of deceased's hut as she, (PW.1) was returning to the hut where the deceased was crying with pain we agree with Mr. Mulokozi, learned State Attorney, that the contradictions in Letisia's (PW.1's) testimony can safely be explained by the fact that she was testifying on events which took place 3 years ago. The contradictions were due to lapse of memory and not deliberate.

As for Mr. Mbise's argument that PW.1 told lies against the appellant because there was misunderstanding between them we agree that the evidence showed that the two were not in the best of terms but there was also the evidence of the Village Secretary (PW.5) and PW.6 which was to the effect that the appellant escaped from lawful custody as he was being sent to the Ward Secretary. There was no suggestion leave alone evidence that these witnesses had reason to tell lies against the appellant.

And, to crown it all there was the evidence of PW.3, PW.4 and PW.5, the cell-leader, that the appellant confessed to have assaulted the deceased.

Looking at the totality of the evidence we are satisfied in our own minds that the learned trial judge was right in convicting the appellant of the offence of murder as charged. The sentence of death is mandatory. In the event we order that the appeal be dismissed in its entirety.

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DATED at MBEYA this 21st day of October, 1996.

N.S. MNZAVAS
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