

IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 148 OF 1994

BETWEEN

1. ONESMO NDONDOLE	]	
2. MODESTUS KINYUNYU	]	..... APPELLANTS
3. NAWABU MADEBE	]	

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High  
Court of Tanzania at Iringa)

(Kileo, PRM/Extended Jurisdiction)

dated the 18<sup>th</sup> day of April, 1994  
in

Criminal Sessions Case No. 41 of 1993

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JUDGMENT OF THE COURT

MSOFFE, J.A.:

The appellants were convicted of Murder c/s 196 of the Penal Code and sentenced to suffer death by hanging. They are dissatisfied and hence this appeal.

At the trial, the following facts were not in dispute:- That the complainant PW2 Ayubu Hangula owned a shop at Iyayi Village,

Njombe District. On 27/5/90 he went out to spend the night with his junior wife. While there he was awakened by fellow villagers and only to be told that his shop had been broken into and a number of items stolen. He went back to the shop. On arrival, he saw his senior wife Janeth Kitalima lying down. She had been stabbed with a knife. He took her to Ilembula Hospital where she died the following day.

It was also not disputed that the people who broke into the complainant's shop were also the ones who killed the deceased. The appellants, together with one Julius Kibiki who escaped before being committed for trial, were arrested in connection with the killing of the deceased. They were searched and each was found with several items which were exhibited in Court. The items were said to have been stolen from the shop in the course of the deceased's killing. The first appellant was found with one new TAMECO knife, 53 Perma sharp razor blades, 10 packets of Match boxes, 8 packets and 15 Cigarettes Sportsman and one radio aerial. The second appellant was found with a two band National radio with serial No. 3129820,

one pair of Khanga, a piece of Sunny soap, one big Shanty Petroleum Jelly, one small bottle Petroleum Jelly, two knives TAMECO type, 2 bars Hi-Soap, bicycle tube and bicycle Spokes. The third appellant was found with bicycle tyres and tubes, one piece Hi-Soap, 1 big bottle of Shanty Petroleum Jelly, 5 small bottles of Petroleum Jelly and some bicycle spares which were in a gunny bag.

The appellants made extra judicial statements before a Justice of the Peace – PW7 Jamila Shayo. In the statements they admitted killing the deceased in the course of shop breaking and stealing. At the trial, they retracted the confessions, and accordingly trials within trial were conducted. In a Ruling dated 14/4/1994 the learned trial Principal Resident Magistrate (Extended Jurisdiction – as she then was) was satisfied that the statements were made voluntarily and accordingly allowed them to be introduced in evidence.

The appellants' conviction was based on two pieces of evidence i.e. the extra judicial statements, and circumstantial evidence as established in their being found with the above items.

Mr. Mwakilasa, learned advocate, filed a memorandum of appeal in which there is one ground, namely:-

"1. The learned Principal Resident Magistrate (Extended Jurisdiction) misdirected himself (*read herself*) on the question of corroboration."

At the hearing of the appeal on 19/5/2004 the Court was informed that the 2<sup>nd</sup> appellant (Modestus Kinyunyu) had since died. He died on 12/5/1996. Accordingly, in terms of Rule 71 (1) of The Tanzania Court of Appeal Rules, 1979, his appeal was marked abated.

In arguing the appeal on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> appellants Mr. Mwakilasa made a fairly brief submission. He urged that the above items were not adequately identified to be among those stolen from the complainant's shop on the date of incident. He went on to say that the items did not have special marks mentioned earlier by the complainant to the police before the search in question. In any case,

he went on to urge, the items were easily available in shops – to suggest that there was nothing strange in the appellants being found with them. Therefore, according to Mr. Mwakilasa, since the items were not adequately identified by the complainant they could not be used to corroborate the confessions.

On the other hand, Mr. Boniface, learned State Attorney, argued very strongly that the conviction was not based on the above corroborative evidence alone. The conviction was grounded on the extra judicial statements plus the above mentioned corroborative evidence. He was quick to add, however, that even without the above corroborative evidence a conviction could still lie on the strength of the extra-judicial statements alone. On Mr. Mwakilasa's contention that anybody could own the above items, Mr. Boniface submitted that while that might be true, a look at the statements will show that the items mentioned therein tally with the ones found with the appellants. In fact, he went on to submit, the third appellant was found with used bicycle tyre and rings – items which are mentioned in the statements.

We have gone through the record very carefully. In the end, we are satisfied that the appeal has no merit. As correctly submitted by Mr. Boniface, even without the above corroborative evidence, the appellants could still be convicted on the strength of the extra judicial statements. We agree with him entirely. A look at the statements will show how the offence was planned and executed. For instance, the 1<sup>st</sup> appellant (Onesmo Ndongole) is on record as having stated, inter alia, as follows:-

“Tulijadiliana kwamba tuvunje mlango kwa jiwe kubwa lilikuwa barabarani. Nilibeba mimi na Madebe kabla tulipanga kuwa tukivunja wawili waingie ndani kumtuliza mwenye nyumba, ikawa Madebe na Kibiki mdogo waingie ndani. Wawili wabaki pale dukani – Mimi na Kibiki mkubwa Kinyunyu abaki nje alikuwa na spoku wametengenezea barua kuwashtua watu kama wanakuja, wanagongesha kisha zinawaka. Tulitupia jiwe tukavunja mlango tukaingia vile vile kama tulivyopangana. Tulipoingia mama akaanza kupiga kelele. Sisi tukawa tunapakia vitu

kwenye gunia na visalfeti (mifuko ya mbolea). Tulitoa nje tukaita wenzetu waliokuwa ndani. Jikoni tulichukua baiskeli ndiyo tulibebesa vyombo. Tulimwacha marehemu akipiga kelele kuwa ameumizwa. Tuliondoka moja kwa moja mwenye barabara. Tulifika nyumbani saa 1 alfajiri tukaanza kugawana vitu kila moja akaenda kwake. Baiskeli aliichukua Madebe. Tukawa kila moja nyumbani kwake mimi nilichukua bunda la sigara, viberiti na kisu. Tarehe 4/6/90 saa 6 mchana nilikuwa kwenye kilio nilifuatwa na Polisi wa Rujewa nikaenda kusachiwa wakachukua viberiti, sigara na kisu vyote ni vya kwenye lile duka tulilovunja.”

In the same manner, the 3<sup>rd</sup> appellant Nawabu Madebe stated, inter alia, as follows:-

“Tarehe 27/5/90 nilikuwa Rujewa nikiwa na Modestus Kinyunyu, Ndondole, Kibiki mkubwa na mdogo, Kasimu Mpalagata tulifika Igawa tukamkuta Shoti na Omari tukafika Iyayi saa 5 usiku. Tulikuwa na bomba za spoki tukapakia

viberiti tukapiga zikalia kama bunduki, na jiwe kubwa tulilikuta pale pale. Saa sita tukavunja mlango wa duka kwa jiwe. Tuliingia ndani. Mimi na Kibiki mdogo tuliingia kumtuliza marehemu asipige kelele na kutafuta hela nilipata Shs. 7,000/= (Elfu Saba) Modestus, Kibiki mkubwa na Shoti walikuwa dukani wakipakia vitu kwenye gunia moja njiani tuligawanya vikawa vipeto viwili. Ndondole, Omari na Kasimu walibaki nje. Tulipokuwa ndani hatukuwa na kisu ila nilikuwa na fimbo, Kibiki mdogo alikuwa na kurungu yule marehemu alikurupuka kutoka ndani akaenda akavaana na Shoti aliyekuwa na kisu cha mle dukani kwani Shoti ndiye aliyekuwa akipangua vitu vya mle dukani. Modestus akipakia kwenye gunia. Marehemu alipovaana na Shoti nilisikia akilalamika kuwa ameumia. Tulichukua baiskeli tukaondoka kufika njiani tukafungua baiskeli mimi nikachukua malingi na sabani, sabuni, sigara, viberiti walichukua wenzangu. Mimi nilibaki na kisu kimoja. Tulipogawana vitu kila mtu alikwenda kwake.”

It will be obvious from the above statements that the appellants formed a common intention to execute an unlawful act. Hence the death of the deceased was a direct result or consequence of the execution of their unlawful act. So, in terms of S. 23 of The Penal Code, Cap 16, there was no way they could escape a conviction of murder.

Also, we agree with the learned trial Principal Resident Magistrate (Extended Jurisdiction – as she then was) that if corroborative evidence was necessary, then the same was to be found in the items found with the appellants. It is true that anyone could own the properties, but in the absence of evidence that the appellants owned shops, it was rather unusual to be found with all those properties. What is more, the items mentioned in the statements were the very ones which were seen with the appellants. Also, while on this point, there is a very important observation made by the Magistrate in her Judgment when considering the assessors' view which, we think, is very instructive. The observation reads as follows:-

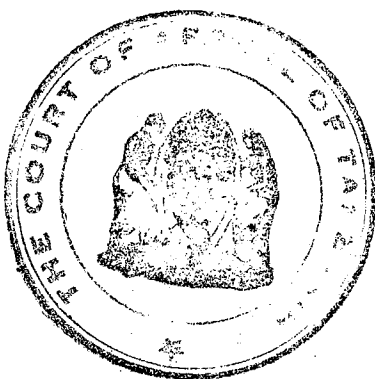
"... I was especially impressed by their reasoning – that it could not be possible for all the accused persons, each to be found with an amount of a variety of items similar to the ones stolen from the complainant's shop. I think this is a very vital point which goes to corroborate the accused's retracted extra-judicial statements ..." (Emphasis added)

In our view, the above was a very fair observation, the gist of which was that there was evidence to corroborate the extra judicial statements.

The appeal is dismissed.

DATED at MBEYA this 10<sup>th</sup> day of June, 2004.

J.A. MROSO  
**JUSTICE OF APPEAL**



H.R. NSEKELA  
**JUSTICE OF APPEAL**

J.H. MSOFFE  
**JUSTICE OF APPEAL**

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

  
( S.A.N. WAMBURA )  
**SENIOR DEPUTY REGISTRAR**