IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A, KOROSSO, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 178 OF 2017

JACOB ASEGELILE KAKUNE.....APPELLANT

VERSUS

D.P. P.....RESPONDENT

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

(Levira, J.)

Dated the 25th day of May, 2017
in
Criminal Sessions Case No. 12 of 2016
.....

JUDGMENT OF THE COURT

18th & 24th March, 2020.

KITUSI, J.A.:

The appellant was convicted for murder under section 196 of the Penal Code, [Cap. 16 R.E 2002] after a full trial before the High Court of Tanzania sitting at Mbeya. He was sentenced to the mandatory death sentence. It was alleged that the appellant caused the death of one Alex Aliko on 26th April, 2012 at Lubara area, Rungwe District within Mbeya Region.

The prosecution led evidence to the effect that the deceased, a secondary school student, was sharing a rented room with the appellant, an employed herd boy at Lubara area. The room they were occupying was within a house owned by a group known as Fokolale Movement which Getrude Mwalusanya (PW1) was a member of. Prior to the deceased's death there was a long-standing conflict between the deceased and the appellant over the room, the details of which are not of immediate relevancy to this case. On 25th April, 2012 the deceased complained to PW1 about the persisting conflict and the latter had undertaken to have the matter discussed on the following day. She informed Rajabu Anosisye Mwakaje (PW2), the caretaker of the house to take part in the intended discussion scheduled for 26/4/2012. As we shall see later, this meeting never took place because the person who had presented the complaint to PW1 went missing.

Later at around 21:00 hours on 25/4/2012 the appellant had supper with the deceased and Rashid Aliko (PW3), the deceased's younger brother, with whom the two were sharing the room. It is in evidence that PW3 was also a student in the same school as his brother. After the supper, PW3 went to visit a friend where he spent the night.

In the morning when PW3 went to the room to get prepared for school, his brother was missing. When asked, the appellant told PW3 that the deceased had left during the previous night after supper and that he had carried his belongings with him. It seems PW3's sixth sense did not buy this story.

Eventually PW1 and PW2 were informed about the disappearance of the deceased. PW2 put questions to the appellant about his roommate's whereabouts but he did not give rational answers, which made PW2 suspicious and PW3 even more suspicious. The matter was reported to the local authorities as a result of which search was mounted involving members of the village. The search led to the finding of the body of the deceased in a bush not far from where the appellant and the two brothers were living. The body had a cut wound around the neck and a shirt beside it.

PW2 stated that the shirt that was found near the deceased's body belonged to the appellant as he used to wear it every day. The local leaders put the appellant under arrest as a suspect before he was later handed over to the police. At Police station, the appellant allegedly

confessed before D/Sgt. Major Michael (PW6) that he killed his roommate. On 3/5/2012 the appellant was taken to the office of Greda Mwakabunge (PW4) a Justice of the Peace before whom he confessed again that he killed his roommate. The confession was recorded by PW4 and she tendered it in evidence as Exhibit P1.

In defence the appellant totally denied killing Alex Aliko and said he was just as shocked as anyone else that his friend whom he believed had spent the night studying with other scholars, was found dead. He referred to the conflict he had with the deceased as a fact but dismissed it as having been minor and which he knew would be resolved in the course of time.

As for the alleged confession, the appellant stated that the police made him sign it and he signed it only for fear of the torture he had earlier received from them at police station. He even disowned the signature on Exhibit P1 and challenged that statement for showing the date of the incident that differs from the one appearing on the charge.

The learned trial judge's conclusion was that the issue of involuntariness in making the statement that was raised by the appellant

during the defence was an afterthought because it was not raised when the statement was introduced into evidence and admitted as an exhibit. She concluded that the statement was made by him voluntarily and its contents left no doubt that the appellant killed Alex Aliko. The learned Judge went on to cite four other reasons on the basis of which she convicted the appellant. **First,** the finding of the appellant's shirt besides the deceased's body. **Second,** the personal conflict between the appellant and the deceased. **Third,** the appellant being the last person to be seen with the deceased alive. **Fourth,** the finding of a bloodstained garment in the appellant's room.

The appellant presented seven grounds of appeal to challenge the decision of the trial court, which we paraphrase as under: -

1. That the trial court erred in convicting him for murder when malice aforethought was not established.

2. That the evidence for the prosecution shows that death was a result of the conflict that existed between the appellant and the deceased.

3. That the evidence of the Justice of the Peace and that in the Extra Judicial Statement did not establish that the killing was with malice aforethought.

