IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 320 OF 2016

1. **BOMBOO AMMA**
2. **PETRO JUMA @ LANTA** ..... **APPELLANTS**

VERSUS

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

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

(Dr. Opiyo, J.)

dated the 20th day of November, 2015
in
Criminal Sessions Case No. 90 of 2014

JUDGMENT OF THE COURT

01st & 9th October, 2018

KWARIKO , J.A.:

Before the High Court of Tanzania sitting at Babati, the appellants Bomboo Amma and Petro Juma @ Lanta were charged with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002]. It was alleged that on the 9th day of December, 2013 at Daghailoy Village within Babati District in Manyara Region the appellants murdered one Alex Mussa Jumanne (the deceased). They pleaded not guilty and after the trial

the High Court found them guilty, convicted and sentenced them to the mandatory sentence of death by hanging. On being aggrieved by that decision the appellants came to this Court on appeal. For ease of reference Bomboo Amma and Petro Juma @ Lanta, the appellants herein, will be referred to as the 1st and 2nd appellants respectively.

We find it necessary to revisit, albeit briefly, the facts of the case obtained before the trial court.

The court record at the trial shows that there was a land dispute between the 1st appellant and the deceased where each claimed to be the lawful owner. Hence, the deceased went to plough the disputed land in the morning of 9/12/2013 accompanied by his wife EMILIANA GARAU (PW2), his sons ATHANAS ALEX (PW4) and Arnold Alex and his uncle NURU ATHUMANI (PW6). The disputed land boarded the farm of WIRASI KADUE (PW5) who was the original owner of the same. PW5 and his wife ADELA JOHN (PW3) were working on their farm at the material time.

While still working, the deceased and his family members heard an alarm being raised from the village side. After a while, they saw a group of three people including the 1st appellant, his son Babuu and younger brother

Safari Amma. The 1st appellant had a machete, (panga) which locally referred to as 'sime', while Safari had a stick. Safari drove the oxen aside while the 1st appellant continued to raise alarm and asked the deceased to stop working on that land; the deceased said he could only stop to dig the land upon an order from relevant authority.

Shortly thereafter, another group of three people emerged. These included Gway Amma, Yagu Amma and their mother. The third group arrived which comprised of the 2nd appellant, Elia Zacharia and Tlatla Amma. At that point Gway Amma initiated assault on the deceased by punching him on the nose until he bled and fell down. When he tried to run he was beaten in the back by Safari and fell down hence they put him in the centre and more beatings ensued. At that point in time the 1st appellant cut him with the machete at the waist and head while others used sticks to beat him all over the body.

It was further revealed that even when the deceased tried to run from one point to another, they caught and held him down for more assault. The 2nd appellant grabbed a machete from PW4 and cut the deceased on the head and shoulders; and also threatened to finish PW4. When the beating was in progress they were chanting 'kill', 'kill'. It was also

evidenced that the 1st appellant went to collect an axe from the home of Shabani which he used to cut the deceased.

When PW2 could no longer stomach her husband's beatings, she went away to seek help where she informed her uncle Ramadhani Athumani of the assault. Ramadhani went to the scene and found the deceased already dead. He found that the deceased's brain had spilt out. He informed PW2 of the scenario and she reported the matter to police. At the police she found the 1st appellant complaining that he was invaded by the deceased and had ran away for his safety. However, when PW2 explained what had happened the 1st appellant was formerly arrested and his machete that he used to assault the deceased was seized.

Thereafter, PW2 led the police including No. E 3008 D/Cpl. DONGOYE (PW1) to the scene of crime. On the way PW2 saw the 2nd appellant who was about one km from the scene; she pointed him to the police and was arrested. At the scene the deceased was found lying, lifeless, two sticks on his body, brain out, legs broken and hands chopped off. PW1 inspected the scene of crime and drew a sketch map of the same which was admitted in evidence as exhibit PE2. Earlier, during preliminary hearing a Post-Mortem Examination Report in respect of the autopsy of deceased body was

admitted as exhibit PE1, while the said machete was received as exhibit PE3.

Through his investigation PW1 found that, though there were more than ten (10) suspects they managed to arrest the appellants only. And that the deceased was mainly attacked by family members but few neighbours participated without inquiry of the source of assault.

In his defence the 1st appellant (DW1) testified that the disputed land belonged to him and tendered court order (exhibit DE1), Divisional Secretary letter (exhibit DE2) and handing over letter (exhibit DE3) to that effect. He said that, he was informed on the material day by his wife MAGDALENA BARABARA (DW3) that, the deceased was working on that land; he informed a Hamlet chairman FABIAN MATLEY (DW4) about that matter. DW4 asked him to ask the deceased to stop working on the land until he came there as he was away. However, when DW1 approached the deceased and stopped him from ploughing the land he threatened, insulted and chased him around the farm. That, he had no any weapon and when people gathered he feared for them and went to report the matter to the police.

The 1st appellant admitted that Safari Amma, Babuu, Gway and Yagu were his relatives, while the 2nd appellant and Zacharia are his neighbours. Also, when he left the scene he did not know what happened behind. And that he did not recognize anyone who responded to the alarm.

On his part the 2nd appellant raised a defence of alibi that he was at Posta area at the material time, hence did not know what happened to the deceased, until he was arrested by the police who was in the company of PW2.

At the end of the trial, the trial court found that the prosecution case was proved beyond reasonable doubt, that, it was the appellants who with malice aforethought killed the deceased. It further found that the appellants' defence did not at all shake that evidence. They were convicted and sentenced as such.

Each appellant filed a separate memorandum of appeal containing four grounds of appeal each but both were similar in content. In essence, their memoranda raise two important grounds of complaint as follows:

1. That, the prosecution case failed to establish malice aforethought on the part of the appellants.
2. That, the appellants' cautioned statements were admitted in evidence contrary to law.

During the hearing of the appeal the appellants appeared in person being represented by Mr. Omary Idd Omary and Mr. Innocent Mwanga learned advocates respectively; While Mr. Diaz Makule learned State Attorney appeared for the respondent/Republic. Since the grounds of appeal are similar the appellants' counsel agreed to argue them in collaboration.

Mr. Omary commenced the submission by arguing the first ground of appeal that, the prosecution did not prove malice aforethought on the part of the appellants for the following reasons: One, that, according to PW2, PW3, PW4, PW5 and PW6, the deceased was attacked by more than ten people who came in three different groups, hence it could not be said with certainty that the appellants were the guilty ones. Two, that, all prosecution witnesses except PW1 said they left the scene while the deceased was still alive. Three, while PW3 said an axe was used in the attack, PW6 denied that fact and the same was not tendered in evidence. Four, while PW2 said that they found PW3 and PW5 in their farm, PW4 said that, the two witnesses found them at the farm. Five, while PW4 said he remained alone when PW2 and his younger brother Arnold left the scene,

PW2 said she left the appellants at the scene and PW6 said he remained alone at the scene.

Additionally, Mr. Omary argued that exhibit PE3, the machete, was not forensically examined to prove if it was the murder weapon and PW1 said the machete had mud. To cement his argument Mr. Omary referred the Court to the case of **MOHAMED SAID MATULA v. R** [1995] T.L.R 3, **JOHN MAKOLOBELA & ERIC JUMA @ TANGANYIKA v. R** [2002] T.L.R 296, **NATHANIEL ALPHONCE MAPUNDA & ANOTHER v. R** [2006] T.L.R 395 and **SHABANI MPUNZU @ ELISHA MPUNZU v. R,** Criminal Appeal No. 242 of 2010 (unreported). These cases stressed the need by the court to consider and resolve inconsistencies on the prosecution evidence.

On his part Mr. Mwanga who argued the second ground of appeal illustrated that, the 1st and 2nd appellants' cautioned statements, exhibits PE3 and PE4 respectively were admitted in evidence contrary to law. He contended that, the statements were taken beyond the prescribed period of four hours after the appellants were taken into restraint contrary to section 50 (1) (a) of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA). He said, while the 1st appellant was arrested on 9/12/2013 at 11:00

am, he was interrogated on 10/12/2013 at 2:00 pm. And the 2nd appellant who was arrested on 9/12/2013 at 11:00 am, he was interrogated the same day at 4:20 pm. That despite of the anomaly, the trial court used the 2nd appellant's statement in its decision. To fortify his contention Mr. Mwanga cited the case of this Court of **JANTA JOSEPH KOMBA & 3 OTHERS v. R,** Criminal Appeal No. 95 of 2006 (unreported).

Mr. Mwanga went on to argue that, the record is silent on whether or not the appellants' statements were read over to the appellants after they were admitted. Finally, he contended that it was contrary to law for PW1 to have interrogated both appellants, since the law requires that there ought to be separate interviewer for each appellant. He referred to a persuasive decision in the Kenyan case of **NJIRU & OTHERS v. R** [2002] 1 EA at page 220. Mr. Mwanga was of the view that exhibits PE3 and PE4 ought to be expunged from the record of evidence. He implored us to allow the appeal and quash the conviction and set aside the sentence against the appellants.

Mr. Makule prefaced his submission in reply by opposing this appeal. He argued the first ground of appeal that, while it is not disputed that there were more than ten people at the scene, and thus difficult to

identify who among them had inflicted the fatal blow, but as rightly scored by the trial court, there are matters to consider where death occur in those circumstances. Therefore, he was of the view that the appellants' involvement in the killing and the malice aforethought on their part was sufficiently considered by the trial court. Mr. Makule enumerated the circumstances which proved malice aforethought on the part of the appellants as follows: One, the 1st appellant act to raise alarm which mobilized people to the scene, and utterances that it was war with the deceased, show that he aimed to kill or injure the deceased. Two, the 1st appellant carried dangerous weapon (machete and axe) to the scene, which he used to cut the deceased at the delicate parts of the body, including the head and waist. Three, during the attack with his colleagues chanted 'ua' 'ua' meaning 'kill' 'kill'.

On his part the 2nd appellant's malice aforethought were described, first, when he grabbed a machete from PW4 and cut the deceased at the head and shoulders. Secondly, he tried to escape from arrest hence he knew he was a guilty party. To cement the foregoing Mr. Makule cited the case of **MAKUNGU MISALABA v. R,** Criminal Appeal No. 351 of 2013, CAT (unreported).

In addition, Mr. Makule argued that, although the mob consisted of more than ten people but the appellants were clearly identified through their actions and utterances, and that they had common intention. That, other attackers ran away and are still at large. Had they been arrested they would have been charged as well. Also, although PW6 said he did not see an axe being used but it does not mean that no axe was used.

As regards the complaint that the machete (exhibit PE3) was not forensically examined to prove whether it was used in the assault, he argued that, medical evidence is not necessary where there is direct evidence, and in this case PW2 identified the machete. A case in reference is that of **ARMAND GUEHI v. R,** Criminal Appeal No. 242 of 2010 (unreported), which quoted the case of **JOSEPH HAMISI & ANOTHER v. R,** Criminal Appeal no. 13 of 1990 (unreported).

In respect to the second ground of appeal, Mr. Makule submitted that, exhibits PE3 and PE4 were only tendered in the course of cross-examination stage to impeach the witnesses. And the trial court had already made a decision when it referred to those exhibits. That, even if, it did not refer to them there could be no harm. He also pointed out that at any rate, even if the statements are expunged from the record of evidence,

there is still sufficient evidence to prove that the appellants committed murder.

In his rejoinder submission Mr. Omary argued that the trial court agreed that, in a mob killing it is not easy to prove which blow caused the death. Finally, he distinguished the present case with **MAKUNGU MISALABA's** case (supra), since in that case it was not a mob killing.

We will start with the complaint in the first ground of appeal that, the prosecution case did not prove malice aforethought on the part of the appellants. Malice aforethought is defined under section 200 of the Penal Code [CAP 16 R.E. 2002] (the Code) thus;

> *Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances–*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily*

harm is caused or not, or by a wish that it may not be caused;

(c) *an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;*

(d) *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.*

It is provided under the cited law that, malice aforethought can be established inter-alia where intention to cause death or grievous harm (paragraph (a), and knowledge however indifferent, that the act done could cause death or grievous harm to a person is proved (paragraph b).

Coming to the case at hand, the appellants' intention to cause death or grievous harm to the deceased was vividly explained by the prosecution witnesses, PW2 to PW6. As regards the 1st appellant; his act to raise alarm which gathered people to the scene, his declaration that it was war with the deceased and the multiple blows he inflicted with machete on the deceased, point to the conclusion that he meant to kill or cause grievous harm.

On his part, the 2nd appellant's actions were explained by PW2 to PW6. They evidenced that, after he converged to the scene, he grabbed a machete from PW4 which he used to cut the deceased at the head and shoulders. Both appellants and their colleagues who are still at large were heard saying 'ua, ua' meaning 'kill, kill'. This shows that they meant to kill the deceased. (See also the case of **CHRISTINA d/o DAMIANO v. R,** Criminal Appeal No. 178 of 2012 CAT (unreported).

We are also of the settled mind that, the appellants had knowledge that their actions could cause death or grievous harm to the deceased. This is because of the nature of the weapons they used in the assault, the amount of blows inflicted and the parts of the body where the harm was inflicted. The appellants used dangerous weapons, sharp and blunt, namely; machete, axe, sticks and clubs directed to the head, waist legs and hands of the deceased, which are vulnerable parts of a human body. In the case of **ELIAS PAUL v. R,** Criminal Appeal No. 7 of 2004 (unreported) this Court said thus;

> *"Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case a stone was used and*

was hit on the head, chest and abdomen which are vulnerable parts of a human body".

To ground it all, this Court had earlier said in the case of **SAIDI ALLY MATOLA @ CHUMILA v. R,** Criminal Appeal No. 129 of 2005 (unreported), which quoted with approval the case of **ENOCK KIPALA v. R,** Criminal Appeal No. 150 of 1994 (unreported) said the following;

".....usually an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing".

In this case apart from what we have showed earlier, the appellants severed the deceased body. According to PW2 to PW6 and the Post Mortem Report (exhibit PE1), the deceased was cut in the head resulting in

spilling out the brain matters, waist, broken legs and hands chopped off. This proves that multiple and deadly blows were inflicted to ensure that he didn't survive.

However, the appellants' learned counsel forcefully argued that the prosecution did not prove that it was the appellants who killed the deceased. This is because; there were more than ten people who participated in the assault. As rightly shown by the trial court, where death occur as a result of mob killing it is difficult to single out who inflicted the fatal blow. However, that is not so in the present case because PW2 to PW6 were more than clear on what each appellant did during the assault as earlier on said when their evidence was being recapitulated herein. Even, all the people who responded to the 1st appellant's alarm were all mentioned by names. PW2 to PW6 were positive that those people came into three groups as follows; first group comprised of the 1st appellant, his younger brother Safari Amma and son Babuu Bomboo; second group had Gway Amma, Yagu Amma and their mother; third group had the 2nd appellant, Elia Zacharia and Tlatla Amma. And, as the witnesses said the attackers were mainly the 1st appellant's family members save for the 2nd appellant and Elia Zacharia who were neighbours. PW1 said that, they only

managed to arrest the appellants as others ran away and were still at large. Hence, in that situation it could not be said that the appellants' involvement in the killing was not proved.

Also, the appellants' counsel complained that the witnesses differed on whether an axe was used in the assault. Our answer to that issue is simple, that, since the witnesses were at different angles at the scene of crime, the possibility that others did not see the axe cannot be eliminated. PW5 was positive that the 1st appellant went to take the axe from one Shabani's house and used it to cut the deceased.

It has also been the appellants' concern that the machete used by the 1st appellant (exhibit PE3) was not forensically examined to prove that it was the one used to assault the deceased. We are of the settled view that, the prosecution witnesses positively identified the machete to be one of the killer weapons, detailing that it had red cover (ala). PW2 even readily pointed to it, at the police station, when the 1st appellant went to report the incident holding it. We are of the considered view that, even if there was no forensic evidence, the prosecution evidence was sufficient that exhibit PE3 was used in the attack, more so, as it was seized from the

1st appellant shortly after the incident, he did not even have the time to hide or change it.

The complaint as who among deceased family and PW3's family went first to the farm is immaterial; this is because it was proved that, all got there before the 1st appellant raised alarm to mobilize others.

In the same vein, we are positive that even though there were contradictions on the prosecution evidence, they were minor, not going to the root of the case and could not weaken the prosecution case. (See also the case of **ARMAND GUEHI v. R,** Criminal Appeal No. 242 of 2010, CAT (unreported)).

We have also found with certitude that the appellants' defence did not at all weaken the prosecution case. As for the 1st appellant, his defence was very weak; this is so because he even said he did not recognize the people who responded to the scene. This could not have been possible since the prosecution witnesses said many of the respondents were his family members; they were mentioned by names. Also, his claim that he did not know what happened after he left the scene is, but, an afterthought in view of how the witnesses described his involvement in the killing.

The 2nd appellant's defence of alibi was correctly considered and rejected by the trial court. He was sufficiently identified by the prosecution witnesses, all village mates, as the active participant in the killing. He was also pointed out by PW2 to the police, soon after the incident. He did not say he had any grudges with PW2 as he was not even the 1st appellant's relative. For what has been explained the common intention to kill the deceased was also proved. At this juncture, we find the first ground of appeal without merit and we hereby reject it.

The second ground of appeal should not detain us much; this is because the appellants' cautioned statements were only admitted in evidence in the course of cross-examination of the witnesses (appellants), to impeach their credibility. This was done under section 154 of the Evidence Act [CAP 6 R.E. 2002]. The statements were not produced in court as prosecution exhibits; hence, it is not valid to argue that they were wrongly admitted in evidence. As rightly argued by Mr. Makule, the trial Judge referred to the statements after she had already made her findings on the case. At any rate, even where we were to expunge it from the record of evidence, there still would be overwhelming and strong evidence

that, the appellants, with malice aforethought killed the deceased. Thus, this ground too is baseless and we dismiss it.

Eventually, for the reasons shown above, we are satisfied that the case against the appellants was proved beyond reasonable doubt. We uphold the trial court decision on conviction and sentence. We therefore dismiss the appeal in its entirety.

DATED at **ARUSHA** this 8th day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL