IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 287 OF 2021

MAHAMUDU HAMISI CHUPA @ MBAVU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 22nd day of October, 2020

in

Criminal Sessions Case No. 19 of 2019

JUDGMENT OF THE COURT

18th & 28th, March, 2022.

KENTE, J.A.:

The appellant Mohamudu Hamisi Chupa @ Mbavu was convicted of murder contrary to section 196 of the Penal Code [Cap 15 R.E 2019] by the High Court of Tanzania (Dyansobera, J.), sitting at Mtwara and subsequently sentenced to suffer death, the only sentence for the offence of murder. Aggrieved by both the conviction and sentence, he launched the present appeal for consideration by this Court.

During the trial, the prosecution called six witnesses to establish its case. Of these, its main witnesses were Helena Dastan Chitanda, (PW1), Severina George Mnimbo (PW2) and Msafiri Issa Umbili (PW3) to whose evidence we shall refer in detail sometimes later in this judgment. It is common ground that, prior to the occurrence of the murder incident, the appellant and the deceased one Dickson Walalik Mnimbo were residents in Nkowe Village in Ruangwa District, Lindi Region. It is as well not disputed that, at the material time, the deceased and PW1 were living together in concubinage. That was after PW1 had terminated her previous relationship with the appellant accusing him of having a proclivity to prolonged and boring courtship without intention to enter into marriage.

Essentially the case for the prosecution was that, on 17th January, 2018 at about 8:00 pm, the appellant together with his friend one Jirani invaded the deceased who was together with his lover PW1 and inflicted on him injuries which led to his death only, as the evidence suggests, shortly afterwards. Apparently, the assault was by way of a revenge on the deceased for cohabiting with the appellant's ex-lover. The case for the prosecution rested mainly on the evidence of PW1, PW2 and PW3 who witnessed the murder incident. PW1 testified that, on the material

day she and the deceased were at their home seated near the door. She then saw the appellant and his friend one *Jira* who were putting on shorts but bare chested. The appellant and his friend went straight to the deceased and attacked him using a bush-knife and a bicycle pumb with which the two were respectively armed. On seeing this, PW1 raised the alarm which however, did not immediately stir the appellant and his friend from further assaulting the deceased. Even though, it was not entirely a fool's errand for PW1, to put her neighbors on notice. For, immediately thereafter, PW2 responded to the alarm and sought to intervene but she was warned by the appellant's accomplice not to draw nearby. Fearing for her own life, PW2 ran away but that was after having witnessed the appellant and his friend seriously attacking the deceased by striking him with a flattened bush-knife and a bicycle pump. Another witness who eye-witnessed the assault of the deceased was PW3. He told the trial court that, at the material time, he was home listening to the radio. He then heard some shouts from far but after switching off the radio, he realized that the shouts were getting close to his house. He opened the door and got out only to find the appellant and his friend carrying the deceased. On coming to the verandah of his house, they put him down and continued to assault him. When he tried to intervene and rescue the deceased, the appellant's friend warned him

that they would do to him what they were doing to the deceased. According to PW3, while the appellant kept an eye out for anyone who sought to go to the rescue of the deceased, his friend went on assaulting the deceased. Asked what did he do after he was threatened by the appellant's friend, PW3 told the trial court that, he chickened out and went on to watch at what the two were doing to the deceased through the window. PW2 told the trial court that, from there, the two assailants took the deceased away and when they came back, he heard them as saying "sasa bado mwanamke" which loosely translates into, the next person to attack would be the woman, PW1. After the situation calmed down, PW3 got out. He moved around and found the place where the deceased was violently attacked splattered with drops of blood. Tracing the said drops, he came across the deceased who was lying down, apparently in a coma. Hurriedly, PW3 went back and picked some of his neighbors including PW1 and led them to where the deceased was abandoned. The deceased was taken to Mtimbo Dispensary where he was however, pronounced dead shortly thereafter.

According to the postmortem report (Exh.P2), the deceased's death was due to severe anemia secondary to head injury. During the trial the appellant denied to have been involved in the assault of the

deceased occasioning his death. However, he admitted to have gone to the home of PW1 on the material day saying that, he went to collect his belongings but only to be invaded and attacked unconscious by an anonymous person. He told the trial court that, when he regained consciousness, he realized that he was admitted to Ruangwa District Hospital. The trial Judge rejected the defence, and, accepting the evidence of PW1, PW2 and PW3, convicted the appellant as charged.

In this appeal, while the appellant was represented by Mr. Robert Dadaya, learned advocate, Ms. Ajuaye Zegeli, learned Principal State Attorney appeared for the Respondent/Republic.

Initially the appellant had lodged a memorandum of appeal containing seven grounds. However, on being engaged to represent the appellant and when the appeal was called on for hearing, Mr. Dadaya rose at the outset, and prayed for leave to argue an additional ground of appeal pursuant to Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 as amended (hence forth the Rules). The sought leave by Mr. Dadaya was granted, there being no objection from Ms. Zegeli.

Having presented a supplementary memorandum containing the additional ground of appeal in which the trial Judge is being criticised for his alleged failure to properly analyse and evaluate the evidence

thereby reaching to an erroneous decision, Mr. Dadaya went on to abandon the 1st, 3rd, 5th, 6th and 7th grounds contained in the memorandum of appeal initially filed by the appellant. He also adopted and subsequently argued the second and fourth grounds which, respectively, fault the trial Judge for convicting the appellant while relying on the weakness of his defence evidence as opposed to the strength of the prosecution case, and, convicting the appellant on the basis of exhibits P1 and P2 in the absence of the appellant's confessional statement to which, in the appellant's view, would have corroborated the other two documentary exhibits.

Submitting in support of the complaint that the trial Judge did not analyse and evaluate the appellant's defence evidence, Mr. Dadaya sought to buttress his argument with reference to page 54 of the record of appeal where the appellant told the trial court that, when he went to pick his property at PW1's home, he was attacked by a person whom he did not know. According to Mr. Dadaya, if we correctly understood him as we reckon we did, in his open ended submissions, the trial Judge should have found that, in view of the appellant's account of what happened to him when he went to PW1's home to collect his belongings, there was a fight between the appellant and the deceased and that,

whatever the appellant did, he was acting in self -defence and in defence of his property as provided respectively under section 18A (1) (a) and (b) of the Penal Code [Cap 16 R.E 20019]. However, when we probed Mr. Dadaya and asked him not to be vague on the question as to whether what he meant was that, the injuries leading to the death of the deceased were inflicted by the appellant in the course of a fight, the learned counsel returned to us an open-ended answer saying that, the appellant might have exercised the right to self-defence unconsciously after he was attacked by the unknown person. When we asked him how, under normal circumstances, a person who had been attacked as to slip into unconsciousness could turn around and be able to retaliate and cause death to his attacker, just like us, the learned counsel was temporarily awestruck. Apparently, seeing that he was attempting to fetch water in a reed basket, the learned counsel gracefully bowed out and left us to decide if his argument and reasoning could ring true.

Still on the question of self-defence, Mr. Dadaya submitted that, the prosecution had failed to lead evidence showing how the appellant could have sustained injuries which led to his admission to Hospital if he was not attacked and injured by the deceased. On that point, the learned counsel faulted the trial Judge for shifting the burden of proof

onto the appellant by saying that the appellant could not himself come up with an explanation for his being injured and hospitalized at the time which was synchronous with the deceased's murder. Mr. Dadaya criticized the trial Judge for not drawing an adverse inference against the prosecution for the unexplained omission to call witnesses from Ruangwa Hospital to tell the court the reason behind the appellant's hospitalization immediately after occurrence of the murder incident. The learned counsel referred us to a series of decisions by this Court where a view is held that the trial court did not evaluate the defence evidence. Such cases include **Ally Patrick Sanga vs. Republic,** Criminal Appeal No. 341 of 2017 and **Mosi s/o Chacha Iranga and Another vs. Republic,** Criminal Appeal No. 508 of 2019 (both unreported). In all these cases, the Court took the view that, failure to evaluate defence evidence makes a resulting conviction unsafe.

With regard to the evidence of PW1, PW2 and PW3 who were the eyewitnesses to the deceased's vicious assault by the appellant and his friend, the learned counsel's argument was two-fold. Mr. Dadaya submitted that, except for PW1 who was not reliable as she was a witness who had her own interest to serve in this matter, PW2 and PW3 did not witness the beginning of the fight between the appellant and the

deceased. As to the nature of PW1's interest in this case, the learned counsel contended that, all along, PW1 harbored a grudge against the appellant for having refused to marry her. Concluding, Mr. Dadaya submitted that, the appellant did not have intention to kill as he was just called by PW1 to go and collect his belongings which she said, the deceased did not want to see. In totality therefore, the learned counsel contended that, the prosecution had failed to prove malice aforethought on the part of the appellant. He urged us to find merit in the appeal and allow it in consequence.

Ms. Zegeli was relatively brief in her reply submissions. In a plain sailing style, the learned Principal State Attorney submitted in the first place that, the appellant was convicted on the basis of the direct evidence of PW1, PW2 and PW3 who were credible and reliable witnesses as correctly found by the trial Judge. She went on submitting that, the assault of the deceased occurred at two places, that is at the home of PW1 and PW3, where the appellant and his friend villainously attacked the deceased inflicting serious injuries on him which eventually caused his death. Submitting on the complaint by Mr. Dadaya that the appellant was wounded, Ms. Zegeli maintained that, it was not the duty of the prosecution to establish that the appellant was also wounded by

the deceased before being overpowered as to succumb to death. If on the other hand, the appellant was arrested at hospital as laboriously contended by Mr. Dadaya, the learned Principal State Attorney submitted that, that does not necessarily mean that the appellant was wounded by the deceased and subsequently admitted to hospital.

With regard to the appellant's contention through Mr. Dadaya his advocate that, he might have killed the deceased unconsciously in the course of self defence and defence of his property, Ms. Zegeli countered by submitting that, the evidence on the record did not accord with the proposition that the appellant had a justification for inflicting serious harm on the deceased thereby killing him on the ground that he did so as a means of protecting himself. What is more, according to the learned Principal State Attorney, is the fact that, the conduct of the appellant together with his accomplice exhibits their intention to either cause death or grievous harm to the deceased. The learned Principal State Attorney referred us to the case of **Jacob Mwashitete and Four Others vs. Republic,** Criminal Appeal No. 24 of 2019 (unreported) in support of the argument that, the trial Judge weighed two versions of two competing evidence. Assuming that the defence case was not evaluated, the learned Principal State Attorney invited us, on the

authority of **Ngari Joseph and Another vs. Republic,** Criminal Appeal No. 172 of 2019 (unreported), to step into the shoes of the trial court, look at the evidence and make our own findings of facts. By way of conclusion, Ms. Zegeli submitted that, all things considered, the charge against the appellant was certainly proven to the hilt. She therefore implored us to dismiss the appeal for lack of merit.

As the matters stand, it is now an undisputed fact and the learned trial Judge was satisfied that, a person known as Dickson Walalick Mnimbo is deceased and that his death was violent and unnatural. That being the case, following close on the heels is the question regarding the identity of the slayer. In his impugned judgment, the learned trial Judge considered this question at length and he found as an established fact that, the real culprit was non other than the appellant. He based his factual finding on the testimonies of PW1, PW2 and PW3 who in our opinion gave an unsparing eyewitness account of the deceased's brutal attack and eventual murder by the appellant and his confederate.

After reviewing the evidence of the above mentioned three eyewitnesses whom he found to be credible together with the evidence of Ernest Lutauka (PW5) a pathologist who performed an autopsy on the body of the deceased and posted his finding in his report (Exh.P2)

revealing the presence of a big injury on the forehead, a fracture on the right arm, a deformity on the elbow joint and two cut wounds and bruises and that the big injury on the forehead was caused by a sharp-object, the learned trial Judge was left with no doubt that the evidence of the pathologist corroborated the testimonies of the three eyewitnesses.

On our part, we have considered this matter very carefully, and in fine, we are in respectful agreement with the learned trial Judge. Considering the evidence led before the trial court in its totality, the only rational conclusion that one could arrive at is that, the evidence against the appellant was so obvious as to leave no doubt that he is the one who, together with his friend attacked the deceased occasioning his death. We find Mr. Dadaya's contention that, it is the deceased who attacked the appellant and not vice versa as being unrealistic. For, unlike Mr. Dadaya, we have no reason to discredit any of the three eyewitnesses simply because of the flimsy argument that PW1 harbored a drudge against the appellant for his refusal to marry her and that PW2 and PW3 did not witness the beginning of the fight between the appellant and the deceased. We would at this juncture like to comment that, the question of PW1's alleged, deep resentment against the

appellant was not raised and canvassed by Mr. Dadaya in his cross examination to PW1. Judging from the line of questioning as adopted by Mr. Dadaya during the cross-examination of PW1, it is apparent that he had no factual grounds upon which he could base his accusation that she harbored a grudge against the appellant. This in our view, is something of an afterthought conveniently raised so belatedly to discredit the otherwise damning and reliable evidence of PW1. As for the evidence of PW2 and PW3, whilst we agree that these witnesses were not present at the beginning of the deceased's attack, we still have the evidence showing that they saw the appellant and his friend attacking the deceased moving him from one place to another and finally sending him into a coma. We therefore think that, Mr. Dadaya's contention that PW2 and PW3 did not witness the deceased's murderous attack cannot be correct. The evidence of PW2 and PW3 shows that, they did not catch just a fleeting glimpse of the appellant for, the assault of the deceased was not a short-lived event. It was a relatively long-lasting confrontation which attracted the attention of neighbors as PW1 continued to raise the alarm. In these circumstances, we find, as did the learned trial Judge, the fact that it is the appellant together with his friend who attacked the deceased to death, as having been established.

We now turn to the question of lack of malice aforethought and killing in the course of self defence as contended by Mr. Dadaya. The learned trial Judge correctly directed himself that, in deciding that question, due regard must be paid to the factors which will guide the court in deciding the existence or otherwise of malice aforethought in the mind of the accused at the time of commission of the offence. He did not lose sight of our observation in **Enock Kipela vs. Republic,** Criminal Appeal No. 150 of 1994 (unreported) in which we instructively stated that:-

> *"...Usually an attacker will not declare his intention to cause death or grievous bodily 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 blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending on the facts, of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during or after the killing and (7) the conduct of the attacker before and after the killing."*

Needless to say, the above-mentioned benchmarks for determining malice aforethought need not exist in conjunction. Bearing in mind the foregoing factors which the court is enjoined to look at when determining the question of existence or otherwise of malice aforethought in the mind of a person charged with murder, the learned trial Judge was left with no doubt that in the instant case, the appellant and his accomplice had the intention to kill or cause grievous bodily harm as they were armed with lethal weapons, and that they attacked the deceased and inflicted a deep wound on his head which is the most vulnerable part of a human body. It is noteworthy that, this evidence was supported by the findings of PW5 who examined the body of the deceased and found it to have, among other wounds, a big wound on the forehead. It was PW5's opinion that the said wound could have been caused by a sharp object and that the contusion of the arm and deformity of the elbow might have been caused by a blunt object. It is important to note here that, the above findings were fully in accord with the evidence of PW1, PW2 and PW3 who told the trial court that, while the appellant attacked the deceased using a bush-knife which is a sharp object, his friend used a bicycle pump which is a blunt object. On the basis of this evidence, like the learned trial Judge, we are satisfied that the appellant and his friend had no other intention than that of causing

death or grievous bodily harm as envisaged under section 200 of the Penal Code Cap 16 R.E 2019 (the Penal Code). On these facts, we are inclined to hold as did the learned trial Judge that, the appellant killed the deceased with malice aforethought.

As for the question of self defence which would reduce the unlawful killing of the deceased in this case to manslaughter, we think that to do justice to the argument by Mr. Dadaya, it is necessary to quote the provisions of section 18C (1) of the Penal Code which is relevant to the circumstances of the present case and it reads as follows:

> *"The right of self defence or the defence of another or defence of property shall extend to a person who, in exercising that right causes death or grievous harm to another and the person so acting, acts in good faith and with an honest belief based on reasonable grounds that his act is necessary for the preservation of his own life or limb or the life or limb of another or of property, in the circumstances where-*
>
> (a) *the lawful act is of such a nature as may reasonably cause the apprehension that his own death or the death of another person could be the consequence of that act;*

(b) the lawful act is of such a nature as may reasonably cause the apprehension that grievous harm to his own body or the body of another could be the consequence of that unlawful act;

It follows therefore that, for the appellant to bring himself within the ambit of the above quoted provisions of the law, as opposed to mere denials and lamentations, he was bound to lead evidence showing, albeit on a balance of probability that, he acted in good faith, with an honest belief, based on reasonable ground that his acts were necessary for the preservation of his own life or limb, in the circumstances where the unlawful act being or about to be committed by the deceased, was of such a nature as could reasonably cause fear that his own death, or grievous harm to his body could be the result of that unlawful act which was being or was about to be committed by the deceased.

To recapitulate, in the instant case, Mr. Dadaya contended rather forcefully that, the appellant was attacked by the deceased when he went to collect his belongings and that, whatever the appellant did in retaliation, it was done unconsciously but in self-defence.

With due respect to Mr. Dadaya, we are not prepared to subscribe to his bizzare and farfetched argument. As indicated earlier, it is almost

inconceivable that a person who had been attacked as to lose consciousness could, while still unconscious, relaliate so violently as to cause the death of his assailant. As for the complaint that the appellant was attacked by the deceased and subsequently admitted to hospital, a fact from which Mr. Dadaya implored us to infer that there was a fight between the appellant and the deceased and that the appellant could have killed the deceased in the exercise of his right to self-defence, we wish to say that, looking at the evidence concerning the manner in which the deceased was attacked and eventually killed, it is difficult to believe that the appellant would have gone free, without some wounds. For, we cannot see how a young and healthy man like the deceased, confronted by two vicious attackers, in the presence and vicinity of his lover, could have been attacked and killed, without himself putting up a fight and inflicting some visible wounds to his attackers. That would definitely dispel the lamentation by Mr. Dadaya that the trial Judge ought to have found and held that the appellant was not guilty of murder as he was himself wounded by the deceased in the course of a fight.

We find the complaint by the learned counsel on that score rather untenable both in law and in fact as there is no evidence showing that the appellant was fighting off the deceased as his attacker as to bring

him within the ambit of section 18C (1) of the Penal Code which is relevant to the facts and circumstances of the instant case.

In the result and for the foregoing reasons, we find the appeal to have no merit and we accordingly dismiss it in its entirety.

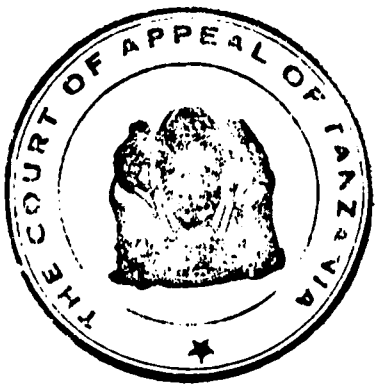
DATED at **MTWARA** this 26th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of March, 2022 in the presence of the Appellant in person, unrepresented and Mr. Wilbroad Ndunguru, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL