IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 147 OF 2008

1. MATHAYO MWALIMU
2. MASAI RENGWA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania (Dodoma Registry) at Singida)

(Mwarija, J.)

dated the 14th day of December, 2007
in
Criminal Sessions Case No. 126 of 2003

JUDGMENT OF THE COURT

30 October & 2 November, 2009

MSOFFE, J.A.:

The appellants MATHAYO MWALIMU and MASAI RENGWA were sentenced to death by the High Court (Mwarija, J.) consequent upon their conviction of the murder of HAMISI MNINO on 19/5/2002 at Ishinsi village within the District of Iramba/Kiomboi in Singida Region. Aggrieved, they have preferred this appeal. Mr. Kuwayawaya Stephen Kuwayawaya and Mr. John Lwegongwa Ruhumbika, learned advocates, appeared and argued the appeal on behalf of the first and second appellants, respectively. Mr. Patience Ntwina, learned Senior

State Attorney, represented the respondent Republic and argued in opposition to the appeal.

We find no compelling need of reproducing in detail the contents of the oral submissions made before us by learned counsel. It will suffice to say very briefly that, as indicated in the respective memoranda of appeal, Mr. Kuwayawaya and Mr. Ruhumbika were of the strong view that the case against the appellants was not proved beyond reasonable doubt. On the other hand, Mr. Ntwina urged to the contrary. In his view, the prosecution evidence, particularly the cautioned and extra-judicial statements, established the appellants' guilt and hence that the prosecution proved the case against the appellants to the required standard.

On 7/11/2005 the High Court (Mjasiri, J.) conducted a preliminary hearing in line with the mandatory provisions of **Section 192** of the **Criminal Procedure Act** (CAP 20 R.E. 2002), hereinafter the **Act**, read together with **The Accelerated Trial and Disposal of Cases Rules**, GN No. 192 of 1988. In the memorandum of matters not in dispute, drawn by the Court and agreed by the parties, it was not in dispute that HAMISI MNINO is dead and that his death was due to violence. Henceforth, in the trial before the High Court the crucial and vexing question was, and indeed still is, this one:- Who perpetrated the violence that led to the death of HAMISI MNINO? This brings us to the facts of the case that were led before the trial High Court.

Briefly, PW1 Kitundu Mnino, a brother of the deceased, testified and told the High Court that on 19/5/2002 the deceased's wife, one Zainabu Juma, approached and told him that her husband had gone missing since the previous day. On 20/5/2002 they reported the matter to the Village Executive Officer. On 21/5/2002 an alarm was raised and four groups were formed to begin a search for the deceased on different directions. The group that went westwards discovered the body of the deceased in a bush at a distance of about 50 paces away from the house of one Mwalimu Juwala. The body had big cut wounds on the neck near the right ear and the index finger was cut. The incident was reported to the police and PW2 No. C7444 Cpl. Hassan visited the scene and drew a sketch plan of the said scene. The plan was eventually produced and admitted in evidence as exhibit P1. On 23/5/2002 PW5 Dr. Silas Mazuki examined the body and made a report. In the *post mortem* examination report which he later produced, and was admitted, in court as exhibit P5 he opined that the death was due to severe haemorrhage. In the summary of report he observed, *inter alia*, that:-

> The deceased was assaulted and sustained multiple cut wounds on head and neck.

So, why were the appellants arrested, charged and convicted eventually? PW1 testified that in the course of the search for the deceased he went to the house of one Mwalimu Juwala. The latter told him that on 19/5/2002 there was *pombe* for sale in his

homestead. The deceased and the appellants were there. At around 5.00 p.m. they left together. With this information, the appellants were eventually arrested. Later, they made cautioned and extra-judicial statements admitting to have killed the deceased. The prosecution case was, therefore, premised on the following aspects. **One**, that the appellants were the last persons to be seen with the deceased. **Two**, that in their respective statements they admitted killing the deceased.

But what was the defence case? In essence, the appellants denied killing the deceased. In their respective defences at the trial, they retracted the confessions. At the said trial they did not, however, deny being with the deceased on 19/5/2002 in the drinking spree at the home of Mwalimu Juwala and eventually leaving with him at 5.00 p.m. In this context, they did not, therefore, dispute the prosecution version that they were the last persons to be seen with the deceased.

In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of HAMISI MNINO, like the court below, we too are satisfied that they are the ones who killed him.

The next question that falls for consideration is whether or not the appellants killed the deceased with malice aforethought. In our respectful opinion, the answer to this question lies in the appellants' own statements. In the first appellant's extra-judicial statement he said somewhere as follows:-

> *Tulikuwa tunakunywa pombe iitwayo KISUDA. Baada ya pombe tuliondoka kwenye saa 10.00 jioni kwenda nyumbani. Njiani tulikutana na marehemu. Masai akamsalimia marehemu. Marehemu alikuwa amelewa akamtukana Masai matusi ambayo siyakumbuki.* ***Masai alipigana na marehemu*** *na marehemu akaanguka na kufariki.* ***Walipigana kwa fimbo*** *..... (Emphasis supplied.)*

As for the second appellant, in his cautioned statement he stated thus:-

> *..... Nilikuwa nyumbani kwa Mwalimu Juwala tulikuwa tunakunywa pombe pamoja na marehemu Hamisi Mnino na mtoto wa Mwalimu aitwaye Matayo Mwalimu. Tulikunywa pombe hadi saa 17.00 hours za jioni ndio tuliondoka pamoja na Matayo Mwalimu na marehemu Hamisi Mnino kuelekea nyumbani kwa kila mtu. Baada ya kufika njiani ndio tulianza kugombana*

mimi na marehemu HAMISI MNINO. Baada ya kugombana kwa vile tulikuwa tumelewa ***tukaanza kupigana*** *ndio marehemu akawa ametupa panga ambalo alikuwa nalo na mimi nililichukua na kuanza kumkatakata marehemu sehemu ya kichwani na shingoni, alivyoanguka chini ndio mtoto wa Mwalimu aitwaye Matayo Mwalimu alimpiga fimbo ya sehemu za kichwani mara mbili ndio ikawa mwisho .....*

(Emphasis supplied.)

It is evident from the above statements that there was a fight between the appellants and the deceased. The law has always been that where there is evidence of a fight it is not safe to infer malice aforethought. In this regard, it will always be safe to ground a conviction of manslaughter instead of murder. For this reason, we think that the High Court ought to have convicted the appellants of manslaughter.

Before we end this judgment we wish to address one point for future guidance to trial Judges and Resident Magistrates with Extended Jurisdiction. We notice that in this case the trial judge sat with three assessors, MARIAM SELEMANI, HADIJA SAID and YUSUF MADAI. That was perfectly in order because in terms of **Section 265** of the **Act** all trials before the High Court are with the aid of assessors the number of which shall be two or more as the court thinks fit. However, in the

course of the trial the judge gave room to the assessors to **cross-examine** witnesses. With respect, we think this was wrong. In a criminal trial assessors do not **cross-examine**. They **ask** questions. We are supported in this view by the following provisions. **Section 290** of the **Act** reads:-

> 290. The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution.

In similar vein, **Section 294 (2)** of the **Act** provides:-

> (2) The accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses, if any, and after their cross-examination, if any, may sum up his case.

And **Section 177** of the **Evidence Act** (CAP 6 R.E. 2002) provides:-

> 177. In cases tried with assessors, the assessors **may put any questions** to the witness, through or by leave of the court, which the court itself might put and which it considers proper.
> (Emphasis supplied.)

So, from the above provisions of the **Act** there is no room for assessors to **cross-examine** witnesses. Under the **Evidence Act** assessors can only **ask** questions. As at what stage in the trial can assessors ask questions, we think that this depends on the trial judge. In our respectful opinion, however, we think that assessors can safely ask questions after the re-examination of a witness.

The reason for the above exposition of the law is not far fetched. The exposition is based on sound reason. The purpose of cross-examination is essentially to contradict. That is why it is a useful principle of law for a party not to cross-examine a witness if he/she cannot contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. They are there to aid the court in a fair dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness in a case. They should only ask him/her questions.

In the end, we quash the appellants' conviction for murder and set aside the sentence of death by hanging. In substitution thereof, we convict the appellants of the lesser offence of Manslaughter contrary to **Section 195** of the **Penal Code** (CAP 16 R.E. 2002). We accordingly sentence each appellant to a term of ten (10) years imprisonment from the date of this judgment.

DATED at DODOMA this 2nd day of November, 2009.

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(Z. A. MARUMA)
DEPUTY REGISTRAR