IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 34 OF 1995

BETWEEN

1. HEMSI NZUNDA
2. ANDISON TUYAINE
3. NEMSON TUYAINE

. . . . . APPELLANTS

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the judgement and sentence of the High Court of Tanzania at Mbozi)

(Mwipopo, J.)

dated the 12th day of May, 1995

in

Criminal Sessions Case No.67 of 1991

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The three appellants, Hemsi Nzunda, Anderson Tuyaine and Nemson Tuyaine, were convicted of murder, it being alleged in the information that on 15/10/90, at Isalalo village in Mbeya district, they murdered one Stephano Zingwa Msongola. The fatal attack upon the deceased was said to have taken place around, 2 a.m., the motive being robbery. In convicting the appellants the High Court relied on the evidence of the deceased's widow, PW.3 Miteremi Nampashi, who claimed to have identified the bandits at the scene of crime, and on the dying declaration which he made at the village dispensary around midday on the next day. At the hearing of the appeal the Principal State Attorney Mr. Sengwaji joined hands with counsel for the appellants Mr. Mbise in discrediting the decision of the High Court.

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We have given serious and careful consideration of the evidence and we similarly think the decision cannot be supported in law. We begin with the aspect of identification upon which PW.3 was the only witness. On the material night she was sleeping in the main house while her husband, the deceased, and a guest, one Mbosa Mpembela, were sleeping in another house. She claimed that around 2 a.m. she was awakened by noise in that other house. She got out and saw the appellants dragging the deceased out and hacking him with a bushknife. There was moonlight. As she raised alarms she also advised Mbosa Mpembela to escape. But this evidence was contrary to what the deceased told the village chairman, PW.1 Mtaulwa Mkundilwa Ansuli, at the village dispensary. The deceased told him that the assault took place inside the house. Secondly, PW.3 told the deceased's son, PW.2 Jackson Msongole, that she identified the appellants by their voices when they were demanding money from the deceased. It is therefore doubtful whether she actually saw the invaders and may very well have lied when she claimed that they also came to attack her. Thirdly, PW.3, whom the trial judge described as an old rural woman, named the persons she purported to have identified as Ngoni Nzunda, Mhaya Silwina and Yila Silwina, which she claimed were the appellants' childhood names. The appellants denied to have been known by those names and, apart from the word of PW.3, there was no evidence to contradict them; in fact the first appellant's father, DW.4 Jamson Nzunda, came to say that his son was named Hamisi (apparently pronounced "Hemsi") at birth and was never given another name. Finally even PW.4 D/Sgt. Ephraim who took PW.3's

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statement was unhappy about her claim to have identified the invaders and said:

> PW.3's identification of the accused was not quite credible and when she named the accused before me there was someone who was interpreting to me when writing the statement.

That "someone" was not called to testify. It seems to us that the only person to name the appellants as they are known was the deceased, and it is on record that PW.4 was given those names before meeting PW.3 by one Epson Yohana Mhango who reported the incident at the police station.

In accepting the evidence of identification the trial judge said:

> The night was moonlight, it was outside the compound, the attack was prolonged for a long time, the attackers came to beat the PW.3 too thereby exposing themselves to PW.3 even more clearly at a close range than before. Both PW.3 and the deceased knew the accused before the incident including their names. Whereas PW.3 named them in their childhood names PW.1 heard their names from the deceased in their present form and ordered for their arrest using their present names and they turned out to be the same persons named by PW.3 in their childhood names ... I believe like she (PW.3) did that those youthful names did exist and were used to call the 3 accused as explained by PW.3. DW.4's testimony to the contrary concerning the 1st accused comes from a partisan father ...

We think, with respect, the learned judge would have hesitated to make these assertions had he fully and properly directed himself on the evidence as a whole. He did not revert to the deceased's information to PW.1 that the attack took place inside the house as opposed to the open compound; he did not revert to the evidence of PW.2 that PW.3 told him that she identified the appellants by their voices only. Perhaps if he had done so he would have found PW.3 a liar. Moreover, it was not available to the learned judge to say that the appellants "turned out to be the same persons named by PW.3" in the absence of an identification parade. We agree with Mr. Sengwaji that a parade should have been conducted in order for PW.3 to identify those persons she knew by their childhood names. The learned judge was also impressed by the fact that PW.3's description of the blows noted on the deceased tallied consistently with the nature of the wounds detected on the deceased's body. We see no significance in the consistency since PW.3 had had several hours to observe the wounds; she could describe or make up the type of blows even without seeing the attackers at all. There were other claims that put PW.3's credibility to doubt, such as saying that PW.2 talked to the deceased whereas in fact he found the deceased already speechless, but we need not list them all. We are satisfied on the whole that had the learned judge properly directed himself on the evidence he would have found it unsafe to rely on PW.3.

We come to the dying declaration. It was testified to by PW.1 the village chairman. He stated that he arrived at the dispensary around 11.30 a.m. and talked to the

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deceased who named the appellants as his attackers. Soo: after the deceased closed his mouth and died. As a gene rule a court can act upon a dying declaration if it is satisfied that the declaration was made, if the circumstances in which it was made give assurance to its accuracy, and if it is in fact true. In his judgment the trial judge did not revert to any of these factors and did not make any findings in relation thereto, but merely recorded that the deceased talked to or was heard by PW.1 and other persons make the declaration. We wish to cite the judge's own words to demonstrate the extent of his misdirection. He said:

> ... the dying declaration of the deceased has been testified in court by PW.1 the village chairman one Mtaulwa Mkundilwa Hansuli. He went to see the deceased at the dispensary on 15/10/90 and talked to him. The deceased told him that his attackers were Hemsi s/o Nzunda the 1st accused, Anderson s/o Tuyaine the 2nd accused and Nemson s/o Tuyaine the later (sic) two the deceased said were related to the deceased. He sent for the militia to go and arrest them. The other person who heard the dying declaration of the deceased was PW.2 Jackson s/o Msongole the son of the deceased ... The deceased told him about the episode and named the 3 accused persons as his assailants.

Having failed to consider the three factors stated above, we think the trial judge materially misdirected himself in acting on the evidence pertaining to the declaration. His misdirection is amply demonstrated in the finding that the declaration was also heard by PW.2. PW.2 was not at home or

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the night of the attack and found the deceased already taker to the dispensary. And, in his own words, "When I went to hospital my father could not talk." The judge also stated that the declaration was heard and believed by "the ten cell leader Epson Yohana Mhango ... that the accused are the ones who attacked the deceased ..." This Mhango was in fact not called to testify. The record merely states that he was sent by PW.1 to report the incident to the police. If he named the appellants at the police station, and PW.4 said that he did, it may well be that he was given the names by PW.1.

For our part, we turned to consider the three factors. We have no doubt that the deceased made the declaration in view of the evidence of PW.1; however, the circumstances attending to the declaration have occasioned us considerable difficulty. First of all, the attack took place around 2 a.m. but the deceased is not on record naming anyone until about 11.30 a.m., that is more than nine hours later. There is no explanation for this long silence if in fact the deceased identified the appellants at the time of the attack. Secondly, the deceased himself told PW.1 that the attack took place inside the house. There was no evidence of any light inside the house. PW.3 stated that the appellants had torches but we have already held that her credibility was questionable. There might have been moonlight, alright, but this could not possibly penetrate into the house. We are left with the only conclusion that the prevailing circumstances were not favourable for accurate identification. And for all that we have said about PW.3, her evidence cannot be taken to corroborate

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the declaration. It is therefore difficult to say that the declaration was true. Some of these difficulties would probably not have arisen had the prosecution called Mbosa Mpembela who had slept in the deceased's house. Attempts to find him proved futile and we do not wish to draw any adverse inference for his non-production. However, the prosecution could also have called one Fyukila Mpembela who was first to respond to the alarms that very night, but for unknown reasons he was not called. The prosecution could again have called one Andrea Mwilenga, the 10-cell leader who took the deceased to the dispensary in the morning but he, too, was not called, and again for unknown reasons.

On account of all the uncertainties pertaining to identification and the dying declaration, the assessors who sat with the learned judge declared that the evidence was weak and advised him to acquit the appellants. We think they were right; in view of all that we have said, we think the judge should have taken that advice. The burden was upon the prosecution to prove the case against the appellants beyond reasonable doubt but this burden, in our view, was not discharged. We allow the appeal, quash the convictions and set aside the sentences of death. The appellants should be set at liberty forthwith unless they are further held on some other lawful cause.

DATED at MBEYA this 10th day of June, 1999.

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A.S.L.RAMADHANI

JUSTICE OF APPEAL

B.A. SAMATTA

JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA

JUSTICE OF APPEAL

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

(A.G. MWARIJA)

DEPUTY REGISTRAR