IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 184 OF 2009

NDITO SUKUMAWIKI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Mujulizi, J.)

dated the 22nd day of May, 2009
in
Criminal Session Case No. 9 of 2006

JUDGMENT OF THE COURT

30 June & 1 July 2011

MANDIA, J.A.:

On 4/3/2002 PW2 E 1485 Detective Corporal Mgulla of Meatu Police Station was at his duty post at the Bus stand Police post. He heard an alarm call, locally called "mwano", from the direction of Mshikamano area and went over there. At the scene he, together with the officer in charge C.I.D. who had joined him, found the headless body of a person lying outside a house. PW2 Detective Corporal Mgulla testified that two women identified the headless body to be that of the deceased Yusuf Charles.

These were the deceased's mother SHOMA d/o KULWA and the deceased's wife MELECIANA d/o LUHELEJA. Surprisingly these two named women were not called to testify. On 8/3/2002 four days after receiving the report of death PW2 Detective Corporal Mgulla went to Mwanhuzi Primary Court where he saw initials "NS" written in blood on the door of the office of the Primary Court magistrate. On looking around the primary court premises PW2 found the head of the deceased. The same witness also gave evidence that the appellant's wife had reported seeing the deceased with a bloodied machete. Since the wife and the mother did not testify, and the machete was not tendered in evidence, this is hearsay evidence which no court can act upon.

Another police officer from Meatu Police Station who visited the scene and drew a sketch (Exh P2) is PW4 D 4773 Detective corporal Kenan. Apart from drawing the sketch the evidence of PW4 is a repetition of what PW2 E 1485 Corporal Mgulla had said.

PW3 MG 768811 Mashaka Mbaruku Hassan was also fielded by the prosecution. He is a watchman at Mwanhuzi Primary Court who testified

that on 5/5/2002 at midnight he saw a person he did not identify standing outside the door of the chambers of the primary court magistrate. To scare away the unidentified person he shouted "Kamata huyo". The person left and went away, never to come back. He went over to the door and found the initials "NS" written in blood of the door leading to the chambers of the magistrate.

On 15/1/2003 at 2 p.m. PW5 Njau Kajala Steven Magazi, then a Primary Court Magistrate at Mwanhuzi Kimali Primary Court, recorded an extra-judicial statement from the appellant Exhibit P5. The evidence of this witness shows the appellant gave his statement voluntarily and signed it to certify its correctness. Though the evidence of PW5 shows the appellant was taken to the Primary Court by one Detective Corporal Kassim of Meatu Police Station, the latter did not testify. There is therefore no record of how the appellant came into the hands of the police.

A primary court magistrate, PW1 Leonardina M. Mrema testified that in 2001 the deceased's house was sold in a public auction in which the appellant emerged as the successful bidder. The local primary court issued

a notice to vacate to the deceased who disobeyed the notice. Later the magistrate heard the judgment debtor had been killed, and initials reading "NS" were inscribed in blood on the door leading to her chambers.

When the appellant was put on his defence he narrated a long story on how he gained ownership of the deceased's house at Mshikamano village through a public auction and how the deceased frustrated his efforts into moving into his newly acquired house until he sought the help of the officer in charge of the local police station and the Primary Court Magistrate. The appellant testified that after moving in the deceased invaded him one Tuesday night and kicked the door open while uttering these words:-

"Leo untanikoma. Umeshindwa kuondoka kwenye hii nyumba. Tumekutana wababe kwa wababe."

The appellant then raised a machete and tried to cut the appellant. The appellant parried the blow and the panga fell from the deceased's hand. The appellant then took the panga and dealt one blow aimed at the deceased's neck, severing the head. The appellant testified that he became

confused after that, ran the whole night to Bunashi village, on to Imalaseko until he reached his younger brother's house at Mwanzugi village in Igunga village where he stayed until his arrest. At Igunga he changed his name to Gitu s/o Salum.

The evidence as narrated above led to the appellant being charged with murder in the High Court of Tanzania at Tabora. The trial court found the appellant guilty, convicted him and sentenced him to hanging. The appellant was aggrieved by this conviction and sentence and preferred this appeal. Mr. Revocatus Mugaya Mtaki, learned advocate, filed the memorandum of appeal and represented the appellant during the hearing, while the respondent/Republic was represented by Mr. Juma Masanja, learned State Attorney. The only ground of appeal filed by Mr. Revocatus Mugaya Mtaki, learned advocate, reads thus:-

1. The learned trial Judge erred in law in holding that the prosecution had proved the case against the Appellant beyond reasonable doubt.

   It is our humble submission that the learned trial Judge did not give adequate consideration to the deference of provocation

and self-defences which were apparent in the Appellant's defence at the trial. Had the learned trial Judge broadly considered these defences he would not have convicted the Appellant with the offence of murder c/s 196 of the Penal Code and instead he would have convicted him with the offence manslaughter c/s 195 of the Penal Code cap 16 RE 2002."

Arguing the appeal before us Mr. Mtaki, learned advocate conceded that the trial court had dealt with the issue of self-defence adequately in his judgment. He therefore abandoned the ground. The learned advocate stood on provocation the sole ground of appeal in which he argued that since the trial court her found it as a fact that the appellant had bought the deceased's house in a public auction, and that the deceased had refused to vacate the house even when threatened with a citation for contempt of court this adamancy of the deceased amounted to provocation. He argued that there was no time for the appellant to cool down as the provocative acts of the deceased were continuous. The learned advocate argued that the continued acts of provocation were sufficient to reduce the charge to manslaughter.

In reply, Mr. Juma Masanja, learned State Attorney, argued that under the law for a defence of provocation to be raised successfully an act must be done in the heat of passion and it must be shown that there was lack of self-control on the part of the accused person. The learned State Attorney pointed out the fact that amongst matters listed down as not in dispute is the fact that the deceased was ordered to vacate the house sold but he refused. The learned State Attorney referred us to a quotation from the Extra Judicial Statement made by the appellant (Exh P3) which appears at p. 97-98 of the record and goes thus:-

> *"nilirudi nyumbani nisubiri usiku huo uingie kisha niende kwenye nyumba kumwangalia kama kweli ameachiwa na kurudi kwenye hiyo nyumba kisha tupambane naye ..."*

The learned advocate took this extract of the appellant's statement as a manifestation of premeditation – that the appellant had formed the intention to go and fight the deceased before going over to where the deceased was. The learned advocate therefore argued that the words appearing at page 57 of the record which the appellant attributes to the deceased are an after thought and a lie. The words go thus:-

Leo utanikoma. Umeshindwa kuondoka kwenye hii nyumba. Tumekutana wababe kwa wababe."

The earned State Attorney also argued that the appellant kept changing his plea, from "not guilty" at page 3 of the record, to "I killed him by accident" at page 12 of the record to "it is true I did so in self defence at page 15 of the record. In the view of the learned State Attorney, the changing of the plea is a manifestation of guilt. The learned State Attorney also observed that the appellant admitted the contents of the extra-judicial statement. He takes it that the appellant confessed to murder in Exhibit PW3. He invited us to hold that the appellant's confession is the best evidence against him, citing **Bahati Makeja v R** Criminal Appeal No. 118 of 2006 at page 16. The learned State Attorney also invited us to infer guilty conduct into the appellant's act of taking the deceased's head to the magistrate's court and writing his name in blood on the door leading to the magistrate's chambers.

Replying to a question posed by the court, the learned State Attorney agreed that there is nowhere on record showing that when the appellant went to see the deceased he carried any weapon. He also admitted that

the weapon used to kill the deceased was inside the house occupied by the deceased up to an including the time when the lethal wounds were inflicted on the deceased. The court also noted that the extract which the learned State Attorney read out omitted some words, which, if included, would make the quotation read thus:-

> *"nilirudi nyumbani nisubiri usiku huo uingie kisha niende kwenye nyumba kumwangalia kama kweli ameachiwa na kurudi kwenye hiyo nyumba kisha tupambane naye kwa kumuuliza kilichompeleka hapo."*

The added word, which the learned State Attorney omitted are "kwa kumuuliza kilichompeleka hapo." The essence of the paragraph quoted by the learned State Attorney is the presence of confrontation. If the added words are included, the essence of the confrontation changes by being a particular confrontation, a verbal one in which the appellant intended to ask the deceased what brought him back to the house. These words must be construed against the background of the case that the disputed house belonged to the appellant who had been given possession by the court. It was only natural for the appellant to ask the deceased what brought him to

the house after the court process which handed over the house to the appellant. Reading malice aforethought into this circumstances requires an over-stretched imagination. We decline to follow suit.

On changing the wording of the plea by the appellant Section 275(1) of the Criminal Procedure Act, chapter 20 & R.E. 2002 of the laws, which governs the taking of pleas in the High Court, does not provide for any standard form of plea. All the appellant was required to do was to deny committing the offence in whatever phraseology. To hold him untruthful because he has changed the wording of his plea is improper so long as he had denied responsibility.

Both the appellant and the respondent agree that the evidence which convicted the appellant is the passage we have quoted from the extra-judicial statement made by the appellant. As we have said earlier, the passage does not show malice aforethought in that the appellant intended to go and ask the deceased why he had returned to his (appellant's) house after the court had even cited him (deceased) for contempt. None of the prosecution witness led evidence in which malice aforethought could be

seen or inferred. Even if we take the extra-judicial statement, particularly the passage quoted above, no malice aforethought within the ambit of Section 200 (a) to (e) could be inferred up to the time the appellant entered the house in which the deceased was. The trial judge, at page 137 of the record made the following comment:-

> *"In the circumstances therefore, on the facts narrated by the accused himself in Exhibit P3 it is him who kicked open the door to the house in question before attacking the deceased, with a panga, which he, the accused, had prepared before hand for that purpose."*

Exhibit P3 is part of the record and on the existence of the panga the appellant is on record as saying:-

> *"nilimwona akiwa huru na akiwa ndani ya nyumba hiyo tuliyokuwa tukigombea ndipo nilichukua panga yake iliyokuwemo ndani ya nyumba hiyo na kuitumia kumkata nayo...."*

One may ask himself, if the deceased invaded the house against a court order against him, and was in control of the house at the time the deceased went over, where and when did the appellant get time to prepare a panga beforehand as remarked by the trial judge ? The statement of the appellant says it clearly "ndipo nilichukua panga yake..." which shows the owner of the panga was the deceased. It is clear that the person who was dispossessed of the house by a court order and then disobeyed the court order and invaded the house is the one who prepared the panga, hence the remark by the appellant that he took "panga yake," referring to the deceased. This statement referring to "panga yake" was made even before the appellant was charged in court so it is a more authentic version of the events than interpolations by persons who were not at the scene.

We are also intrigued by the penultimate paragraph of the trial court's judgment which goes thus:-

> *"The accused planned for and executed the murder of the deceased. And in an act of absolute impunity and total disregard to the rule of law, placed the deceased's head on the door*

> *steps of the Kimali Primary Court, which in his own words had failed to give him justice. He took "taking the law into one's own hands," to its extreme."*

The appellant's extra-judicial statement Exhibit P3 does not show a plan. We however accept that there was a grisly killing that was committed by the appellant, and he has admitted so much in his extra judicial statement. The testimony of the witnesses who testified for the prosecution do not point out the perpetrator of the killing. Detective Corporal Mgulla (PW2) mentions two women who could have pointed out the killer, the appellant's mother and wife, but these were not called as witnesses. The only incriminating evidence came from the appellant himself in the form of his extra-judicial statement. The statement however shows two sides of the same coin. One side of the coin is the deceased's conduct where he invaded a house which no longer belonged to him and was in occupation when the appellant went over to him. When the appellant went to the house there was already a panga inside there. On the other side of the coin there is the appellant who, as his statement shows, wanted to go and ask the deceased why he had returned to a house which no longer

belonged to him. There is no evidence on record to show that the appellant carried any weapon when going into the house. We therefore have two antagonists – one holding on to a house he was dispossessed of in a legal process, and another one given possession of the house through the law. It was night, because the appellant said in his statement that he shone a light in the deceased's face to blind him and deflect his aim. We do not know what happened because one of the two actors is not alive to tell his side of the tale. All we can conclude from the circumstances of this case is that the two antagonists fought, and in the process the appellant got the better of his adversary. It is a principle of our law that a mutual fight reduces a charge of murder to manslaughter **see Moses Chichi v R [1994] T.L.R. 222 and Jackson Mwakatobe and two others v R [1990] TLR 84** . We therefore allow the appeal, but find that the evidence on record shows that the prosecution has proved the offence of Manslaughter. We therefore convict the appellant of Manslaughter c/s 195 of the Penal Code.

As regard sentence, we have found that this was a particularly brutal killing in which the appellant confessed in his extra-judicial statement to

taking the deceased's head to the local court and painted his initials on the door of the magistrate's chambers using the deceased's blood. In desecrating the deceased's body the appellant showed a degree of cruelty which deserves to be penalized in such a way as to send a message to him that society does not approve of actions like the one he committed. We sentence the appellant to imprisonment for twenty years.

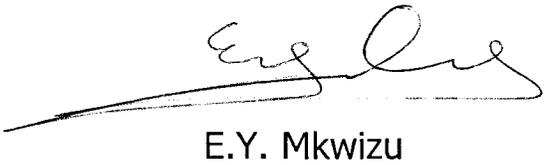
DATED at **TABORA** this 1st day of July, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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



E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL