THE COURT OF APPEAL OF TANZANIA AT ARUSHA

(CORAM: RAMAPHANI, J. A.: NSEKELA, J. A.; And KAJI, J.A.)

CRIMINAL APPEAL NO. 120 OF 2002

BETWEEN

HUNAY LANGWEN & 3 Others **APPELANTS**

AND

THE REPUBLIC **RESPONDENT**

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

(Munuo, J.)

dated the 6th day of October, 1992
in
Criminal Session Case No. 45 of 1990

JUDGMENT OF THE COURT

RAMAPHANI, J.A.:

The four appellants, together with another person, were charged with the murder of a boy, Gwandu Sige. The four appellants were convicted and sentenced to suffer death hence this appeal.

The learned trial judge was satisfied with the evidence of the only eyewitness, Hadandi Sige, PW 2, that on the night of 1st June, 1988, one Sige Barie, now deceased, was sleeping in his *boma with* his two sons, PW 2 and Gwandu. Suddenly a group of cattle rustlers pounced on them taking away 79 head of

cattle. The rustlers also kidnapped the deceased Sige, Gwandu and PW 2 across the Warret NAFCO wheat farms into the Mreru forest where they abandoned them.

PW 2 said that from their house they were blindfolded so that they could not recognize their captors and they were tied with a rope. After sometime through the jungle and as PW 2 and his father kept on stumbling, the blinds were taken off. However, early on 2nd June, 1988, they were blindfolded again and then PW 2 was tied to a tree and abandoned while his father was taken farther along. PW 2 managed to free himself and returned to the village to report. As it was already night time they waited for the morning to go searching for his father and Gwandu.

They found his father tied to a tree head downwards but they never saw Gwandu. However, they found a T-shirt which PW 2 recognized to have been his but which he gave to Gwandu as it had become too small for him. Then they also saw two sandals made from tyres which he identified to be those of Gwandu.

PW 2 was positive that he identified the first appellant and the third appellant as the their kidnappers having had a thorough view of the two during the time the blinds were taken off and when they were just about to tie him to a tree and before they blindfolded him again.

As for the fate of Gwandu the learned judge had this to say:

> While still combing Mreru forest in search for Gwandu the search party traced the rope with which the little boy had been tied to a tree; near the rope was one of the boy's sandals. His other tyre sandal was recovered a few paces away where there were drag marks leading to what appeared to be a cave for wild animals. The T-shirt the boy last wore was also found at the scene but no traces of his other remains or bones were recovered. Since the clothing and tyre sandals were recovered in the midst of the Mreru forest and owing to the fact that the late Gwandu like his father and his elder brother, P W 2 had been tied to a tree with a rope, and in view of the drag marks found between the tyre sandals and the T-shirt the boy last wore, the police concluded that the victim must have been mauled by wild beasts leaving no trace of his remains behind ...

With due respect to the learned judge, she did not make her own findings of the fate of Gwandu. After she had carefully catalogued what was found and identified to belong to Gwandu, she stated the conclusion of the police that "the victim must have been mauled by wild beasts leaving no trace of his remains behind". She did not categorically say whether or not she agreed with that conclusion by the police. However, she used that conclusion in convicting the appellants:

> There is no way Accused No. 1, 2, 3, and 4 can avoid their responsibility in the cattle raid and kidnapping of Sige Barie, his elder son P.W. 2 Handandi and the late Gwandu Sige whose remains must have been feasted upon by wild animals in the Mreru forest...
>
> Under the circumstances Accused No. 1, 2, 3, and 4 are guilty and convicted of murdering Gwandu Sige on the 1.6.1988 as charged.

The crucial finding in any charge of murder or manslaughter is whether there is

a person who has been killed. The trial judge has to make a categorical finding that someone is really dead and should not leave that to be by way of an inference. So, the issue in this appeal then, is Gwandu Sige dead?

Mr. S. N. Merinyo, learned advocate, appeared for all four appellants and had six grounds of appeal. His ground three was that:

> The Honourable trial Judge erred further in assuming the death of the alleged deceased without proof of such death without sufficient evidence to that effect.

The learned advocate referred us to the passage in the judgment which we have already quoted above cataloguing pieces of proofs that Gwandu is dead and then proceeded to point out errors. Mr. Merinyo pointed out that it was not said that the T-shirt was found to be blood stained or ripped as should have been if Gwandu was devoured by a wild beast. The learned advocate submitted the same with respect to the sandals and the rope.

Mr. Merinyo pointed out two contradicting pieces of evidence by PW 2: First his testimony in court in which he said that Gwandu was also taken to the Mreru forest. Second, his Police Statement, Exh. D. 1, in which he said that Gwandu was left behind at home. For the respondent/Republic was Ms. Neema Ringo, learned State Attorney, who stated that there are many deficiencies in the case

and that the Republic does not support conviction.

In court PW 2 said:

> My father and I were tied together with a rope, both of our left hands were tied to a rope and because we were also blindfolded we were simply driven out of our house jointly. Gwandu Sige was driven behind us, we could hear him walk behind us.

However, in Exh. D. 1 PW 2 said:

> Walitufunga kamba mimi na baba na wakatutoa nje ya boma na tukaanza kubugozwa (sic) kupelekwa sehemu tusiyoifahamu huku mdogo wangu tukiwa tumemwacha pale nyumbani.

That can be translated:

> They tied my father and me with a rope and took us out of the premises and started to lead us to an unknown destination while we had left behind my younger brother at our house.

We agree with Mr. Merinyo that the statement, Exh. D 1, should be more accurate as it was given soon after the event, in June 1988, while the testimony in court was in September, 1992.

But even his testimony in court raises some doubts. For instance, "Gwandu Sige was driven behind us, we could hear him walk behind us". There are two queries: One, PW 2 could only have spoken for himself that he heard Gwandu walking behind them. How could he say on behalf of his father and hence use the plural form "we could hear"? Two, PW 2 also said: "We could hear the footsteps of our herd of cattle following behind us at a distance of about 500 paces". We ask: could they honestly hear the footsteps of a boy of 11 years amidst the hoofs of

79 head of cattle, even if 500 paces away? We think not. He only imagined hearing the footsteps of Gwandu.

Of course, there is the question how did the T-shirt and the sandals get to the Mreru forest? We do not know. There are two ways of looking at it: One, it is only a problem if PW 2 is believed that the T-shirt was Gwandu's. Two, the paradox underscores the magnitude of the problem and amplifies the doubts surrounding the whole case. Trite law requires us to resolve the doubt in favour of the appellants.

If there is no proof beyond reasonable doubt that Gwandu Sige is really dead, then that is the end of the matter. So, we do not need to go to the other grounds except, may be, one. Mr. Merinyo pointed out that the record is loud and clear that the learned judge proceeded with the trial while accused persons 1, 3, and 5 had no legal representation. That was wrong. This Court has clearly said so in Laurent Joseph v. R. [1981] TLR 351 and again in Lekasai Mesawarieki v. R, Criminal Appeal No. 31 of 1993. In those two decisions this Court ordered retrials. In this case both Mr. Merinyo and Ms. Ringo are at one that ordering a retrial for murder is useless as there is no conclusive proof that Gwandu is dead. We agree. Moreover, the incident was on 1st, June, 1988, while MUNUO, J's judgment was on 6th October, 1992, and we heard the appeal on7th October, 2004, that is, 12 years later.

So, we quash the conviction of murder, set aside the sentences of death and order the immediate release of the appellants from custody unless their continued retention is lawful.

DATED at ARUSHA this 27th day of October, 2004.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL