IN THE HIGH COURT OF TANZANIA

AT SONGEA

ORIGINAL JURISDICTION

Mtwara Registry Criminal Sessions Case No.3 of 1973

MBINGA CRIMINAL CASE NO.170/72

THE REPUBLIC .....vs:.....LAZARUS @ KUMINIKA S/O NDELA

CHARGE: Murder c/s 196 of Penal Code

J U D G M E N T

Kisanga, J.

The accused Lazarus Kuminika Ndela is charged with murder contrary to section 196 of the Penal Code, the particulars being that he murdered one Isdori Magesa.

In support of the charge the prosecution called a total of 9 witnesses whose evidence may be summarized as follows: On the day of the incident the accused and the deceased and many others went to do communal work at the home of one Enhald Gaspar. At the end of the work Enhald entertained them with pombe and he appointed the deceased to serve the pombe to the rest. While the party was in progress the accused went to serve himself by force claiming that the deceased was not serving him. The deceased objected to such interference by the accused and in the course of such objection he and the accused exchanged angry words and pushed each other. However the scuffle was stopped after which drinking continued. During the continued session the accused took some water and poured it in the hut or kitchen in which the deceased and several others were sitting. This annoyed the inmates who, as a result, decided to leave for home. After they had gone for only about 30 paces the accused suddenly struck the deceased on the head with a heavy walking stick "mpini wa nyengo." The deceased fell down and died only shortly afterwards while he was being conveyed to hospital. According to the medical evidence the deceased sustained an irregular wound measuring 4" long by scalp deep on the parietal region and underlying this wound there were irregular fractures measuring 5" and 4" long. There were also bruises on the face and chest of the deceased. In the doctor's opinion death was due to severe intra-cranial haemorrhage following the head injuries. Briefly that was the prosecution case.

Accused in his defence adopted the statement which he made during the Preliminary Inquiry before the District Court. In that statement he said in effect that on the day of the incident he and a number of others including the deceased went to do communal work at the home of Enhald Gaspar and that at the end of such work Enhald entertained them with pombe. The deceased was the person serving the pombe to the participants. At some stage the accused and Egno complained to Enhall that they were not getting pombe

hile they had worked like anyone else and Enhald accordingly gave him some pombe. He returned to the kitchen and drank the pombe there. Egno was also sitting in the kitchen. Presently Joackim came and said that someone was insulting Egno. Whereupon Egno went outside and started fighting with the deceased and some others. When the accused went out to see what it was all about the deceased caught him. Kapinga and Kalwebe charged him with interfering in their affairs and claimed that he was going about with their women. Then Kizito slapped him and pushed him and he became provoked. Whereupon he picked up a stone and threw it but he did not know whom he threw it at. After that he went home. Some five days later the police came and charged him with the killing of the deceased. At first he denied but later he agreed that he threw a stone because the deceased was strangling him; that he was defending himself because his assaillants were many while he was alone. That was in essence the defence of the accused.

I summed up the case to the two assessors who sat with me and they were unanimous in finding the accused not guilty of murder but of manslaughter on grounds of drunkenness.

I now turn to consider the case as a whole and to decide whether or not the charge has been proved. In doing so I bear in mind that it is the duty of the prosecution to prove its case against the accused person and that the accused has no obligation of proving his innocence. The proof must be beyond reasonable doubt and the duty of proving the case to that standard remains on the prosecution throughout the trial. Should I entertain any reasonable doubt as to the guilt of the accused I must resolve such doubt in favour of the accused.

The evidence of Crispin, Egno and Enhald makes it very clear that the deceased was injured and died while he was being conveyed to hospital. Then Dr. Semiono said that the dead body of the deceased was identified to him before he performed post-mortem examination on it. Thus from the evidence of these witnesses there can be no doubt whatsoever that the deceased Isdori Magesa is dead, and I directed the assessors so to find.

The next question to consider is who inflicted the injury which caused the death. According to Joackim, Egno and Crispin the accused inflicted the injury on the deceased and ran away. The accused in his defence, however, stated that he merely threw a stone but he did not know at whom he threw it, and after doing so he went home. It is quite clear that after the incident that night the accused absconded and never returned to the home of Egno, his relative, where he was staying. Then the question is if all that the accused did was only to throw a stone then

what made him abscond? Such conduct on the part of the accused cannot be consistent with his innocence and I am satisfied that the accused absconded because he knew that he had injured the deceased. I therefore accept the evidence of Joackim, Egno and Crispin on this point and find as a fact that it is the accused who inflicted the injury causing the death of the deceased. Admittedly there are inconsistencies in the evidence of Crispin and Joackim on the one hand and the medical evidence on the other which tends to show that Crispin and Joackim did not clearly see the position from which the accused struck the deceased. But both Joackim and Crispin are consistent in saying that they saw the accused running away from the scene immediately the deceased was struck. This evidence is supported by that of Egno and I see no reason for rejecting it. So that once it is accepted that the accused alone ran away from the scene immediately after the deceased was struck, the irresistable inference to be drawn is that it is the accused who struck the blow. In those circumstances the inconsistency as to the position from which the accused struck the blow is, in my opinion, of little or no consequence.

The evidence also poses considerable difficulty as to the actual instrument used by the accused in striking the deceased. The prosecution witnesses allege that the accused used a piece of stick called "mpini wa nyengo" but the accused maintains that he threw a stone. The prosecution evidence on this point is not entirely satisfactory. In the first place there are inconsistencies about the stick. For example, Crispin told the police that just before the incident that night it was Joackim who had the stick as the party were going home. In this court, however, Crispin changed his story and said that it was the accused who was having the stick. Again Egno and his son Joackim maintained that the stick belongs to the accused but under cross-examination Egno was confronted with a statement which he made to the police and it is only then that he admitted that the said stick is his own and it belongs to his own home. But what is even more important is that Joackim and Egno were hesitant in saying what instrument was used by the accused to injure the deceased. Senior Inspector Yusufu Mingwe said that these witnesses made this disclosure only after he himself had pointed at the said stick at the home of Egno and asked if it had been used during the incident. Then the question is if the witnesses were clear that the accused used the stick, why should they hesitate to say so? For, once they were prepared to disclose the accused as the assaillant, there seems no logical reason why they should hesitate to disclose the weapon which the accused used. It would seem to me that the witnesses were thus hesitant because they were not sure what instrument was used. The suggestion that the deceased was

jured by the stone which the accused claims he threw during the incident is equally untenable because Dr. Semiono said that the injuries found on the deceased could not have been caused by a blow using a stone. I am therefore statisfied that on the evidence it is impossible to say with certainty what instrument the accused used in injuring the deceased. This however does not exonerate the accused. Because I have made a finding that it is the accused who inflicted the fatal injury, and judging from the medical evidence the injury so inflicted is a serious one. In such circumstances therefore lack of evidence as to the actual weapon used in causing the injury does not affect the liability of the accused.

I now turn to consider what defence, if any, are open to the accused. In his statement of defence the accused appears to raise the defences of provocation and self-defence. Because he appears to suggest that he inflicted the fatal injury when Kizito provoked him by slapping him or that he did so in an attempt to defend himself when the deceased was strangling him and a number of others were also attacking him at the same time. If the accused was attacked as he claims, one would expect him to raise an alarm and appeal for help. This however he did not do and this goes to negative any suggestion that he was attacked at all. From his own statement and from the evidence as a whole there is no suggestion that Enhald, the owner of the home, and Egno, the host and relative of the accused, ever attacked the accused or had any grudge against him. Then if the accused was attacked as he claims why did he not refer the matter to Enhald and Egno for assistance or settlement? Again upon his arrest for this offence he made a cautioned statement to the police in which he mentions Christian Clemence as his assaillant that night adding that Christian beat him with a stick in the ribs. He does not suggest that he was attacked by anyone else. In his statement in court, however, he mentions other people as being his assaillants. Then the question is if he was attacked as he claims, why does he keep on mentioning different persons as his assaillants each time he makes a statement? Furthermore if he was attacked by a mob, one would expect him to say so at the earliest opportunity when he made the cautioned statement to the police, but the fact that he did not do so would go to show that there is no truth in his allegation. For these reasons I am satisfied that the statement of the accused is a complete lie and I accordingly reject it.

Next, I have to consider the issue of drunkenness. It is true that the accused does not raise it anywhere in his defence but it is apparent from the prosecution evidence and therefore the court has a duty to consider it. Joackim said that on the day of the incident the accused was very drunk. Again Enhald said that communal work stopped at about 12 a.m. and then drinking

started which went on till about 8.30 p.m. Thus there was a total of over 8 hours' continuous drinking. Enhald further said that the type of pombe which they were drinking could make a person drunk if he drinks much of it. I find that continuous drinking for over 8 hours was much drinking during which the accused must have got drunk. Other prosecution witnesses, including Crispin, said that the accused was not drunk but having regard to what has just been said above, I have no reason to prefer their opinion on the point. Consequently I hold that the accused assaulted and wounded the deceased in circumstances of drunkenness. In arriving at that conclusion I bear in mind that some time before the incident that day there had been a quarrel between the accused and the deceased in which they pushed each other but they were seperated. I take the view that by reason of drunkenness the accused was still excited even after the scuffle was stopped, and he continued to be in fighting mood until the time he eventually assaulted and wounded the deceased.

In the result I respectfully agree with the unanimous opinion of my two assessors and find the accused not guilty of murder but guilty of manslaughter and convict him accordingly.

R.H. Kisanga,
Judge.

9.x.73
Mr. W.H. Sekule for the Republic.
Mr. El-Maamry for Mr. El-Gheith for the accused.

Mr. Sekule: Accused has a previous conviction of assault causing actual bodily harm contrary to section 241 of the Penal Code. The conviction was recorded in Mbinga P.C. Criminal Case No.203 of 1970 and the conviction is dated 29/1/71.

Accused: It is true.

Mr. El-Maamry: The accused was arrested on 15/10/72 and has been in remand ever since. Furthermore he is married with four children, all of who depend on him for their livelihood. He is a simple farmer. The previous conviction is of a minor nature. I ask the Court to deal with him leniently.

Accused in Mitigation: I have nothing to add.

Sentence: In sentencing the accused I take into account what has been said on his behalf. But I also take into account that the deceased was completely innocent and that all along the accused was the one to blame. The assault on the deceased was entirely unprovoked. The accused struck the deceased on the head which is a very delicate part of the body, and in doing so he must have used consideable force which was sufficient to

cause two big fractures on the skull measuring 5" and 4" long. All this happened because the accused was drunk. But this Court has repeatedly warned that drunkenness is no licence to kill. If a person has drunk pombe he must learn to control it and behave himself. He must learn to ensure that he does not become a danger to the lives and person of others. In all the circumstances I am satisfied that the conduct of the accused could not attract the sympathy of this Court. Accused will go to prison for nine (9) years.

R.H. Kisanga,
Judge.

Right of appeal against both conviction and sentence explained.

R.H. Kisanga,
Judge.

9...73

Assessors thanked and discharged.

R.H. Kisanga,
Judge.

SONGEA
9.x.73