IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 7 OF 1995

BETWEEN

MARWA MWIBABI ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Tabora)

(Mchome, J.)

dated the 12th day of December 1994

in

Criminal Sessions Case No. 31 of 1994

J U D G E M E N T

MAKAME, J.A.:

The case in the High Court which gave rise to this appeal before us was handled in an extraordinary manner. The learned trial judge unhappily erred and it was most unfortunate that both learned counsel, Senior State Attorney Mr. Rutagwerela, and advocate Mr. Rutakolezibwa, officers of the court, failed to draw the learned High Court judge's attention to an obviously erroneous course. Both learned counsel before us, Mr. Muna, advocate for the appellant, and Mr. Ndunguru, Senior State Attorney, submitted that the procedure adopted was irregular.

The appellant was charged with the murder of his six-year old son, SALUM MARWA. He brutally assaulted the deceased and the deceased's elder brother MWITA MARWA who fortunately managed to escape, apparently for misplacing a plastic mug.

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When he was arraigned the appellant offered a plea of Manslaughter, which the Republic would not accept. The learned trial judge whereupon, quite properly, noted:

> "The offer to (sic) the plea of guilty to the lesser offence of manslaughter is not accepted by the Republic and so the case has to go on."

At the Preliminary Hearing, after the Republic had given a resume, the learned defence counsel owned some facts but went on to say, inter alia, "We deny that the killing was with malice aforethought ... It is manslaughter." The defence was thus clearly refuting an essential ingredient of the offence of murder and so the appellant was pleading Not Guilty to Murder.

The learned trial judge wrote

> "All the facts are undisputed. <u>What is in dispute is whether there was malice afore-thought</u>"

We provide the underlining so as to facilitate emphasis.

Senior State Attorney Ruta submitted that the accused, now appellant, was not disputing the facts "save that the accused killed the deceased with malice aforethought." He went on to furnish the court with arguments and closed with a prayer that the appellant should be convicted for murder. Defence counsel made his submission and concluded that "He should be convicted of manslaughter only".

On the strength of the material before him the learned judge proceeded to compose what he called a "Judgement" during the course of which he remarked:

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> "The accused person through his learned advocate, Mr. Rutakolenzibwa, admitted all the facts. The only dispute left was whether these facts prove the offence of manslaughter or murder. As the facts were all undisputed I found it unnecessary to adjourn this case and call any witnesses. And as there was no hearing of witness I found this not to be a trial as such and unnecessary to sit with assessors. I invited the learned counsel for both sides to address the court on whether these undisputed facts lead to murder or manslaughter."

The learned trial judge went on at some length and somehow managed to arrive at the decision that the appellant was guilty of murder, and condemned him to death. We note, incidentally, that although there was a finding that the appellant was guilty he was not convicted before he was sentenced. This was itself irregular. Sentence must always be preceded by conviction, whether it is under section 282, (where there is a plea of guilty), or whether it is under section 312 of the Criminal Procedure Act, (where there has been a trial).

At the hearing of this appeal Mr. Muna, learned counsel advocating for the appellant, dropped the last of his three grounds and briefly argued only the first two - that no evidence was led to prove murder, and that there was no trial, and so the proceedings were a nullity, because there were no assessors to aid the judge, in terms of section 265 of the Criminal Procedure Act.

Mr. Ndunguru, for the Republic, was not able to support the High Court decision. He was of the view that the procedure adopted was highly irregular and that we should order a trial de novo.

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We have recounted at some length what transpired in the High Court. We trust it has come out in sharp relief why we remarked at the beginning that the proceedings were extraordinary. The issue of malice aforethought was a bone of contention all along and so there should have been a trial, and this, of course, with the aid of assessors. The undisputed facts would not have to be proved, but the issue of malice aforethought, which was disputed, had to be established. The Republic should have been given the opportunity to try to prove the ingredient and the Defence a chance to refute the same.

Because of the foregoing we declare the proceedings a nullity from Page 4, AFTER Mr. Rutagwelera had tendered the post mortem examination report, Exh. P1. The proceedings from the beginning to the tendering of Exh. P1 should be read out to assessors after which a trial should be held. Meanwhile the appellant shall continue to be in custodial confinement. We so order.

DATED at DAR ES SALAAM this 21st day of February, 2003.

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.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR