IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MAKAME, J.A., KISANGA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 114 OF 1994

BETWEEN

KIROIYAN OLE SUYAN. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

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

(Munuo, J.)

dated the 30th day of June, 1992

in

Criminal Sessions Case No. 53 of 1991

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

This appeal is against conviction and sentence for murder and is based on one ground, namely, that the offence was not proved beyond reasonable doubt. Alternatively, it is contended that the appellant killed in self-defence and should have been convicted of the lesser offence of manslaughter.

The facts of the case were simple and were essentially testified to by three witnesses, PW1, PW3 and PW4. The deceased, Kapurwa ole Malambo, was on 26/5/86 spending the night at the house of PW2 who was then out guarding his shamba, but his wife, PW1, was at home. Around 3 a.m. the appellant arrived at the house and called out "Hodi". PW1 recognised the appellant's voice and made him out in the moonlight through the door. She inquired what he

.../2

was up to at that late hour and informed him that there were guests in the house. This information infuriated the appellant who became abusive and demanded of PW1 to tell the guests to get out. The deceased had been listening to the exchange. He got up, put on his shoes and went out with a stick, leaving his sime behind. A stick fight ensued but soon the deceased was lying on the ground fatally wounded. He had been cut on the forehead with a sime. PW1 got out raising the alarm as the appellant viewed the body with a torch he had and then fled. The same night he reported to PW3, his father-in-law, that he had killed a son of Naemata. He next disappeared from the village with his family. Two years later he sent relatives to the deceased's brother, PW4, to initiate negotiations for a customary settlement. Three meetings were held at which the appellant appeared but refused to make the customary payment of 49 head of cattle unless the complaint made to the police was first withdrawn. The fourth meeting was to take place at Selela, PW4's village. Before the meeting PW4 alerted the police. Some officers infiltrated the meeting disguised in Maasai attire and arrested the appellant.

Learned counsel for the appellant Mr. Loomu-Ojare argued the substantive ground of appeal from two standpoints. He contended, in the first place, that the evidence of identification was not critically examined by the trial judge. He elaborated on this saying it was apparent that the moonlight was poor since the appellant's sime, said to have been found at the scene of crime, was not seen until day-break. Mr. Loomu-Ojare submitted that had the trial judge adverted to this factor she probably would have doubted PW1's ability to identify the appellant.

.../3

We think, with respect, this is a weak argument since identification did not solely depend on the moonlight. We hasten to agree with Mr. Loomu-Ojare, though, that nowhere in the evidence was the moonlight said to be bright as twice stated by the learned judge in her judgment. Still, there were other and sufficiently compelling aspects of identification. PW1 knew the appellant well and this was not in dispute. She could therefore be trusted to know the appellant's voice and this, too, was not disputed. In our view it did not require much moonlight to make out a well known person whose voice had already been recognised. Moreover, PW1 got out and saw the appellant at close quarters as he examined the deceased's body. Finally, she named him to her husband (PW2) when the latter arrived in response to her alarms. We think these factors gave sufficient assurance of the ability of PW1 to identify the appellant and it is not likely that the trial judge would have come to a different view even on a critical examination of the moonlight aspect.

Mr. Loomu-Ojare's other standpoint was that there was no evidence to corroborate PW1. The trial judge considered corroboration and said:

> ... the accused's own declaration to PW3 and PW4 that he had killed the late Kaparwa ole Malambo and more particularly the accused's move to settle the murder traditionally cements PW1's testimony that the accused killed the deceased.

.../4

We agree, but we will add a few remarks in view of Mr. Loomu-Ojare's observations. Mr. Loomu-Ojare pointed out that the appellant declared to PW3 to have killed a son of one Naemata and no evidence was brought to link the deceased with this Naemata. It is indeed unfortunate that the trial judge never addressed this matter at all. However, we have on our part given consideration to the matter and we think the appellant had the deceased Kapurwa ole Malambo in mind when talking to PW3. We say so because subsequently he negotiated with the deceased's brother, PW4, to settle the crime out of court. But Mr. Loomu-Ojare further observed that the evidence of PW4 was not corroborated. No-one else was called to confirm the alleged negotiations and the circumstances of the appellant's arrest. That, too, is an important observation. None of the clan elders who were said to have been involved in the negotiations and, most deplorably, none of the police officers involved in the arrest, was called to testify. Basically, however, this was a matter of credibility and the trial judge was the best judge of that matter. Although the judge did not expressly say so, we take it that she found PW4 a credible witness since she readily acted on his evidence. Furthermore, it seems to us that the appellant's own evidence supplied some corroboration. He stated that he was arrested at a moran meeting at Selela village by policemen who had infltrated the meeting. There was nothing in Mr. Loomu-Ojare's submissions to make us doubt the credibility of PW4. His attempt to suggest that PW4 was in prison at the material time was not a success for the evidence shows that PW4 was imprisoned for three years in 1975. He could not have been serving that sentence in 1988. We therefore believe, as the trial judge did, that PW4 was a witness of truth. According to this witness

.../5

the appellant prayed for pardon, saying that the devil had made him kill the deceased. We think that evidence was properly accepted.

Finally, Mr. Loomu-Ojare pointed to some contradictions between PW2 and PW3, and that centered on whether or not PW3, a 10-cell leader, went to the scene of crime the same night. We think this was a minor contradiction and there was an explanation for it. The case of Lukago v. Republic [1994] TLR 198 which Mr. Loomu-Ojare cited involved serious contradictions in the prosecution evidence which went unresolved by the trial judge. In the instant case the witnesses gave evidence six years after the event and allowance ought to be given for minor discrepancies. Moreover, it is difficult to see the connection Mr. Loomu-Ojare was trying to build up between the contradictions and the credibility of PW3 in stating that the appellant declared to him to have killed a person. There was no evidence to suggest that when PW2 and PW3 met, whether that night or the following morning, PW3 did not disclose the appellant's report to him. We think, on the whole, PW1 was amply corroborated, not least also by the appellant's flight from the village with his entire family. The appellant was therefore properly held to have killed the deceased.

As stated at the beginning, it was submitted in the alternative that the appellant killed in self-defence. Mr. Loomu-Ojare argued that there was a fight in which the deceased got out to confront the appellant, and there was no evidence of premeditation. Learned counsel for the Republic Mrs. Lyimo countered that the history of bad blood between the appellant and the deceased, the act of the appellant going to the house of PW2 at such an unusual hour, armed

with a stick and a sime, and the act of commanding the occupants of the house to come out, were evidence of a prior intention to kill the deceased. The trial judge indeed held that there was premeditation and gave two grounds for holding so. First, there was evidence of a long running feud between the appellant and the deceased. They were said to have fought several times before, one such fight being witnessed by PW1 at her shamba and another being witnessed by PW4 at the deceased's home, and they were also said to have fought just two days before the fateful day. We prefer to put it that way since the evidence on the other alleged fights was hearsay. Second, the judge said that the appellant "returned to the home of PW2 at the dead hour ... to fish the deceased from his sleeping nest."

Assuming there was bad blood between the appellant and the deceased, we, ourselves, have difficulty in seeing it as evidence of premeditation in the absence of evidence that the appellant knew that the deceased was at PW2's house when he headed there. In other words, there was no evidence that he was after the deceased but we can only speculate that he had a pleasant surprise when no other person but the deceased came out. We were unable to find the source from which the learned judge gathered that the appellant "returned to the home of PW2 ... to fish the deceased from his sleeping nest," for that is not to be found in the evidence. On the contrary, there was evidence from PW2 to the effect that the appellant had not come to his house earlier on. Cross-examined by the second assessor, the witness said:

.../7

> During the material day I had not seen the accused and the deceased walking or talking together. I had not seen the accused at my home during the day on the fateful day.

The learned judge did not end with the statement just cited, she made other statements, similarly not in the evidence, all suggesting that the appellant was aware of the deceased's presence in the house before the deceased came out. She said:

> According to PW1 the accused flashed his torch and saw the person through the thorns put at the entrance of PW1's hut to serve as a door.

She also said:

> PW1 heard the accused calling out at the person who was sleeping in the material house.

She finally said:

> ... the deceased was challenged to come out.

All this was not in evidence except the third statement which featured in the evidence of PW1 but has to be doubted. All along PW1 made it appear that she made the appellant to believe that there were a number of guests in the house and that the appellant wanted them out, but not a particular person. In her evidence-in-chief she said:

> The accused asked me who was in the house and told him there were guests from Mbulumbulu. The accused told me to tell the guests to go out.

.../8

In cross-examination by the first assessor, she said:

> The accused came to the house and challenged whoever was in the house to get out.

It was during cross-examination by the resourceful second assessor that she said:

> Our houses have no doors, we close the entrance with thorns. The accused took the thorns away and challenged the deceased to come out.

We say that this has to be doubted because such a significant episode of throwing off the door could not have escaped her memory until almost the end of her testimony. The judgment thus contains statements which are not in evidence and which by coincidence are the only statements that suggest premeditation on the appellant's part. We therefore prefer to say that there was no evidence of premeditation. We would not wish to believe that these serious statements were gratuitous of the learned judge or were given in evidence but not recorded. The latter possibility is no less discomforting for one is bound to ask how much more went unrecorded.

The foregoing also takes care of Mrs. Lyimo's points. It need only be added that the act of the appellant going armed is not incapable of an innocent explanation. The Court takes judicial notice of the fact that a stick or club and sime are the usual and necessary accompaniments of the rural Maasai at any time. There was therefore nothing unusual in the appellant being so armed, especially at night. It was similarly not unusual for the appellant

.../9

.../10

to mount the nocturnal visit to PW2's house. According to PW1 the appellant, like the deceased, used to spend nights at the house in the exercise of a privilege allowed to Maasai men of the same age group. The appellant and the deceased were of the same age group as PW2. And in the light of this, it is not surprising that the appellant berated PW1 when he was told that there were guests in the house and so ordered her to tell them to get out.

Apart from the strange statements in the judgment there were serious gaps in the evidence such as to make it impossible to know how and why the appellant resorted to the use of a sime. PW1 said:

> When the accused was talking to me, the deceased woke up and put on his shoes while listening to what the accused was saying. I told the deceased not to go out. The deceased pushed me aside and got out. When the deceased got out I raised an alarm because I saw the deceased lying down. I raised the alarm when I heard people fighting with sticks after the deceased got out.

The impression one gets from this passage is that PW1 never observed the course of the fight but merely heard the striking of sticks. This impression is confirmed in other parts of her evidence. In cross-examination by the defence counsel (Mr. Loomu-Ojare), she said:

> I found the deceased lying on the ground when I went out after hearing the sticks hitting each other indicating a fight.

.../10

And in cross-examination by the second assessor, she said:

> ... I heard the sticks hitting each other so I knew the accused was fighting with the deceased.

This unsatisfactory state of the evidence makes it impossible to determine whether the appellant's use of the sime was necessarily an act of aggression and not possibly in self-defence. Where an accused is initially the aggressor he would still be entitled to the defence of self-defence if the tables are turned against him and he determines his life to be in imminent danger. In Laiser v. Republic [1994] TLR 222 also cited by Mr. Loomu-Ojare, the appellant was initially the aggressor but was then set upon and seriously attacked by the deceased and his companion. In the process the deceased felled the appellant on the ground and preseed on the appellant's neck, whereupon the appellant took out a knife and fatally wounded the deceased. This Court stated, citing R. v. Ramgan Ahmed Jamal (1955), 22 EACA 504, that the question of the appellant's guilt regarding the charge of murder was so complicated and uncertain that the court of first instance ought to have felt some doubt about it. The Court held that the defence of self-defence is available also to a person who has started a fight depending on the circumstances of the case and substituted a conviction for manslaughter. The instant case presents a similar problem, but this time the problem of insufficiency of evidence on the fight. What transpired in the fight will remain unknown. The question of murder thus becomes so complicated and uncertain that the trial judge ought to have entertained doubts had she addressed her mind to the possibility of

.../11

self-defence. Alternatively, it was safer to say that the killing was the result of a fight. The appellant denied ever meeting or knowing the deceased, which was a lie, but the weakness of the defence did not substitute for the burden cast on the prosecution to prove the charge beyond reasonable doubt. As demonstrated, that burden was not discharged.

We allow the appeal, set aside the conviction and sentence for murder and substitute a conviction for manslaughter contrary to section 195 of the Penal Code. The appellant has since his apprehension and subsequent conviction been in custody for a total of 13 years. We think that serves the justice of the case and order that he be set at liberty unless further lawfully held.

DATED at DAR ES SALAAM this 17th day of January, 2002.

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(T.L.K. WAMBALI)
DEPUTY REGISTRAR