IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 49 OF 1995

BETWEEN

1. ESIO NYOMOLELO
2. FIKIRI NYOMOLELO
3. FRANCIS NYOMOLELO

. . . . . APPELLANTS

AND

THE REPUBLIC. . . . . RESPONDENT

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

(Mapigano, J.)

dated the 14th day of June, 1995

in

Criminal Sessions Case No. 80 of 1993

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

The appellants are appealing against the decision of the High Court (Mapigano, J.) sitting at Iringa. They were charged with and convicted of the offence of murder contrary to Section 196 of the Penal Code and sentenced to death. At the trial, the two appellants stood charged together with a third person by the name of Francis Nyomolelo, their father who died before the hearing of this appeal. He was referred to as the third accused at the trial. At the commencement of the hearing of the appeal the Court was notified of the death of Francis Nyomolelo, and so the appeal in respect of Francis Nyomolelo abated under rule 71(1). The appeal is proceeded with in respect of the two appellants.

The facts are not long but pathetic. They are that the appellants who are brothers and the deceased were neighbours living at Isalavanu Village in Mufindi District. The deceased Michael s/o Kikoti had a shamba at a place called Ndolezi. From the record, it is apparent that this shamba was the source of quarrel and dispute between the families of the appellants on one side and the deceased on the other. Prior to the day of incident, a quarrel had ensued between these two families

.../2

over the trees which the appellants had felled in the shamba and the charcoal made. The quarrel was settled. But still the families remained not in the best of terms. On 27.9.1992, at about 9 p.m. the deceased was speared to death at the house of Adriano Kikoti (PW.2) his son. The appellants were arrested and charged with the murder of the deceased.

Before the trial Court, the first appellant raised the defence of self defence and the second appellant denied assaulting the deceased. His involvement, he claimed, was to stop the fight between the first appellant, the deceased and PW.2. In the process, PW.4 was injured, according to the second appellant. The trial judge rejected the first appellant's version of self-defence. He held that it was a deliberate attack on the part of the first appellant who was convicted of murder. Invoking the doctrine of common intention in respect of the second appellant, he was also convicted of murder.

In this appeal, Mr. Naali, learned Counsel appeared for the first and second appellants. Mr. Mulokozi, learned State Attorney represented the respondent, Republic. A six point memorandum of appeal was filed and argued by Mr. Naali. Briefly, it was the submission of Mr. Naali that the learned trial judge erred in convicting the appellants because the prosecution had not proved its case beyond reasonable doubt. He referred to the evidence of the witnesses PW.2 and PW.3 which, he said was conflicting. Secondly, Mr. Naali stated that as it was dark, the witnesses could not see and identify properly the assailants of the deceased. It was therefore unsafe to rely on the evidence of these witnesses, Mr. Naali charged. Thirdly, he submitted that as all the witnesses for the prosecution were related to the deceased, it was possible that they could frame up the case against the appellant. So, he submitted that they should not have been relied upon. Fourthly, that it was an error on the trial judge to take into account the confession

..../3

of the first appellant which had been repudiated without corroboration. Fifthly, that there was no common intention because there was a fight and that apart from the appellants, the deceased was also armed. Finally, that the learned trial judge did not direct the assessors on the contradictions between the prosecution witnesses. He prayed that the first and second appellants should have been found guilty of manslaughter and assault respectively.

On behalf of the Republic, Mr. Mulokozi, learned State Attorney argued that the question of repudiation or retraction of the appellants' confession does not arise. At the trial, Mr. Mulokozi stated, no objection was raised when the statement was produced by PW.1. Further, he submitted that even in their defence at the trial, the appellants did not complain about the statements.

We agree with Mr. Mulokozi that the issue of the retraction or repudiation of the statements was not raised at all at the trial until the close of the prosecution case. We only glean from the record mention of it scantly in cross examination of the first appellant. It is trite principle that such a defence if available, should normally be advanced before the close of the prosecution so that the prosecution is given an opportunity to produce evidence in proof of it or otherwise in a trial within a trial. As it is in this case, we are satisfied that it is nothing but an afterthought. This ground has no merit.

In regard to the submission that the prosecution witnesses should not be relied upon because they were related to the deceased, Mr. Mulokozi reacted by stating that this was not true because, these being the only people present at the time of the incident, they are the ones who could tell what actually happened. With respect, we think Mr. Mulokozi's submission is correct. It is common knowledge that in any trial evidence is forthcoming from witnesses who directly or circumstantially witnessed an incident taking place. This is what happened in this case. Witnesses

..../4

PW.2, PW.3 and PW.4 saw what took place at the time. The fact that they are related to the deceased is, in our view, irrelevant. They were witnesses of credence and were believed by the trial Court. We see no reason for casting doubt on their evidence.

On the fact that the witnesses could not identify the appellants, we think in agreement with Mr. Mulokozi that this was irrelevant in the circumstances of the case. Identification was not an issue at all throughout the proceedings of this case. The appellants have not disputed their presence at the scene.

Then Mr. Mulokozi addressed on the issue of contradictions in the evidence of the prosecution witnesses. He submitted that there was no material contradiction in the evidence of the prosecution witnesses. On the contrary, Mr. Mulokozi stressed, it was the defence side which had serious contradictions which the trial judge considered. From the record, it is clear that the learned trial judge directed the assessors on the discrepancies in the evidence of the defence. He also addressed this issue in his judgment. He stated inter alia:

> "As I pointed out to the assessors, there are material and injurious discrepancies in the accounts of the first and second accused persons. There is a conflict in their evidence as to whether the deceased was together with PW.2 when the accused passed at the home of PW.2 ..... the accused have repudiated these cautioned statements. I find however that they have made the statements".

It is therefore clear to us that as rightly submitted by Mr. Mulokozi, there was no material contradictions in the evidence of the prosecution witnesses. Rather, as seen from the above extract, there were serious contradictions on the part of the defence case which were duly considered by the trial judge who also properly directed the assessors

..../5

on the issue. Mr. Naali's complaint that the trial judge did not direct the assessors on the discrepancies is, with respect, without foundation.

Consequently, in the circumstances of the case, having regard to the background of the matter in which there was a dispute over a shamba, the manner in which the first appellant came to the house of PW.2 armed with spears and a bill-hook and attacked the deceased, we are satisfied that there was sufficient evidence upon which to sustain the conviction against the first appellant. We are also satisfied that there was sufficient evidence to support the conviction against the second appellant for the same offence by invoking the doctrine of common intention in terms of Section 23 of the Penal Code. The circumstances were such that the learned trial judge was entitled to come to the conclusion that the second appellant knew or ought to have known that death was not improbable to happen in the course of prosecuting the common intention.

In the event, we dismiss the appeal in its entirety.

DATED AT MBEYA THIS 28TH 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