

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 423 OF 2019

JULIUS KASHOROGOTO @ KALOKOLA

SALVATORY RWEHUMBIZA

..... APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Bukoba)

(Kilekamajenga, J.)

dated the 11th day of July, 2019

in

Criminal Sessions Case No. 51 of 2015

.....

JUDGMENT OF THE COURT

16th & 27 August, 2021

MWAMBEGELE, J.A.:

The appellants, Julius kashorogoto @ Kalokola and Salvatory Rwehumbiza were, respectively, hamlet and village chairpersons. For their unlawful omission in those capacities, they were found guilty and convicted of causing the death of Stephen Ngimbwa on 02.07.2014 at Ruhija Village, Ruzinga Ward in the Misenyi District of Kagera Region. They were

sentenced to serve a prison term of seven and twelve years respectively. Aggrieved, they have come to this Court on this first and final appeal.

Before we go into the determination of this appeal in earnest, we find it apt to narrate its material background facts, albeit briefly, as they were brought by the prosecution at the trial before the High Court. They go thus: the residents of Ruhija village, in Misenyi District of Kagera Region had dedicated each Wednesday for working on development programs. On the fateful day; that is, on the said 02.07.2014 in the morning, they gathered for working on development program. On that day, the scheduled development program was road repair. While they were still going on with that assignment, at about 12:00 noon, they heard a drum beat which ordinarily beckoned them to assemble on an emergence. A meeting was convened whose agenda was to do away with thieves in the village. At the meeting, the deceased and Respicius Leonidas (PW6) were pinpointed as thieves. They were put under arrest and had their hands tied with rubber bands and put at the center of the gathering which surrounded them. The deceased's house was searched and an assortment of allegedly stolen items were retrieved. However, none of the items were identified by any person at the meeting.

At that meeting, a resolution was passed that the duo should be expelled from the village. That would be done by taking them out of the border of Ruhija village, on the direction of Buyango ward. That boarder is located in Minziro forest. That assignment was to be done by only men members of the village; women were prohibited from participating but ordered to remain at the meeting.

Male villagers "escorted" the deceased in Minziro forest. On the way, they were beating the deceased with sticks. PW6 was also beaten but not as severely as the deceased was. After some distance, PW6 was untied and ordered to run away. The male members of the village proceeded with the deceased. After some distance, the assignment was dedicated to only five male members of the village some of whom were named by Fredy Rwechungura (PW2) as Wencheslaus, Albert and Rwekaza. The five members "escorted" the deceased deep into the forest and returned after an hour without the deceased. The meeting was reconvened briefly and the villagers were ordered to disperse.

The police got wind of the incident. They mounted a search and found the body of the deceased on the following day by the roadside at Nyanga hamlet. The first appellant was arrested four days after the

discovery of the deceased's body. The second appellant was arrested four months later at Musoma in Mara Region where, allegedly, he was hiding. The two appellants, together with another person going by the name of Rugaiyura Kyaruzi @ Leonidas, who was acquitted, were charged with the murder of the deceased. The appellants were convicted of a lesser offence of manslaughter and sentenced as shown hereinabove.

Their appeal to the Court is comprised in two memoranda; the first one filed by themselves on 30.12.2019. It comprises fifteen grounds of appeal. The second one was filed by their advocate, Frank Kalory John of Kabunga & Associates Advocates on 11. 08.2021. This one comprises two grounds of appeal.

At the hearing of the appeal, Messrs. Thomas Eustace Rwebangira, Paschal Kamala and Frank Kalory John, learned advocates, joined forces to represent the appellants. On the other hand, Messrs. Emmanuel Kahigi and Joseph Mwakasege, learned State Attorneys, represented the respondent Republic.

In arguing the appeal, Mr. Rwebangira clustered the seventeen grounds of appeal comprised in both memoranda. The first cluster

composed of grounds 1, 5, 7 and 12 of the substantive memorandum of appeal. These grounds, in effect, challenge the evidence adduced at the trial. That the evidence did not establish that the appellants' acts or omissions had a link to the murder of the deceased.

The second cluster comprised ground 2 and 4 of the substantive memorandum of appeal whose gist is that the trial court, having found that the appellants were not among the five members of the village who proceeded with the deceased deep in the bush, should not have convicted them for the death of the deceased.

The third cluster comprised grounds 3, 6 and 10 of the substantive memorandum of appeal. In these grounds, the appellants complain that the trial court erred in convicting the appellants without direct evidence as there was a broken chain of command.

The fourth cluster composed of grounds 11 and 13 of the substantive memorandum of appeal. In this cluster, the appellants complain that the sentence was excessive and that circumstantial evidence was not watertight.

The last one comprised grounds 14 and 15 of the substantive memorandum of appeal and the two grounds in the supplementary memorandum of appeal. The gist in this cluster is that the trial Judge shifted the burden of proof on the appellants and thereby wrongly convicting them.

Mr. Rwebangira started his onslaught by reminding us that we are sitting on a first appeal, as such we are enjoined to re-evaluate the evidence adduced at the trial and, if warranted, come up with our own conclusions. For this proposition, he cited **Amani Ally @ Joka v. Republic**, Criminal Appeal No. 353 of 2019 (at p. 20 of the typed judgment) and **Zakaria Jackson Magayo v. Republic**, Criminal Appeal No. 411 of 2018 (at p. 18 of the typed judgment), both unreported decisions of the Court wherein we underlined our duty as a first appellate court.

With regard to the first cluster, Mr. Rwebangira submitted that Straton Stephano (PW1) did not attend the meeting and his mother, Josephine Augustine (PW3) came at the meeting late and left before the meeting was closed. These witnesses cannot therefore testify on what transpired during the meeting, he argued. It was only PW2 who was

present at the meeting but also that this witness was not one of truth. It is hard to believe, Mr. Rwebangira contended, that PW2 who allegedly witnessed the deceased and PW6 being beaten and that he saw the deceased being taken to the forest by villagers and later by five people deep in the bush but could not report to the relevant authorities but to PW3.

Mr. Rwebangira submitted further that the appellants were committed for unlawful omission but there was no evidence led to show that the appellants were among the villagers who took the deceased deep into the bush.

The learned counsel submitted further that the trial Judge relied on the evidence of E. 4072 D/Sgt Morris (PW5) whose testimony was largely hearsay. He cited to us the persuasive decision of the High Court in **Haji Ibrahim v. Republic** [1975] LRT n. 56 in which it was held that the testimony of a police witness about information supplied by a third party who is not called as a witness is hearsay and inadmissible.

He also submitted that there was no evidence led by the prosecution to show that the appellants ordered the villagers to beat the deceased.

Mr. Rwebangira submitted further that the appellants sufficiently explained in their respective defences that they told the gathering to untie the deceased and PW6 and that they obeyed the order after which they dispersed. He argued that the prosecution witnesses never cross-examined on this aspect which should mean that the appellants testified but the truth. On failure to cross-examine the appellants on vital points in their testimonies, Mr. Rwebangira referred us to p. 12 of our decision in **Zakaria Jackson Magayo** (supra). He submitted further that, even if the appellants said the deceased and PW6 be expelled from the village, that does not mean that they ordered that they should be killed. He submitted that the principle enunciated in **Goodluck Kyando v. Republic** [2006] T.L.R. 363 that each witness is entitled to be believed, which principle we restated in **Zakaria Jackson Magayo** (supra), must apply equally to both the prosecution and the defence.

The learned counsel also pointed out that the delay to arrest the appellants left a lot to be desired. He referred us to our decision in **Soda Busiga @ Sumu ya Mamba Shija v. Republic**, Criminal Appeal No. 53 of 2012 (unreported) to buttress the point in which we doubted the belated apprehension of the culprit.

The learned counsel also added that the defences of the appellants were not considered and thus invited us to reevaluate all the evidence on record and come to our own conclusion.

With regard to the second cluster, Mr. Rwebangira submitted that much of what was to be submitted in this cluster has been canvassed in the first cluster. He only added that there is no nexus between the appellants and the death of the deceased.

On the third cluster, Mr. Rwebangira submitted that the first appellant was not a leader of the hamlet where the meeting was convened. He was a leader of another hamlet. In the circumstances, he could not be liable to any culpable omission on a killing which occurred at a place where he was not a leader. He added that there was no proof of *actus reus* and that threats only do not amount to murder. For this proposition, the learned counsel cited to us **Republic v. Mustapha Sandiri** [1990] T.L.R 120. Counsel also relied on **D.P.P v. ACP Abdallah Zombe and 8 others** [2017] TLS LR 182 to submit that ACP Abdallah Zombe did go to the scene of crime and because of that the Court found him not responsible for the killings of the deceased persons.

With regard to the fourth cluster, the learned counsel submitted that the grounds in this cluster are on circumstantial evidence. He submitted that in order for circumstantial evidence to be relied on to found a conviction, the same should irresistibly point to the guilt of an accused person. To buttress this argument, he cited to us **Ally Bakari and Pili Bakari v. Republic** [1992] T.L.R 10 wherein it was held that where the evidence against an accused person is wholly circumstantial, the circumstances from which an inference adverse to the accused person is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be drawn.

With regard to the last cluster, Mr. Rwebangira submitted that, a greater part of it had been canvassed when discussing other clusters. He added that the trial Judge shifted the burden of proof on the appellants when he said they should have brought witnesses to testify. He referred us to **Mohamed Said Matula v. Republic** [1995] T.L.R. 3 for the stance that upon the charge of murder being preferred, the onus is on the prosecution to prove not only the death but also the link between the said death and the accused. That onus never shifts away from the prosecution, he argued, and no duty is cast on the accused to establish his innocence.

Having submitted as above, the learned counsel submitted that the provisions of section 22 of the Penal Code, Cap. 16 of the Revised Edition, 2019 (the Penal Code) could not be applicable to the present case. He thus invited us to allow the appeal and set the appellants free.

Responding, Mr. Mwakasege, expressed his stance at the very outset that he, for and on behalf of the respondent Republic, supported the appellants' conviction and sentence. He prefaced his submissions with an anecdote to the effect that the appellants ought to have been convicted of murder but, out of sheer good luck, they were instead convicted of manslaughter, a lesser offence to murder.

In his response, Mr. Mwakasege combined the first, second and fourth clusters and argued the third cluster separately. On the combined clusters, he submitted that the appellants initiated the meeting in which the main agenda was to evict suspected thieves from the village. The deceased and PW6 were named and a resolution passed that they should be expelled from the village. He submitted that the appellants were leaders of the area who left the villagers do what they wanted. He referred us to the decision of the Court in **Godfrey James Ihuya & Others v. Republic** [1980] T.L.R 197 in which it was held that leaders

leaving people to do what they wanted made those leaders culpable. In the case at hand, he contended, for the role they played, the appellants were rightly convicted in terms of section 22 (1) (b), (c) and (d) of the Penal Code.

Responding to the third cluster, Mr. Mwakasege submitted that the appellants were convicted for their omission to prevent the villagers from beating the deceased and the trial Judge, at p. 123 of the record of appeal, listed elements which constitute omission as; **one**, there must be a legal duty or obligation, **two**, there must be culpable negligence, **three**, the duty or obligation should be directed towards the preservation of life or health of a person; and, **four**, liability may still arise even if the omission is not accompanied by any intention to cause death or bodily harm. In the case at hand, Mr. Mwakasege submitted taking us to p. 17 of the record of appeal that the appellants were among the people who accompanied the villagers who were beating the deceased. They were under legal duty to prevent the unlawful act, instead, they encouraged it, he argued. The learned State Attorney argued that under the elements listed at p. 123 of the record of appeal and the provisions of section 22 (1) (b), (c) and (d) of

the Penal Code, it was not necessary if the appellants agreed that the deceased should be killed.

Regarding the third cluster, Mr. Mwakasege submitted that the burden of proof was not shifted on the appellants. By suggesting that the appellants should have brought witnesses to testify in their defences did not amount to shifting the burden of proof on them. If anything, the learned State Attorney argued, the appellants' defence was considered and the High Court was satisfied that the case was proved against them to the hilt.

Having argued as above, Mr. Mwakasege submitted that the appeal is without merit and urged us to dismiss it entirely.

Rejoining, Mr. Rwebangira submitted that the allegation that the appellants convened the meeting to name thieves was given adequate explanation by the appellants that they did not. He reiterated that PW1 was not at the meeting, PW3 came at the meeting late and left before the meeting ended. With regard to PW2, Mr. Rwebangira submitted that the fact that he testified at p. 17 that "we wanted to take them away" suggests

that he was an accomplice whose evidence should have been corroborated and that there was no corroboration so far.

Mr. Rwebangira rejoined further that **Godfrey James Ihuya** was distinguishable from the case at hand in that, there, unlike here, the appellants participated in the torture of the deceased and that they approved the torture and there were regular meetings conducted. In the circumstances, he contended, **Godfrey James Ihuya** is irrelevant in the present scenario.

Mr. Rwebangira also submitted that there was quite a distance from the forest where, allegedly, the five villagers went with the deceased to where the body of the deceased was found. Thus, he argued, even if it is proved that the deceased was taken to the bush by the five villagers who were the last persons to be seen with the deceased, it was doubtful if it was them who killed him, the fact that the body of the deceased was found far away from the forest, left a lot to be desired.

Giving Mr. Rwebangira a hand, Mr. Kamala, rose to rejoin further that the drum beats were sounded from Katana hamlet which was not under the first respondent's leadership. As a chairman of the village, the second

appellant ordered the villagers to untie the deceased and PW6 and, thereafter, they dispersed. In the premises, the responsibility which the High Court shouldered the appellants was not theirs, he argued.

The learned counsel for the appellants thus implored the Court to allow the appeal and set the appellants free.

We have dispassionately considered the contending arguments by the parties. Having so done, we think the decision hangs on a relatively thin thread; that is, whether the appellants unlawfully omitted to play any role which led to the death of the deceased for which they can be held culpable. We say so because it is on unlawful omission for which the trial Court convicted the appellants for the death of the deceased. It is on this issue, we respectfully think, this appeal stands or falls.

The trial court believed what PW2 testified and observed at pp. 124 – 125:

"... the fact that the 1st and 2nd accused persons convened a village meeting on 2nd July, 2014 is undisputed. During the meeting, they named the deceased to be one of the thief suspects. Under their orders and instructions, the deceased was

*searched and was taken to the forest under the pretext of escorting him away from the village. The evidence of PW2, who was an eye witness, whom I do not doubt his credibility, shows that the 1st and 2nd accused persons went together with men villagers into the forest. Although the accused persons were not among the five persons who killed the deceased, they witnessed the deceased being taken further into the forest by five evil persons. The 1st and 2nd accused persons, being village leaders could have stopped that unlawful act if they were not in idem with the perpetrators. In my view, the 1st and 2nd accused persons, albeit have the legal duty to protect the life of their fellow villagers, negligently failed to do so. They committed an **unlawful omission** which led to the death of the deceased."*

Before we go further, we find it apt, to come to grips with the law relating to unlawful omission. The provisions of section 195 (2) of the Penal Code defines the term "unlawful omission" as:

"... an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether the omission is or is not

accompanied by an intention to cause death or bodily harm."

This court had an opportunity to deal with a somewhat akin situation in **Emma Ngwada v. Republic**, Criminal Appeal No. 406 of 2013 (unreported). It articulated:

"Section 195 (2) provides that for an omission to amount to an unlawful one, it must be one amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether or not the omission is accompanied by an intention to cause death or bodily harm."

Adverting to the matter at hand, the question we have to ask is what was the role played or omitted to be played by the appellants pertaining to the death of the deceased. We are aware that the appellants do not deny to have been present at the scene of crime. However, the first appellant testified, and the second appellant supports in his testimony, that he advised the second appellant to tell the villagers to stop what they were doing and untie the deceased and PW6 and that they obeyed and people dispersed. However, the testimony of the prosecution witnesses had quite a contrary account of the participation of the appellants. It is this account

which the trial Judge believed, and to our mind rightly so. PW2 narrated how the appellants encouraged the villagers to do what they did. We will let the testimony of PW2 speak for itself as appearing at pp. 16 – 17 of the record of appeal:

"On 02/07/2014, I was at Ruhija. I remember, we were called to repair the road in our village. In the morning, we went to repair the road under the supervision of Julius Kashorogoto (the Chairman of the sub village) (1st accused person). Before finishing the repair, we heard a drum beat of sign of calling people to assemble. The Chairman, Mr. Salvatory Kabege (the 2nd accused person). He informed us that there are people suspected to be thieves in the village. He named the thieves as Stephan Mgimbwa (deceased) and Respicius. He said, these two people are accused of being thieves and they should be taken away from the village. He insisted that Stephano Mgimbwa (deceased) should be searched. People were requested to list their stolen properties. We remained at the assembly point. Some people went to the deceased's house. They came back with a sack of different things such as warehouse materials, tiles and an iron bar (kiosho). People were told to

identify their properties but none of the properties were identified to be stolen. The Chairman instructed all men to escort the deceased away from the village. There were two people who were suspects namely Stephano Mgimbwa (deceased) and Respicius. We took the suspects. The deceased was tied. We wanted to take them away from our Ward. On the way, the deceased was severely beaten. Respicius was later left free. The deceased was beaten by many villagers including Leonidas (the 3rd accused person). They were armed with sticks. The 1st and 2nd accused persons were also among the people who accompanied the deceased. The one of people was about 500 metres long. At the boarder of the Ward, village diverged towards the forest. I was following to see what will be done to my uncle. When they went to the forest, they stopped me from going to the forest.

The forest is called Kikuru. Five people proceeded to the forest. After an hour those five people came back. The five people who went with the deceased in the forest are not here, they are at home. Those people are; Wencheslaus, Albert, some of them I do

not remember their name. Another one was Rwekaza."

PW3; a Primary School teacher and deceased's wife, also recounted how she found a group of members of the village in the vicinity of her residence. He saw PW6 tied and was at the middle of the gathering. The appellants were also there. She allegedly heard the second appellant as saying: "we will do one thing and nobody will steal again" and the first appellant as saying: "nobody should divulge this secret". She later saw a group of people with a certain Wencheslaus Mujemula holding her husband; the deceased. They had a sack which contained items the deceased was alleged to have stolen. She heard the first appellant saying they wanted to escort the deceased and PW6 out of their village. She also testified that the first appellant called her to collect the sack containing the items which were alleged to have been stolen by the deceased and take it to their house but that she declined. In cross-examination, PW3 testified that the appellants attended the meeting and encouraged people to take actions.

Another piece of evidence which implicated the appellants is that of PW6. This witness testified that he heard the drum beats and responded

to the call. On arrival at the assembly point, the first appellant told him to sit at the middle of the gathering. He told him they wanted him to go back to his place of domicile at Kamachumu. They later brought the deceased who was also made to sit at the middle of the gathering. At a later stage, the first appellant ordered that they would be "escorted" out of the village. On the way, the deceased was severely beaten. At Nyabururu, they untied him and ordered him to run away which he did. PW6 also testified at p. 34 of the record of appeal that:

"I know the 1st accused, he was the chairman of the sub-village. His name is Kalokola Kashorogoto. I met him at the place where he was beating the drum to call/convene villagers. The last time I saw him when we arrived at the river before they allowed me to run away. I know the 2nd accused as the chairman of the village. The last time I saw him is when they released me and allowed me to run away."

The trial court disbelieved the appellants' episode. In its stead, as already alluded to above, the High Court believed the story brought to the fore by the prosecution witnesses. We think the High Court was quite in the right track to do so. The narration of the prosecution witnesses shown

above, in our considered view, depicted in no uncertain terms what transpired on the material day which led to the death of the deceased Stephen Ngimbwa at Ruhija Village. The witnesses narrated in a meticulous manner how the appellants participated in the ordeal which led to the death of the deceased. The first appellant, a hamlet leader, is the one who was in charge and supervised the road repair. He is the one who sounded the drum beats, so PW2 testified. The second appellant was very instrumental in making orders of the deceased's house being searched and that the deceased and PW6 be taken out of the village. Both appellants encouraged the villagers to beat the deceased and PW6. Both appellants were with the villagers "escorting" the deceased and PW6 outside the village up to the point when the five took charge.

The appellants supervised the villagers in the road repair. The villagers were therefore able to obey their orders. We are certain that the appellants were in a position to make the villagers stop the atrocities the villagers were doing against the deceased and PW6 if they wanted to do so. But the evidence is overwhelming that instead of prohibiting, the appellants encouraged members of the village to do so and they actually

made orders that the deceased and PW6 who were suspected thieves be expelled from the village.

In **Godfrey James Ihuya** (supra) the appellants were convicted in the High Court following the death of Masanga Mahula Mazegenuka while under interrogation. Two appellants were officers in charge of the interrogation. The remaining two appellants were among the interrogators of the deceased. In upholding the decision of the High Court, the Court held:

- "(i). the fourth appellant who directly participated in the torture of the deceased is responsible for causing the death of the deceased under the doctrine of common intention;*
- (ii). The first and second appellants who gave comfort, encouragement and approval of the tortures can be held to have caused the death of the deceased by virtue of the provisions of s.22 (c) and (d) of the Penal Code"*

We are satisfied in the present case, as we did in **Godfrey James Ihuya** (supra), that the appellants who gave comfort, encouragement and approval of the beatings of the deceased who was seen last with the five villagers and his body found dead in the morning of the following day, are

responsible for the death of the deceased Stephen Ngimbwa by virtue of the provisions of section 22 (c) and (d) of the Penal Code. We are satisfied that the doctrine of the last person to be seen with the deceased alive, is applicable in the present case – see: **Mathayo Mwalimu and Another v. The Republic**, Criminal Appeal No. 147 of 2008, **Misoji Ndebile @ Soji v. Republic**, Criminal Appeal No. 75 of 2013, **Keneth Jonas v. Republic**, Criminal Appeal No. 156 of 2014 and **Emmanuel Kondrad Yosipati v. Republic**, Criminal Appeal No. 296 of 2017 (all unreported).

The complaint that the trial court shifted the burden of proof on the appellants is not backed by evidence on the record. We dismiss it as being unfounded.

The above said, we find nowhere to fault the verdict of the trial court.

With regard to the sentences imposed on the appellants, Mr. Mwakasege just lamented that the appellants were supposed to be convicted of murder and that they were lucky to be convicted of manslaughter. However, he never prayed for enhancement of the sentences. As such, no meaningful discussion of it was done on the

sentences. Be that as it may, we think the sentences imposed on the appellants met the justice of the case. For this reason, we find no justifiable reason to meddle with them.

In the upshot, we find no scintilla of merit in this appeal and, consequently, dismiss it entirely.

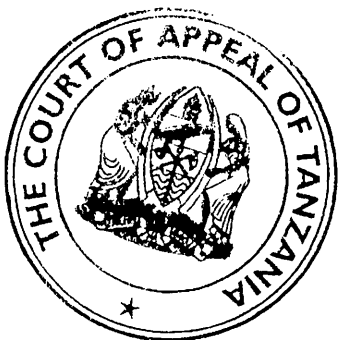
DATED at BUKOBA this 27th day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of Mr. Joseph Mwakasege, learned State Attorney for the Respondent/Republic and Mr. Frank Kalory John, counsels for the Appellants is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL