IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 528 OF 2015

NICODEM DAUDI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 6th day of May, 2015
in
Criminal Session No. 89 of 2014
.....

JUDGMENT OF THE COURT

02nd & 5th August, 2016

KILEO, J. A.:

The appellant Nicodem Daudi was charged and convicted in the High Court of Tanzania sitting at Arusha on two counts of murder contrary to section 196 of the Penal Code. The death penalty was imposed upon him. It was alleged, as per charge sheet, that on the 12th day of April, 2013 the appellant murdered Emanuel s/o Lohay @ Emanuel and Boi d/o Gobare Emmy.

At the hearing of the appeal the appellant was represented by Mr. Silayo Edwin, learned advocate while the respondent Republic was represented by Ms.Tarsila Gervas, learned State Attorney.

Mr. Edwin adopted the first and second grounds appearing on the memorandum of appeal that was filed by the appellant. He abandoned the rest of the grounds. The complaints in the two grounds are to the effect firstly, that the trial court erred to convict on the charge of murder while the prosecution did not prove malice aforethought and secondly, that the prosecution case was based on contradictory and unreliable evidence.

There was no dispute at the trial that the two deceased had met an unnatural and violent death. It was also not in dispute that it was the appellant who caused their deaths. The only issue in this appeal as it was in the trial court is whether the appellant killed with malice aforethought.

It is always the duty of the prosecution, in cases of this nature, to prove every element of its case beyond reasonable doubt. Submitting before us Mr. Edwin argued that given the circumstances of the case, it could not be said that malice aforethought, which is an essential element in a charge of murder, was proved without shadow of doubt.

He pointed out that the only eye witness to the commission of the crime was PW2 whose evidence was highly suspect as it was wrought with contradictions in itself. Referring to **Lucas Kapinga and Two Others v. Republic,** [2006] TLR 374 he submitted that the learned trial judge should have found the witness unreliable and his testimony should not have formed the basis of the conviction. In this case the Court held that a prosecution witness who changes his story on an important aspect of the case is not a credible and truthful witness. On the other hand, the learned counsel argued that since the appellant's defence was not rebutted the learned trial judge should have given the appellant the benefit of doubt in which case she would have found that malice aforethought was not established.

At first Ms. Gervas for the Republic supported conviction and sentence. When we however prompted her on whether the appellant had a fair trial for the murder charge in the light of a statement made by the trial judge in her ruling on whether there was a case to answer which had the effect of implying that the trial judge had prejudged the appellant before he put up his defence, the learned State Attorney conceded that the possibility of bias could not be ruled out. Below is part

of the statement that was made by the trial judge in deciding whether the appellant had a case to answer:

> *"...I have gone through the evidence adduced by the prosecution have found it established that the accused did murder those two deceaseds..."*

Ms. Gervas urged us, as did Mr. Edwin; in the circumstances to quash the conviction of murder and instead enter a conviction of manslaughter contrary to section 195 of the Penal Code.

The evidence of PW2 was indeed shaky and should not have been used to sustain a conviction. At line 13 on page 45 of the record he is recorded as having said: "I was sleeping in a separate room from accused." Immediately, on the following line he said:" *The house does not have room."* Again at line 11 the witness said that on 11/2/205 the accused didn't sleep at their house. Yet at line 21 he said*: "Accused did stay with us for 5 days."* At page 44 line he is recorded as having stated: *"..He started to beat me and then hit grandmother, then Emanuel.."* At page 46 line 5 he changed his earlier statement and said*: "He attacked Emanuel first, then grandmother and then me."* The witness was changing like a chameleon, and the trial judge ought to have found that he was not a credible and truthful witness. This takes us to the

statement that the trial judge made in the course of ruling on whether or not the appellant had a case to answer. The trial judge stated, even before she had heard the appellant's defence that having gone through the evidence adduced by the prosecution she had **found it established** that the accused did murder those two deceaseds. [Emphasis provided].

We are settled in our minds that the learned trial judge was not entitled to make such a statement at that stage because the defence was yet to be presented to her. No matter how strong a prosecution case is, (even though in this case it was not so strong anyway), a trial court can only find a charge established after it has heard both the accuser and the accused. To do otherwise is a denial of a fair trial to which an accused is entitled.

Under normal circumstances, we would have vitiated the whole proceedings for failure to afford the appellant a fair trial and order a retrial, but as it will soon become apparent, in the peculiar circumstances of this case where the appellant admitted to the killing but on the ground that it was preceded by a fight, and was in self defence, we shall refrain from doing that.

It might as well be that the learned trial judge failed to see the glaring contradictions in the testimony of PW2 which she preferred to

believe because she had already prejudged the case before she heard the appellant in his defence. At page 78 of the record the trial judge made the following observation:

> *"....Therefore I agree with State Attorney he did use excessive force even if he was defending himself."*

The law is quite clear where death results in the use of excessive force in the defence of oneself. Section 18B. of the Penal Code, Cap 16 provides:-

> "**(1) In exercising the right of self defence or in defence of another or in defence of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence.**
>
> **(2) A person shall be criminally liable for any offence resulting from excessive force used in self defence or in defence of another or in defence of property.**
>
> **(3) Any person who causes the death of another as the result of excessive force used in defence, shall be guilty of manslaughter."**

The following is partly what the appellant stated in his defence (appearing at page 50-51 of the record), which was not rebutted:

"I then asked him to pay me my wage which was 50.000/=. Then he pushed me telling I have been drinking his milk and eating his food was enough payment.. ..... He then pushed me and I fell on the wall....Boi was present and he took a panga and wanted to cut me and I tried to protect myself with the axe and hit Boi on the head as well. I admit to have cut both deceased with the axe after having a fight with Emanuel..."

We are settled in our minds that if the learned trial judge had given sufficient consideration to the appellant's defence she would have found that it had raised doubts with regard to the prosecution case on the question of malice aforethought. The appellant claimed (a claim that was not rebutted), that death was preceded by a fight between him and the deceased persons. In **Moses Chichi v. The Republic** [1994] TLR 222 the Court held:

> *(i) The defence of self-defence is available also to a person who has started a fight depending on the circumstances of the case;*
>
> *(ii) Where death occurs as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder.*

The above has been a consistent holding of this Court- see for example; **Israel Misezero @ Manani v. the Republic**, Criminal Appeal No. 117 of 2006 and **Zuberi Abdalla v. the Republic**, Criminal Appeal No. 144 of 1991 (both unreported).

In view of the above considerations we find that the appeal by Nicodem Daudi was filed with sufficient cause for complaint. We agree with him that at most the evidence that was available proved manslaughter rather than murder. In the circumstances we quash his conviction for murder, step in the shoes of the High Court and instead enter a conviction for manslaughter contrary to section 195 of the Penal Code cap 16 R.E. 2002.

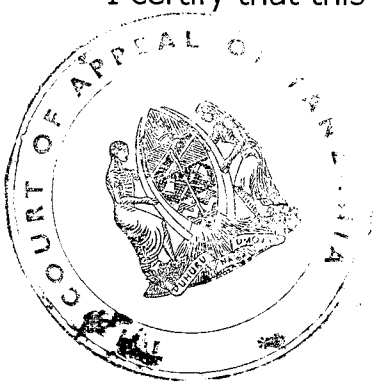
Dated at **Arusha** this 5th day of August 2016

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL