IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 251 OF 2005

NATHANIEL ALPHONCE MAPUNDA]
BENJAMINI ALPHONCE MAPUNDA] ..... APPELLANTS
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Manento, J.)

dated the 28th day of October, 2003
in
Criminal Sessions Case No. 40 of 2001

JUDGMENT OF THE COURT

17 & 31 August, 2006

MSOFFE, J.A.

The appellants, who are brothers, were charged with murder contrary to section 196 of the Penal Code. It was alleged that on 16.10.2000 at about 00:30 hours at Liwili village within Mbinga District they murdered one Egreta Ndimbo. After a full trial the High Court (Manento, J.) sitting at Mbinga convicted the first appellant of murder and the second appellant was convicted of manslaughter contrary to section 195 of the Penal Code. Consequently, the first

appellant was sentenced to death and the second appellant was sentenced to a term of imprisonment for twenty one years. In grounding the convictions the learned trial judge observed and reasoned partly as follows:-

> "On my observation to the demeanour of the 2nd accused person, the way he was giving his evidence, answering questions put to him, I am of the opinion that he was persuing (sic) a just and lawful cause, that of arresting a suspect. But he was negligent in not rescuing the deceased. I have a feeling that he was telling the truth when he said that he argued his brother, the 1st accused not to assault the deceased after her arrest but the 1st accused, persisted in the assaulting of the deceased, causing the rapture of the forehead of the deceased. The whole proceedings showed how the 1st accused, was in command of the situation. Sending other people to go and report to the authority first the order given to PW2 Geofrey Kayombo who refused and later on to the 2nd accused. All those circumstances leads me to conclude that there

> was no *mens rea* by the 2nd accused. That was only by the 1st accused, who had alleged that the deceased was stealing his maize. What the 2nd accused did was to assault the deceased. But his being in action leads to a commission of lesser offence. As to malice aforethought, I would say that it has been proved against the 1st accused person. Perforating the deceased's forehead, causing it to rapture and damaging the brain, was an act intended to cause the death of the deceased. That the deceased, was a weakly health woman was fatally beaten on her head, which at the end, caused her death. The first accused's malice aforethought could also be inferred from his belief that the deceased was a reputed thief, a habit born, on her mother's family."

The appellants are disatisfied, hence this appeal against the respective convictions and sentences.

At the hearing of the appeal Mr. Mbise learned counsel advocated for the appellants. Mr. Manyanda learned State Attorney

assisted by Mr. Boniface learned Senior State Attorney appeared on behalf of the respondent Republic. We wish to state from the outset that the learned State Attorneys did not support the convictions and sentences.

Mr. Mbise filed a memorandum of appeal with four grounds of complaint. The grounds read as follows:-

1. The learned Honourable trial Judge erred on concluding that the deceased did not meet her death at the hands of members of a Mob.
2. The learned Honourable trial Judge erred in not taking into account the Cautioned and Extra Judicial Statements admitted and marked Exhibits **P.2 (a)** and **(b)** and **P.3 (a)** and **(b)** in his Judgment.
3. The learned Honourable trial Judge took a wrong approach to the testimony of the second appellant as against the first Appellant.

4. The sentence of twenty one **(21) years** imprisonment imposed on the Second Appellant is manifestly excessive in the circumstances of this case.

In arguing the appeal Mr. Mbise submitted generally on the above grounds. In the process, he contended that it was wrong for the trial High Court not to believe the defence evidence that the death of the deceased was caused by a mob of people. No prosecution witness testified and stated that he/she saw the appellants assaulting the deceased to death. In this regard, the prosecution case either succeeded or failed on the basis of the defence case. The appellants' version of the circumstances surrounding the deceased's death was not contradicted by the prosecution side. If the judge had appreciated the above facts he would not have convicted the appellants, Mr. Mbise concluded on the point.

As for the different convictions and sentences, Mr. Mbise faulted the judge for treating the appellants differently. Once the judge had found that the appellants had a common intention of assaulting the

deceased he ought not to have convicted and sentenced them differently. At any rate, Mr. Mbise went on to say, the sentence of 21 years imprisonment meted out to the second appellant was too severe for an offence of manslaughter.

In supporting the appeal Mr. Manyanda essentially repeated the submission made above by Mr. Mbise. He too was convinced that the judge was in error for the reasons stated by Mr. Mbise. He emphasized that anything that was material to the case came from the appellants themselves. It was therefore wrong to ground the conviction on the basis of the defence case, he urged. In conclusion on the above point, Mr. Manyanda was of the view that the appellants' convictions were based on suspicion only. Like Mr. Mbise, Mr. Manyanda also felt that once the judge had found that the appellants had a common intention of assaulting the deceased it was wrong to convict and sentence them differently.

In his brief submission Mr. Boniface was of the view that there were a lot of doubts in the prosecution case. The doubts ought to

have been resolved in favour of the appellants, he submitted. Like Messrs. Mbise and Manyanda, Mr. Boniface was also of the view that the judge ought not to have treated the appellants differently in handing down the convictions and sentences.

Mr. Boniface added another point which was not canvassed by Messrs. Mbise and Manyanda in their respective submissions. The point relates to the cautioned and extra judicial statements which were produced and admitted in evidence at the preliminary hearing. The complaint here is that the statements were not read over to the appellants. With respect, we agree with Mr. Boniface in the following sense. A look at the record of the preliminary hearing conducted on 26.8.2002 will show that cautioned statements as well as extra judicial statements were produced and admitted in evidence as exhibits P2 and P3 respectively. Thereafter, a memorandum of matters that were not in dispute was drawn up and signed by the parties. However, the record of the case does not show that the contents of the memorandum were read over and explained to the

appellants as required by sub-section (3) of S. 192 of the Criminal procedure Act, 1985. The sub-section reads:-

> (3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed **and the memorandum shall be read over and explained to the accused in a language that he understands,** signed by the accused and his advocate and by the public prosecutor and then filed.
>
> (Emphasis supplied)

In the case of **Efraim Lutambi** v **Republic**, Criminal Appeal No. 30 of 1996 (unreported) this Court stated:-

> " ..... Any exhibits, **including cautioned and extra judicial statements,** which are not in dispute should have them referred to and given exhibit numbers in the

> memorandum of undisputed matters. The contents of the memorandum **including the exhibited statements, if any, should be read over and explained to the accused (in a language he understands), and the fact that that has been done should be reflected on the record.**"
> (Emphasis supplied).

For purposes of our decision in this matter we note that the judge did not attach any weight to the above statements in his judgment. He decided the case on the basis of other evidence. In the light of this fact, we do not have to go further and discuss the evidential value of the statements in relation to the case and what orders could be made in the circumstances. It will suffice to say briefly that we hope in future the provisions of S. 192 (3) of the above Act, as emphasized in **Lutambi**, will be complied with fully by Judges and Magistrates when conducting preliminary hearings. After all, the provision is couched in mandatory terms.

At this juncture we think it is pertinent and instructive to state the case that was before the trial High Court.

As earlier stated, the appellants are brothers. At the material time they lived at Liwili village in Mbinga District, Ruvuma Region. The first appellant owned a shamba where he had planted maize. At the time of the incident the maize was ripe and ready for harvesting. On 16.10.2000 at about 12:30 a.m. the fist appellant was going back home. As he passed through his shamba he saw a person harvesting his maize. He quietly went to the home of the second appellant which was nearby and informed him of the person he had seen at his shamba. The two went to the shamba where they saw the person who happened to be the deceased in this case. They raised an alarm, popularly known in the area as "mlete". Among the people who responded to the "mlete" were PW1 Charles Mwingira, PW2 Geofrey Kayombo and PW3 Odo Kayombo. These witnesses stated that on arrival at the scene they saw the appellants with the deceased's body. Upon inquiry the appellants told them that the deceased was assaulted to death by a mob of people who had

already dispersed at the time. In their respective defences the appellants repeated the same story:- That the deceased was killed by a mob of people.

There was no dispute at the trial that Egreta Ndimbo was dead and that she died on 16/10/2000 at about 0030 hours. According to the post mortem examination report the death was due to fracture of the frontal bone with brain damage. It was also undisputed that no prosecution witness testified to have seen the appellants kill the deceased. The crucial issue was whether the appellants were responsible for the death of the deceased. The judge considered the issue and answered it in the affirmative. He held that the appellants assaulted the deceased to death. He also opined and held that the reasonable inference was that the appellants raised the "mlete" as a camouflage "so that it could be believed that they did not kill the deceased."

As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of **Mohamed Said Matula v R** (1995) TLR 3 this Court reiterated the principle by

stating that in a murder charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt. In the instant case, the appellants did not admit the killing. So, it was the duty of the prosecution to prove the case against them beyond reasonable doubt if a conviction was to lie in the matter. Without hesitation, we are in agreement with learned counsel from both sides that this burden was not discharged. As is evident from the evidence, apart from the dead body being seen or found in the first appellant's shamba, and the fact that the appellants were also seen there, there was no other evidence to implicate them with the killing. We agree with learned counsel that the above evidence was not enough to sustain a conviction. There ought to have been more credible evidence linking the appellants with the killing. Apparently no such positive evidence was forthcoming. In fact, in the absence of evidence to the contrary the appellants' version of the incident might as well have been true.

We also wish to add here that although the judge did not say so in so many words he appeared to have been working on the idea that there was circumstantial evidence linking the appellants with the

killing on account of the undisputed fact that they were seen with the dead body. With respect, this fact alone was not enough to ground a conviction. The principle has always been that facts from which an inference of guilt is drawn must be proved beyond reasonable doubt – **Ally Bakari and Another v R** (1992) TLR 10. In the instant case no such proof was forthcoming, as already stated above.

We are aware that it could perhaps be suggested that the appellants were responsible for the death because they were present at the scene of the killing. As far as this point is concerned we wish to associate ourselves with this Court's decision in the case of **Jackson Mwakatoka and 2 Others v R** (1990) TLR 17 where at page 21 the court quoted a statement from a decision of the Eastern Africa Court of Appeal in the case of **R v Komen** that:-

> "Mere presence of the accused at a killing, he not having raised any objection thereto is not enough to justify his conviction for murder."

Again we are also aware that it could perhaps be argued that the appellants were responsible for the death because they were the

last persons to be seen with the deceased. Much as we are aware that this is a sound and cherished principle of law our view is that the principle presupposes that an accused person was last seen with a deceased person while still alive. Indeed, in the cases of **Juma Zuberi v R** (1984) TLR 249 and **Katabe Kachochoba v R** (1986) TLR 170 the respective accused persons were said to have been seen with the deceased persons while still alive. In the instant case the situation is different. The prosecution witnesses saw the appellants with the deceased after she had died. So, the principle would not apply.

As observed by Mr. Manyanda, the case against the appellants may well be highly suspicious. However, in a criminal charge suspicion alone, however grave it may be, is not enough to sustain a conviction, all the more so, in a serious charge of murder – See **Haruna Mohamed and Mathew Lwali v R,** C.A.T. Criminal Appeal No. 30/2001 (unreported).

As for the different convictions and sentences we also agree with learned counsel that the judge was in error in treating the

appellants differently once he had found that they had a common intention of assaulting the deceased. While we are on this point we wish to point out that the principle has always been that where a person is killed in the course of prosecuting a common unlawful purpose each party to the killing is guilty of murder. In **Tabulayenka s/o Kirya and Others** v **Republic** (1943) 10 EACA 51 the Court of Appeal for Eastern Africa stated at page 52 as follows:-

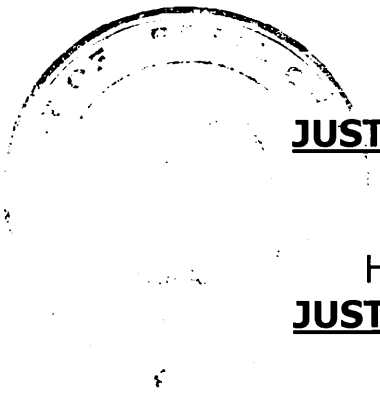
> "...To constitute such common intention it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from **their presence, their actions** and the omission of any of them to dissociate himself from the attack ....."
> (Emphasis supplied).

Furthermore, we also think that the sentence of 21 years imprisonment meted out to the second appellant was too severe

particularly in the light of the mitigating factors that were presented to the court.

In the event, we allow the appeal, quash the convictions and set aside the sentences. The appellants are to be released from prison unless they are lawfully held therein.

DATED at MBEYA this 31st day of August, 2006.



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