4. That the conviction was illegal because the evidence of PW4 and the Extra Judicial Statement proved manslaughter against the appellant.

5. That the trial court erred in entering conviction for murder while from the beginning the appellant had confessed to killing because of anger from the unresolved conflict over the room.

6. That murder was not proved as required by law.

7. That the trial High Court erred in disregarding the evidence of PW4 and Extra Judicial Statement and thereby reached at a wrong decision.

At the hearing, Mr. Omari Issa, learned advocate, who represented the appellant, abandoned ground 6 of appeal and consolidated the rest into one. He made it clear that when the grounds are consolidated, the appeal only challenges the conviction for murder and it intends to argue

that the conviction should have been for manslaughter. In his address Mr. Issa virtually narrowed the scope of this appeal to one issue namely; whether the killing of Alex Aliko was done by the appellant with malice aforethought. We think, in essence, that is the common denominator of grounds 1, 2, 3, 4, 5 and 7 of appeal which learned counsel rightly consolidated. So, we endorsed the scheme adopted by the learned counsel.

Mr. Issa had one arrow to his bow, which is that, death occurred as a result of a fight between the deceased and the appellant. He submitted that it is settled law that once it is established that death occurred as a result of a fight, the Court may not enter a conviction for murder but for manslaughter.

In establishing that there was a fight the learned counsel picked the evidence of PW1 and PW3 which shows that there was a long-standing conflict between the deceased and the appellant, as well as the Extra Judicial Statement (Exh. P1), which according to him, shows that there was indeed a fight between the two. He linked the evidence of PW3 with the Extra Judicial Statement specifically at page 118 where the

appellant confessed that it is the conflict that brought about all this. He went further by referring to the judgment of the trial court at page 142 where the learned judge observed that the existing conflict was the reason for the appellant to attack the deceased.

The learned counsel was emphatic that since the main basis for convicting the appellant was the Extra Judicial Statement, and since in that statement the appellant intimated the existing conflict, then the trial Judge should have concluded that the attack was prompted by that conflict and therefore not actuated by malice aforethought.

The learned counsel prayed that we be pleased to quash the conviction for murder and substitute it with a conviction for manslaughter. He moved us to set aside the sentence of death upon quashing the conviction for murder. He prayed that the appellant be sentenced to a period that will result into his immediate release. Briefly submitting on the sentence, the learned counsel pointed out that the appellant has served three years imprisonment from May 2017, and that prior to that he was in remand custody for over four years.

The respondent Republic was represented by Ms. Mwajabu Tengeneza and Ms. Hannarose Kasambala, both learned State Attorneys, but it was Ms. Tengeneza who addressed us, making her position clear that she was opposing the appeal. She referred to section 200 of the Penal Code which lists down circumstances that may constitute malice aforethought, the bone of contention in this case. She submitted that paragraph (a) of section 200 of the Penal Code, is relevant to this case because it infers malice aforethought from an intention to cause grievous harm.

Ms. Tengeneza took the view that death was intentional in this case because the appellant's intent was to cause grievous harm and that there was no proof of a fight between the deceased and the appellant as argued by the defence counsel. She further submitted that the appellant's own statement at page 63 of the record that the conflict was not a serious one, negates the contention that it could justify his subsequent decision to attack the deceased. As regards malice aforethought, the learned State Attorney submitted that it can be concluded from; the parts of the victim's body which the appellant targeted, the type of the weapon used, the number of blows that were

aimed at the defenseless victim who was asleep at the time and the conduct of the appellant after the killing. Elaborating about the conduct, Ms. Tengeneza referred to the appellant's answers to PW2 and PW3 when they inquired about the deceased's disappearance as showing that he was intentionally hiding something. Then she made reference to the fact that the appellant carried the mutilated body to the bush and got rid of the deceased's personal belongings. We were referred to the decision of this Court in **Abdallah Rashid @ Kamkoka v. Republic,** Criminal Appeal No. 206 of 2016 (unreported) where another case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported) was cited. These cases are relevant in the principle that the suspect's conduct before or after the killing may be one of the indicators of malice aforethought. The learned State Attorney concluded by submitting that nowhere in the Extra Judicial Statement is there mention of a fight between the appellant and the deceased. Instead, the appellant found the deceased sleeping and went on to attack him, which she submitted, would not be expected of any reasonable person.

In a short rejoinder Mr. Issa submitted and maintained that there was a fight and therefore reference to section 200 of the Penal Code was

uncalled for. He went on to submit that even though there is no mention of a fight in the Extra Judicial Statement it should be implied from the fact that there was a long existing conflict between the appellant and the deceased. The learned counsel sought to distinguish the case of **Abdallah Rashid @ Kamkoka** (*supra*) from this case on the ground that in that case there was no Extra Judicial Statement. He submitted that the appellant's conduct did not prove malice on his part.

Having heard the arguments for and against this appeal, we readily agree with counsel on the principle, that where death occurs as a result of a fight the court should convict for a lesser offence of manslaughter, not murder. This Court has taken that position in a number of previous decisions such as **Moses Mungasiani Laizer Alias Chichi v. Republic** [1994] TLR 222, **Stanley Anthony Mrema v. Republic**, Criminal Appeal No. 180 of 2005 (unreported) and **Aloyce Kitosi v. Republic,** Criminal Appeal No. 284 of 2009 (unreported). In the latter case it was held that: -

> *"It has been stated by this Court that where death occurs as a result of a fight or on account*

of provocation the killing is manslaughter and not murder."

We think however, that the argument of a fight which has been raised by Mr. Issa is both legal and factual. We have already agreed with the learned counsel on the legal principle governing death resulting from a fight, it remains for us now to determine, on evidence, whether there was indeed a fight between the deceased and the appellant.

The learned counsel invited us to read existence of a fight from the fact that there was an unresolved old conflict, and that the trial Judge made a finding that this long existing conflict made the appellant attack the deceased. On the other hand, Ms. Tengeneza firmly argued that neither in the Extra Judicial Statement nor anywhere in the evidence is there proof that there was a fight.

With respect, the question of there being a fight or not is a question of fact as we have said, to be proved by evidence. It is not a question of interpretation, or one requiring verbal acrobats as Mr. Issa would have us conclude. So, the question is; what is it that really happened? The appellant's counsel criticizes the trial court for not

considering the evidence of PW4 and Exhibit P1, and he is alleging that if the learned Judge had done so she would have concluded that there was a fight. Although we find the criticism misplaced, we shall take a look at those two pieces of evidence because we have the power to do so, this being a first appeal. To begin with the Extra Judicial Statement (Exhibit P1), the relevant part reads: -

> *"Ilipotimia saa 1 usiku niliondoka kwa Fedinandi nikaelekea katika matembezi yangu na kurejea chumbani kwangu mnamo saa 5 usiku na kumkuta Alex amelala ndipo hasira ziliponipanda sana na kuchukua nyengo iliyokuwemo ndani ya chumba changu na kumpiga nayo shingoni kama mara tatu hivi na nilipoona damu inatoka kwa kasi nikaamua kumfunga shingo kwa kutumia sweta lake alilokuwa amevaa na kuongeza shati lake jingine ili damu yake isiniguse na kutapakaa ndani ya chumba. Ndipo nilipombeba na kumtupa porini, nilirudi kuchukua mizigo yake na kuitupa*

chooni na mingine jalalani baada ya kumaliza nilirudi kulala chumbani."

This statement clearly tells a hair-raising story of the appellant attacking a sleeping person, and doing so by cutting him three times on the neck by using a sharp-edged weapon, until that person died. Here we should reiterate the principle that an accused person who confesses to a crime is the best witness. See the case of **Ibrahimu Ibrahimu Dawa v. Republic,** Criminal Appeal No. 260 of 2016 (unreported). We have no doubt that what is contained in the confessional statement was freely made by the appellant and is the best evidence we can have on what happened. The evidence of PW4 is nothing more than an oral testimony of what the witness heard from the appellant. In the case that has been cited above the Court reproduced a paragraph from another unreported case of **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007, where it was stated: -

"The very best of witnesses in any criminal trial is an accused person who freely confesses his guilt".

Counsel's submissions being mere statements from the bar cannot alter what is on evidence and coming from the appellant himself as shown above. We do agree with the learned State Attorney that there is nothing in the evidence that may justify our finding that there was a fight.

For the foregoing reasons it is our conclusion that there was no fight. We also hold that the trial court cannot be faulted for its failure to conclude that there was a fight. In our considered view, the court could not have concluded so because; one, there was no evidence before it that there was a fight and two, that argument was not raised before it for determination. In addition, we consider the scenario in this case as being twin to the scenario in the case of **Andrea Ngura v. Republic,** Criminal Appeal No. 15 of 2013 (unreported). In that case the appellant had been convicted for murder and raised two new defences at the appeal stage, that is mutual fight and intoxication. In rejecting those defences the Court held: -

> *"However, in the present case, none of the above defences was raised by the appellant in his*

defence at the trial. In fact, under section 219 (1) of the CPA the defence of intoxication must be raised at the time of taking the plea or latest at the preliminary hearing (See ***Emmanuel Yusuf @ Noriega v. R.*** *Criminal Appeal No. 152 of 2005 (unreported)). Besides, since in his defence the appellant does not admit killing the deceased, he cannot now rely on the doctrine of mutual fight. So, we think these two defences were introduced at this stage as mere afterthoughts."*

We have found the case of **Andrea Ngura** (*supra*) relevant to our case in more ways than one. Not only were the defences in that case belatedly introduced at the appeal stage as in this case, but the appellant had, like in this case, attacked a person who was lying still. We have overruled the existence of a fight, but even if there had been a remote suggestion that it existed, one cannot say it was anywhere close to mutual fight. The appellant attacked a defenceless sleeping person, which scenario would not entitle him to plead that death resulted from a mutual fight.

All said, it is our firm conclusion that the defence of mutual fight was not and cannot be available to the appellant in this case. We would have stopped here, because what we have said above disposes of the lone ground of appeal in this case, but we wish to pronounce ourselves on two other aspects.

The first is that, going by the Extra Judicial Statement and the submissions of Mr. Issa, though a bit unclear, it was being suggested that the attack on the deceased by the appellant was prompted by provocation. Bearing that in mind and in fairness to the appellant we invited counsel to address us on the defence of provocation in general, and specifically on doctrines such as heat of the moment and last straw.

Mr. Issa submitted that the appellant was provoked to find the deceased sleeping in the room over which there was an old conflict and that the anger was still hot because he said it could last as long as twenty days for some people. On her part Ms. Tengeneza submitted that no reasonable man could have acted the way the appellant did, because there was a promise to settle the conflict and it had been there for long

therefore the appellant had time to cool down. She said the conduct of the appellant after the attack proved malice aforethought.

The learned trial Judge dealt with this issue and dismissed it in this manner;

> *"The accused had all the chances of controlling himself by resorting to reconciliation through the owners of the house. I am therefore satisfied that the defence of provocation is not available to the accused person because the circumstances do not suggest that he had no self-control".*

With respect, we agree with the learned Judge that the appellant had time to cool off and act reasonably. We find the appellant's behavior rather queer because as the deceased's personal belongings were still in the room, it cannot be reasonably said that the appellant did not expect to find him there. Even the fact that there was a reconciliation meeting scheduled for the next day makes the appellant's reaction on the eve of that meeting, all the more inconsistent with reason. We reaffirm what we

said in **Saidi Kigodi @ Side v. Republic,** Criminal Appeal No. 281 of 2009 (unreported) that: -

> *"We are of the firm view that the defence of provocation is available to a suspect who kills at a spur of the moment, in the heat of passion before he has time to cool down".*

If we may add, for provocation to be a defence it is not enough for one to cite a long existing conflict or provocation as it has been done in this case, because that will not suffice if there is no last and sudden act of provocation. There is a case of **Benjamin Mwansi v. Republic** [1992] TLR 85 which offers some kind of a formula on this, which we associate ourselves with. The Court held;

> *"There is something extra and that is sudden provocation. If we were to be mathematical and devise a formula we would say:* ***killing by provocation is equal to circumstances which constitute murder plus sudden***

provocation without time for cooling down"

(emphasis ours)

Like the trial Judge, we find no merit in the contention that the appellant acted under provocation in the legal sense because there was nothing sudden, even if provocative, in finding the deceased in the room which they had been sharing for a long time. We do not accept Mr. Issa's suggestion and we find it odd, that it was reasonable for the appellant to be in the heat of passion for as long as twenty days.

The second aspect of the case we wanted to pronounce ourselves on, relates to Mr. Issa's contention that the conviction of the appellant was solely based on the Extra Judicial Statement. That is plainly wrong because the learned Judge mentioned four other incriminating pieces of evidence, which we earlier referred to in this judgment. One of those four other pieces of evidence is the existence of personal conflict between the deceased and the appellant. We think this conclusion by the learned Judge that there was an existing conflict is what has wrongly been taken by Mr. Issa as meaning that the appellant had a fight with the deceased.

All said, we find no merit in this appeal. We dismiss it in its entirety.

DATED at **MBEYA** this 23rd day of March, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2020 in the presence of the Mr. Omari Issa, counsel for the Appellant and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL