

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: MUNUO, J.A., MASSATI, J.A And MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 103 OF 2007**

**COSMAS FAUSTINE ..... APPELLANT**

**VERSUS**

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

**(Appeal from the conviction of the High Court of Tanzania.  
at Bukoba)**

**(Luanda, J.)**

**dated the 23<sup>rd</sup> day of August, 2006  
in  
Criminal Session No. 91 of 2000**

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**JUDGMENT OF THE COURT**

3<sup>rd</sup> & 14<sup>th</sup> November, 2011

**MANDIA, J.A.:**

The appellant COSMAS FAUSTINE, was convicted by the High Court of Tanzania sitting at Bukoba for the offence of murder where it was alleged that on or about the 18<sup>th</sup> day of April, 1999 at Kijumbula village in the District of Karagwe in Kagera Region, he murdered one PEREUS s/o STANSLAUS. After conviction, the trial High Court sentenced the appellant to death. He is dissatisfied with the conviction and sentence and he is

appealing to this Court. Before us he was represented by Mr. Faustine Malongo, learned advocate, while the respondent Republic was represented by Mr. Edgar Luoga, learned Senior State Attorney. Mr. Faustine Malongo, learned advocate, filed a memorandum of appeal containing two grounds, namely:-

1. That the trial court erred in fact for failing to hold that the deceased died as a result of a fight.
2. That the trial court erred in law for finding the Appellant guilty of murder instead of manslaughter.

The facts giving rise to the case may briefly be stated. On 18/4/1999 round about 4 p.m. in the afternoon PW1 Felecian Ernest, a ten cell leader of Kikongola Kitongoji of Kijumbura village in Karagwe District was seated inside his house. He had the company of PW3 Bruno Chakusemele, the deceased Pereus Stanslaus, who was his neighbour, and others who did not testify. While thus seated one Petro Nzeimana came running towards them with bruises on his hands and a swollen bloody face. PW1 asked Petro Nzeimana what befell him and the latter

replied that he was beaten up by the appellant Cosmas Faustine who also took sh. 8,000/= from him. As Petro Nzeimana narrated his ordeal to PW1 Felecian Ernest, the appellant came along and asked for the whereabouts of Petro Nzeimana. PW1 stood at the door of his house to prevent the appellant from getting entry into the house and Petro Nzeimana took this opportunity and bolted out of PW1's house through another door, unseen by the appellant. The deceased, who was the appellant's brother, asked the appellant to cool down and wait until the following day to lodge a complaint, if he had any. The appellant replied that he could not leave Petro Nzeimana because the latter had taken his money, and added that if he could not get Petro Nzeimana he will kill somebody. Thereafter the appellant advanced on his brother, the deceased. The deceased turned around and ran away with the appellant giving chase. The deceased ran for about thirty to forty paces and fell down. The appellant closed in, drew a knife from his trouser pocket and stabbed the deceased on the left side of the neck. Those around raised an alarm. The appellant ran away for some one hundred and fifty paces before he was apprehended, subdued and sent to Chabalisa Police Station. PW1 Felecian Ernest while under cross –

examination by Mr. Kabunga, learned advocate representing the appellant, said:-

"The accused told the deceased he would not sleep unless he get (sic) his money. Then the accused said this "Kama unamdhamini Petro nitakupiga wewe."

Under examination by the first assessor PW1 said,

"The deceased and the accused never fought"

This refrain is repeated during questioning of PW1 by the second assessor, when PW1 said

"I did not hear the accused and the deceased to quarrel"

On the following day 19/4/1999 at 7 a.m. which was some fifteen hours after the stabbing a report was made to PW2 C 2349 Detective Corporal Paulo Ishengoma, the officer in charge of Kyabalisa Police Station,

who visited the scene in the company of a medical officer who performed a post mortem examination of the body of the deceased. PW2 Paulo Ishengoma testified that the body had a wound on the neck. The witness also drew a sketch of the scene which he tendered in court as Exhibit P2.

Amongst the prosecution witnesses there was PW3 Bruno Chakusemele Sospeter who was one of the three persons in the company of PW1 Feleciaan Ernest and was a witness to the whole saga from the arrival of Petro Nzeimana to the point where the appellant stabbed the deceased. During cross – examination of the witness by Mr. Kabunga, learned advocate representing the appellant, it was shown that the evidence of the witness given in court differed in some aspects from a statement which the witness had earlier on given to the Police. The statement was put in evidence as Exhibit D1 and, when read out, the appellant denied ever making the statement though he admitted that the signature appearing on the statement was his. Despite the fact that the court had allowed the defence to impeach the credit of the witness, the same court acted on the evidence of the witness. At page 41 of the

record, when assessing the credibility of the evidence given by the prosecution witnesses the court remarked thus:-

“From the foregoing I reject the defence as an afterthought. PW1 and PW3 were saying nothing than the truth.”

Since PW3 is the same witness which the trial High Court had allowed the defence to impeach his credit, he could not be saying “**nothing than the truth.**” In law, where a witness gives a statement on oath which is inconsistent with a previous statement the credibility of such witness is destroyed. This is the position held by this Court in **ISSA SIMA V REPUBLIC** Criminal Appeal No. 158 of 1991. The Court quoted with approval a holding by Georges, CJ in **KIBWANA SALEHE V R** (1968) HCD 391 which held, inter alia:-

“Whenever a witness is proved to have made a statement on oath inconsistent with a statement

previously made by him, the credibility of that witness is completely destroyed, unless he can give an acceptable explanation for the inconsistency. The witness gave no such explanation, and neither his testimony nor previous statement should have been relied upon."

Similarly, we are convinced that the trial High Court should not have relied upon the evidence of PW3 Bruno Chakusemele Sospeter.

When it came to the point of the appellant defending himself, he admitted to the prosecution evidence given by PW1 Felecian Ernest that he followed Petro Nzeimana to PW1's house to demand payment of a debt owed to him of sh. 10,000/=. The appellant alleged that the deceased insinuated to the fact that he could not own sh. 10,000/= unless he was a thief and when he (appellant) denied such insinuation the deceased picked a stick and hit him (appellant) on the head, making the appellant bleed from the nose. What happened thereafter should come from the appellant himself, and it goes thus:-

"I then drew a knife. The deceased ran away. I chased him. The deceased fell in "shimo" a pit. I also fell down. Unfortunately the knife cut him once. We had no quarrel with the deceased. I met the deceased at Felecian house."

Further down the appellant is on record as saying:-

"The deceased did not advise me not to quarrel. What Bruno said is correct that the deceased told me to lodge complaint the following day. When the knife accidentally cut the deceased I ran away. They chased me and arrested me. I was confused, hence the running."

While arguing the appeal, Mr. Faustine Malongo, learned advocate, contended that to establish the facts on what happened at the scene of the killing it is the evidence of PW1 Felecian Ernest weighed against that of the



appellant. The evidence of PW1 Felician Ernest shows that there was no fighting at the scene of the killing, while the defence contends that the deceased started a fight by hitting the appellant with a stick on the head, an act which made the appellant draw a knife and stab the deceased. The defence contended that the circumstances of this case show a mutual fight which reduces the offence to one of manslaughter instead of murder. The trial High Court dismissed the defence of mutual fight. Implicit in the mutual fight story is the allegation that the trial court failed to consider the defence case. We are alive to the position in law that failure to consider the case of the defence is fatal to proceedings – see **JAMES BULOLO AND ANOTHER V REPUBLIC** (1981) TLR 283, and also in **LOCK HART SMITH VS UNITED REPUBLIC** (1965) EA 211.

We are however convinced that the trial High Court considered the defence story and dismissed it as an afterthought. We agree with the finding of the High Court on this point. We have seven reasons for this stand. **First**, the record shows that the appellant arrived at the house of PW1 Felician Ernest in pursuit of one Petro Nzeimana who he (appellant) had injured in the hands and face. Petro Nzeimana was fleeing from the

appellant and sought refuge in the house of PW1 Felician Nzeimana where the deceased was. **Secondly**, both PW1 Felician Nzeimana and the deceased tried to shield Petro Nzeimana from further assault by the appellant and succeeded in doing so when Petro Nzeimana escaped from PW1 Felician Ernest's house through another door. **Thirdly**, the deceased, who was the appellants brother, advised the appellant to cool down and reserve his complaint to the following day. PW1 Felician Ernest is a witness to this verbal advice and testified that there was no fight between the appellant and the deceased. Even the appellant admits in his defence, at page 17 of the record, that the deceased advised him to cool down. **Fourthly**, the evidence on record shows that after the deceased advised the appellant to cool down the appellant turned on the deceased and addressed him thus:-

"Kama unamdhamini Petro nitakupiga wewe", meaning:-

"If you are standing in for Petro I will beat you."

It was after this address that the appellant drew a knife. On seeing the knife the deceased turned on his back and ran to save himself. The

appellant gave chase for some thirty to forty paces, caught up with the deceased who had tripped and fallen in a pit, and stabbed the deceased on the left side of the neck.

The wound which caused that death of the deceased was a stab, not a cut, and the person on whom the injury was inflicted was harmed while he ran away to save himself from the appellant. By the appellant uttering the words "kama unamdhamini Petro nitakupiga wewe" and immediately thereafter drawing a knife and chasing the deceased who had started fleeing after seeing the drawn knife, the appellant clearly had manifested a homicidal intent which was laid bare when he (appellant) followed the deceased into a pit he had fallen into and stabbed him in the neck, causing the death of the deceased. In law, an intent to cause grievous harm constitutes malice aforethought which if death ensues renders the offender guilty of murder as held in **R v FRANCESCO** (1945) E.A.C.A. 94. We are satisfied that the appeal before us has no semblance of merit. We dismiss the same in its entirety.


DATED at MWANZA this 8<sup>th</sup> day of November, 2011

E. N. MUNUO  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

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



P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**