**IN THE COURT OF APPEAL OF TANZANIA**

**AT TANGA**

**(CORAM: RUTAKANGWA, J.A., KIMARO,J.A., And MANDIA, J.A.)**

**CRIMINAL APPEAL NO.8 OF 2012**

**BAKARI HASSAN.....APPELLANT**

**VERSUS**

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

**(Appeal from the judgment of the High Court of Tanzania at Tanga)**

**(Teemba, J.)**

**dated 9th July, 2010**

**in**

**Criminal Sessions Case No.5 of 2009**

.....

**JUDGMENT OF THE COURT**

28th June & 4th July, 2012

**KIMARO, J.A.:**

The appellant was charged and convicted of murder contrary to section 196 of the Penal Code [CAP 16 R.E.2002]. He was alleged to have intentionally killed Stephen Juma @ Kolowa on 24th September, 2007 at 01.00 hours at Ngwashi Sagara within the District of Lushoto in Tanga Region.

The evidence to support the prosecution case was based on the accused's cautioned and extra judicial statements. The appellant and the deceased were friends and were residents of Ngwashi Sagara village. Both were married. Evidence was led by Rose Ponda (PW5) that prior to the commission of the offence on 27th September, 2007 the deceased was

drinking local brew with one Mwanyemi Abraham Gemdo (PW6) at the pub owned by PW5. The appellant visited the bar and found the deceased and PW6 together at the pub. He left leaving the two behind because the drinks were finished. PW6 and the deceased left later, each heading to his house.

The evidence on how the death of the deceased was discovered came from Monica Mhema (PW3) the mother in law of the appellant. His grandson Rashid Bakari (PW2) slept at her house on that night because his mother was not at home. She had travelled. He woke up in that morning and went to his parent's house to take his school uniforms. He saw a lot of blood in front of the house and he reported the matter to his grandmother. PW2 was worried about that information. She notified other villagers including PW6 who was the ten cell leader. Following the blood stains, from the appellant's house, the body of the deceased was discovered under a tree, without the head. The matter was then reported to Hokolai Mpemba (PW4) the Ward Executive Officer who in turn reported the matter to the Police.

C. 7180 D/Sgt Kedmon (PW7) went to the scene of crime accompanied by a doctor. Yuria Stephen Juma Kolowa(PW5) the wife of the deceased identified the body of the deceased. The doctor who examined the body of the deceased said that the cause of death was due to loss of blood because the head was severed from the body. The post-mortem examination report was admitted in court without objection as exhibit P3. On how the accused was arrested, the evidence of PW2 was

that on the morning of the fateful night, the appellant went to her and reported to her that he was called by his parents. The police made a follow up of the appellant at his parent's home but he was not found there. He was later arrested at Muheza and when he was interrogated about the commission of the offence, he admitted in a cautioned statement made before PW7 and extra judicial statement made to John Mahende (PW8) a Primary Court Magistrate and Justice of Peace to have killed the deceased, but not intentionally.

The version of the appellant's defence was that the deceased insulted him calling his wife a prostitute. The insults were made at the bar. Although the appellant left the deceased in the bar and went to his house, later on, at 01.00 am, the deceased followed him at his house while he was already asleep, armed with a "panga" and forced him to open the door. The appellant contended that he was provoked and he came out of the house also armed with a "panga". It was in the course of a fight that the deceased overpowered the appellant and with a view of defending himself, the appellant through a "panga" at the deceased, which unfortunately seriously wounded the deceased. Without knowing that the head of the deceased was severed from the body, and being afraid that the deceased might revenge, he ran away. The appellant said he acted under influence of liquor.

The learned trial judge considered the evidence that was led by the respective parties in the trial and was of the considered opinion that, given the fact that the appellant dragged the body from the scene of crime

where the fight took place, and threw away the head, and finally ran away for hiding, his behaviour was inconsistent with a person who killed without intention.

Aggrieved by the conviction, the appellant filed three grounds of appeal challenging the conviction. In the first ground of appeal, the learned trial judge is faulted for not accepting the appellant's defence of intoxication while she remarked in her judgment that the prosecution case was based on the appellant's cautioned and extra judicial statements that there was a fight between the appellant and the deceased. In the second ground of appeal the complaint is that the learned judge erred for failure to observe that the circumstantial evidence adduced by the prosecution was not sufficient to establish the charge against the appellant beyond reasonable doubt that he killed the deceased with malice aforethought. Lastly, it is contended by the learned advocate for the appellant that the learned trial judge erred for not observing that the appellant's duty was to raise doubt in the prosecution case which he did by showing that there was a fight and the prosecution did not bring any evidence to counter this evidence.

During the hearing of the appeal, the appellant was represented by Mr. Sangawe, learned advocate. Mr. Victor Kahangwa, learned Principal State Attorney; assisted by Mr. Ahmed Seif Ally, learned State Attorney represented the respondent/Republic.

In arguing the appeal, the learned advocate for the appellant chose to combine grounds one and three and argue them together and ground two separately.

The learned advocate for the appellant submitted that the appellant did not deny killing the deceased. The only issue that had to be resolved by the trial court was whether the killing was done with malice aforethought. He said in the cautioned statement the appellant said on that day he drank "pombe" and in the extra judicial statement he said he fought with the deceased who followed him at his home armed with a "panga" and insulted him, so the appellant had a right to defend not only himself but his properties as well, because the appellant said the deceased used the "panga" to cut his door. The learned advocate cited the case of **John Nyamhanga v R** [1980] T.L.R. 6 to augment his submission and requested the Court to allow the two grounds of appeal.

As for the second ground of appeal the learned advocate said the circumstantial evidence was not sufficient to prove that the appellant killed the deceased intentionally. He prayed that the appellant be convicted with manslaughter and not murder.

Mr. Ahmed Seif Ally, learned State Attorney who represented the respondent supported the conviction. He referred to the caution statement of the appellant and said that the defence of intoxication was not available to him because the manner in which the killing was done is inconsistent with a person who did not know what he was doing. He said the appellant admitted the killing. He dragged the body from where the death occurred and took it somewhere else and the head was found severed from the

body. Under the circumstances, contended the learned State attorney, the appellant knew what he was doing. He also referred to the conduct of the appellant after the killing and said it enhanced the facts showing existence of malice aforethought on the part of the appellant. He prayed that the appeal be dismissed.

Admittedly this is not a complicated case. The appellant admitted in his caution statement exhibit P4 and the extra judicial statement exhibit P5 killing the deceased. The learned trial judge said in her judgment and rightly so, that the case for the prosecution was based on the cautioned and extra-judicial statement of the appellant. The only issue is whether the appellant killed the deceased with malice aforethought. The learned advocate for the appellant contends that the appellant had no malice aforethought while the learned State Attorney for the Republic say that the appellant acted with malice aforethought. What we observe here is that both exhibits P4 and P5 were evidence from the prosecution. This means that it was the evidence they relied upon to prove the charge of murder against the appellant. But nowhere in any of exhibits P4 and P5 did the appellant say that he intentionally killed the deceased.

The defence of the appellant as summed up in the trial court judgment was that:

*"...the accused claimed that on 23/9/2007 he went*

*to a nearby pombe shop where local brew are sold.*

*He went on saying that when he was drinking, the deceased also went there. That as they drank, the deceased insulted him by saying that his wife was a prostitute. That the deceased was a source of their fight. That the accused left the deceased in the bar and went home to sleep but again the deceased armed with a panga went to the accused's home at 01.00 am. The accused was provoked and went outside, also armed with a panga. The duo had a fight outside and eventually the deceased overpowered the accused. In a way of defending himself, the accused threw a panga to the deceased who was seriously wounded. The accused then ran away for reason that he was afraid that the deceased would revenge. The accused went on saying that he did not know that the deceased's head was chopped off. He further alleged that he acted under the influence of alcohol-intoxication, as he had taken a mixture of* ***"gongo"*** *and* ***"boha"*** *local brew on the material day."*

It is apparent from both exhibits P4 and P5 and it was evidence brought by the prosecution that the deceased was the source of the fight. He was the one who followed the appellant at his house armed, and using

his "panga" he forced the appellant to open the door. In that process, a fight occurred which led to the death of the deceased. As already said, the appellant never said he killed the deceased intentionally.

In the case of **Stanley Wililo v R** Criminal Appeal No. 32 of 2009 (unreported) the prosecution relied on a cautioned statement to prove its case. The appellant was convicted of rape. In the cautioned statement the appellant did not dispute having sex with the complainant. Throughout the appellant stood to his word that the complainant consented to the sexual act. Citing the case of **Iddi Shaban @ Amani v R** Criminal Appeal No. 111 of 2006 (unreported), the Court allowed the appeal. The Court, in the case of **Iddi Shaban @ Amani** (supra) held that:-

> *"If the prosecution sincerely believed that the appellant raped PW1 on 26th April, 2001 as alleged in the charge sheet, then it ought not to have introduced evidence to disapprove this allegation. The appellant never disowned exhibit P4 neither at the time it was being admitted in evidence nor his defence. Exhibit P4 being part of the prosecution case binds the prosecution and rendered the charge against the appellant preposterous."*

In this appeal since both exhibits P4 and P5 were evidence from the prosecution they cannot disown their own evidence. That was the

evidence the trial court relied upon to convict the appellant with the offence of murder. But did the appellant say he intentionally killed the deceased? All that he said in exhibit P4 and P5 is that there was a fight prompted by the deceased, first by insulting him, and later he followed him at his home armed with a panga. The appellant also said he took liquor prior to the incident. Under the circumstances the appellant had to defend himself. In the case of **John Nyamhanga v R** (supra), the Court held that:-

> *"where the accused person honestly and reasonably saw himself as defending himself, but used excessive force, the issue is manslaughter or acquittal not murder or manslaughter or acquittal."*

Given the manner in which the deceased lost his life, with respect to the learned trial judge we fault her for convicting the appellant with murder. The duty is always on the prosecution to prove the case against the accused beyond reasonable doubt. See the case of **Bigara Kiguru v R** Criminal Appeal No.153 of 2011(unreported). Since there was no evidence to prove malice aforethought on the appellant, he was wrongly convicted with the offence of murder. The appellant admitted the killing. However, he said it was not intentional. Consequently we quash the conviction for murder and substitute it with manslaughter contrary to section 195 of the Penal Code. We also set aside the sentence of death by hanging. Although we accepted that the charge of murder cannot stand under the circumstances, but considering the brutal way in which the

appellant fought the deceased, we sentence him to suffer imprisonment for twenty years. The appeal is allowed to the extent indicated.

**DATED** at **TANGA** this 3rd day of July, 2012.

E.M.K. RUTAKANGWA
**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**