IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 54 OF 2004

MATHAYO LENDITA.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Mchome, J.)

dated the 10th day of June, 2002
in
Criminal Sessions Case No. 64 of 2000

JUDGMENT OF THE COURT

NSEKELA, J.A.:

The appellant, Mathayo Lendita, was convicted of murder and sentenced to death by the High Court (Mchome, J.) sitting at Arusha. He is now appealing against both conviction and sentence.

The appellant was a member of the People's Militia who on the 11.3.99 proceeded on to the border between Monduli District and the Republic of Kenya ostensibly to patrol the border in order to curb sugar smugglers. As he was returning home at about 6.30 p.m. a group of people allegedly from the Kenya side, was chasing him. In

order to scare them away, he shot a bullet in the air and in the process accidentally killed the deceased Joseph Lazaro whom he claimed was one of the people chasing him.

Mr. Kimomogoro, learned advocate for the appellant, filed three grounds of appeal, namely -

> "1. The learned trial judge erred in law in his summing up of the case, in failing to bring the attention of the gentlemen assessors the question of intoxication.
>
> 2. The learned trial judge erred in law in failing to consider whether the appellant was capable of forming the specific intent to kill;
>
> 3. The learned trial judge erred in law to hold that the prosecution failed to establish malice aforethought beyond reasonable doubt."

The thrust of the case for the appellant was the defence of intoxication in that the appellant did not have the necessary capacity to form the specific intention to kill the deceased. In legal terminology, the appellant did not have the requisite malice aforethought. It will be recalled that on the 23.10.2001, when the appellant was asked to plead to the charge, he admitted that he killed the deceased by accident. In the memorandum of matters not in dispute, it was agreed that –

> "1. That the deceased Joseph Lazaro is dead and his death was a violent one as shown in the post-mortem report exhibit P1.
>
> 2. Accused admits causing the deceased's death by shooting him with a fire-arm."

This admission was not in anyway qualified by adding that the killing was induced by intoxication so as to negate malice aforethought. Section 192 (4) of the Criminal Procedure Act, 1985 provides –

> "(4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved."

What was agreed upon in paragraphs 1 and 2 of the memorandum of agreed matters were deemed to have been duly proved. The appellant did not raise the defence of intoxication. Had he done so, the burden of proving that the appellant was capable of forming the requisite intent necessary to constitute murder would lie on the prosecution. (See: **Kahekeya Buzoya & Another v. Republic** (1976) LRT No. 16). However, Mr. Kimomogoro put up a spirited fight on the defence of intoxication and so we propose to deal with it, albeit briefly.

A question that we ask ourselves is, is there any evidence that at the critical moment when the crime was committed, the appellant was intoxicated? There is evidence from PW1 Apolina Penieli Muro who stated as follows when cross-examined by an assessor –

> "The accused was drunk. By looking at him I could tell accused was drunk."

The other piece of evidence is from the appellant himself when he stated –

> "That day I was a bit drunk. I had drunk "gongo". **But I knew what was going on."**

And he continued –

> "I did not kill the deceased intentionally. May be it was bad luck."

Mr. Kimomogoro was of the view that the appellant did not have the requisite malice aforethought. He criticized the learned judge that he did not even address himself on the issue. The learned advocate was of the opinion that the appellant did not know what he was doing.

Mrs. Neema Ringo, learned State Attorney, with equal force, submitted that malice aforethought had been established having in mind three factors. First, the weapon that was used was lethal; second, the injuries that were inflicted upon the deceased were very severe and third, the nature of the conversation that the appellant had with the deceased immediately before the fatal shooting. On this point, the learned State Attorney submitted that PW1 testified as follows –

> "Then accused asked deceased "nikuue, nikuue". And deceased replied "niue". Then accused shot the deceased and he died on the spot."

All these factors, Mrs. Ringo added, established that the appellant had the requisite malice aforethought.

With respect, we agree with the learned State Attorney. On our part, we do not subscribe to the view that the appellant was intoxicated and that he did not know what he was doing. Far from it, by his own words, he knew what he did, though admittedly he had imbibed "gongo". For the appellant to be guilty of murder, the prosecution had to establish beyond reasonable doubt that the appellant had specific intent to kill or to do grievous harm to the deceased and therefore, must be deemed to have acted of malice aforethought. As we see it, on the evidence, the deceased died as a result of the appellant's unlawful act of shooting him with a sub machine gun. This is a weapon to be carefully handled and used. The nature of the injuries the appellant inflicted upon the deceased speak for themselves as stated in the post-mortem examination report. It can reasonably be inferred that the appellant at least intended to cause grievous bodily harm to the deceased.

In the result, we are satisfied that the appellant's conviction was well founded. We uphold the conviction and sentence.

DATED at ARUSHA this 15th day of July, 2005.

A.S.L. RAMADHANI
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.M. RUMANYIKA)
DEPUTY REGISTRAR