

IN THE HIGH COURT OF TANZANIA
AT ARUSHA

CRIMINAL SESSION NO. 59 OF 2006
ORIGINATING FROM MONDULI DISTRICT COURT
CRIMINAL CASE NO. 596 OF 2005
THE REPUBLIC
VERSUS

1. KALMELEK S/O ULKITOY	} ACCUSED PERSONS
2. LOSAY D/O ULKITOY		

JUDGMENT

CHOCHA, J.

In this case, Kalmelek Ulkitoy stands charged with murder of Francis Malawi @ Bauda c/s 196 of the Penal Code. Losay d/o Ulkitoy who had previously been charged together with Kalmelek, had her charged dropped ahead of the trial.

That Francis Malawi Bauda is no more is admitted. According to the doctor's report on postmortem, which is not disputed, the death was due to multiple wounds and ruptured spleen leading to haemorrhage both external and internally and eventually death. The post mortem report

was tendered as Exhibit P.1. The hot dispute is whether the accused murdered the deceased. The prosecution is positive. The defence is vehemently resistant.

The prosecution's story, which is incidentally not resisted whole sale, except on the allegation that the accused is also a culprit, is to the effect that the accused, Lasoy and one Meng'oru who was not arrested were grazing on the 22nd November, 2005. They led their cattle up to the house of Francis Malawi Bauda, Particularly at a place he had reserved grass for thatching his home.

The cattle started feeding on the grass.

According to PW1 who introduced herself as the deceased's daughter in law, the deceased came out of his house. He asked the accused and his colleagues to drive away the cattle from the area, so that no further damage can be caused, on the grass. PW1 Alphoncina said she stays in the deceased boma, but occupied a separate home. She saw the deceased not only ordering the accused and his colleagues to take away the cattle, but he also himself physically drove the out.

According to her, the headsman returned the cattle towards the grass. The ensued an exchange of fierce words from the two sides. The witness was categorical that the headsmen side was constituted with the accused and Meng'oruu.

On account of unfriendly dialogue between the two sides, PW1 who was all along outside his home, about 50 paces away from the scene, decided to go closer.

Before her arrival, she saw the two Masai I,e, the accused and Meng'oruu hit the deceased with the sticks they held. Each struck the deceased once. All two blows were aimed against the stomach. The first was severe such that the deceased tottered. Upon second attack the deceased fell down unconscious.

PW1 said the assailants' attack very fast. The strike was violent. The deceased collapsed. He was also blood vomiting. PW1 raised an alarm. The assailants took to their heels. The accused went for a hide in a nearby school building. People multiplied in response to the alarm raised.

The accused surfaced from a hiding. He ran away. He was caught. He was submitted at police.

PW2 Mohamed Mgereza said he knew the accused and all his colleagues before that day. He said on that day, before they had led their cattle at the deceased's home, they had spent almost half an hour at his place with him. He gave them a sugar cane. They ate it. They then led their cattle towards the deceased's home.

After they and himself had separated, he went at a neighboring stall for the essential. It appears the stall way past the deceased's home. PW2 past at the area. He saw the deceased, they accused and Meng'oruu engaged in a dialogue. It is through PW2's testimony that the name Meng'oruu was introduced in these proceedings for the first time. The witness said he was very familiar to both Meng'oruu and the accused. On account of their long standing friendship, he equated them to his relatives. He said he was not comfortable to testify against them due to their prevailing ties.

The witness had his attention not attracted by the ongoing dialogue. He proceeded to the stall. He had his feisoins. He was through after 10 minutes. He returned.

On his way home he met Mama Semaa. She told him that the deceased had been beaten by the Masai herdsman. PW2 was with Baba Hussein. They quickly rushed to the scene. They found the deceased unconscious. People were gradually multiplying.

It was consequent to Mama Semaa's information that the deceased had been beaten by the Masai that his memory was flashed the meeting between the deceased and the accused persons he had just witnessed. He now concluded that the dialogue had not been a friendly one.

On account of shortage of time that had lapsed between the information from Mama Semaa and when he saw the dialogue, he formed the opinion that the assailant must have been the Masai herdsman.

It happened to be true. His thinking was in consonant with what PW1 had seen.

PW2 himself saw the accused running from a nearby building. He participated in his arrest. It was the person he had given to him a sugar cane. It was the very person PW2 had seen him and Meng'oruu engaged in a dialogue with the deceased shortly before.

Witnesses said Meng'oruu ran away for ever. He was faster than those who attempted to chase him. What is surprising is that it came to nobody's senses to withhold the cattle he was grazing which he abandoned. Perhaps this would prompt his comeback. All seem very satisfied with the accused's arrest, and more importantly, concentrated on the deceased's welfare.

The group quickly contemplated and arranged for the transferring of both the accused and the deceased to police. They hired a vehicle for the purpose. The police in turn referred the deceased to Monduli hospital.

Luck was not on their side. The deceased could not make up to the hospital. If he died, he could not last longer than an hour. He expired. He was laid to rest at Monduli.

No prosecution eye witness was in a position to tell what happened to the cattle which the accused and Mang'oruu had been grazing. But certainly, the crowd had lost sight of Lohay's presence at the scene. Perhaps because her role was very docile. She was not very active. Nowhere she has been explained as having confronted the deceased in any way. Yet, however, she must have been the one who drove away the cattle to some unidentified destination.

Whereas the police referred the deceased to hospital for medical postulations, they retained the accused for police measures.

In fact the police intervention was limited to arresting the accused and Lohay and charging them. Meng'oruu is otherwise still at large. The police (PW3) produced a stick (EXH P2). He said it was the accused's stick he was found with on the fateful day. He said it was the one he used to attack the deceased with.

The witness said he drew the sketch plan after he had inspected the scene of crime. He was assisted by the eye witnesses. The scenario sketch plan was marked EXH P3.

The witness was held to task why he had said that he draw a sketch plan a month ahead of the event. It transpired that this was a slip of a pen.

These were the only PWs. We thought there was need to give the accused an opportunity to be heard. Our instructions were based on the fact that the prosecution had established a prima facie case against him. Principles of natural justice would not favour us if we proceeded to adjudicate on the matter with the accused unheard, lest we end up with conviction.

In his defence, the accused essentially disputed two things. That he did not assault the deceased at all. Secondly that the stick forming EXH P2 was not his.

The accused who had no witness said the deceased was attacked by Meng'oruu who later escaped. He said the stick he was possessing that day was used by the police to beat him until it broke into pieces. He said it was not as huge as is EXH P2.

On the 08th July, 2008, I addressed Hon. Lady assessors in terms of S.298 of the criminal Procedure Act. The provision requires the judge to sum up the facts of case to

the assessors. I Heard each Hon. Assessor considered views.

I focused my summing up on the following fundamentals.

On the burden of proof. That it is the prosecution's duty to establish the case beyond reasonable doubts. I was thorough on the concept beyond reasonable doubts.

I emphasized to the assessors that for the purposes of the offence of murder, the prosecution was expected as of legal duty, to link the accused's actual involvement in the case, either by physical participation or causation. I told them the prosecution's duty of establishing the second crucial element of mens rea. I was again detailed. I heard them advance their opinions. They were very divided. The 1st assessor Luciana was against the prosecution's case. She advanced a murder of reasons to justify her position.

She said the stick forming EXH P2 was not the accused's. She said it was Meng'oruu's. She said the accuse's story that his stick broke into pieces when the police used it to beat him was trustworthy.

She said PW1's story was truthless. She said PW1 did not eyewitness the deceased being beaten. Otherwise she (PW1) could do something to rescue him including raising an alarm. She said since PW1 was far away she could not see who beaten the deceased and cannot be believed when she said she saw the accused beating the deceased.

The Hon, Assessor further contended that at the time the event occurred, the accused was a minor.

His thinking capacity was equally impaired by that minority age. He could not make up his mind as a grown up, for example that it was unfair to graze in the deceased's reserved grass.

The Hon. Assessor observed an ill motivated tradition whereby the Masai value their cattle than anybody's property. She said they believe the Masai traditions are superior to the laws. They do not think they are superior to the laws. They do not think they are governable by any law other than their own traditions. It is consequent to this wrongful belief that the accused led the cattle to feed on the deceased's reserved grass. To this misbehaviour the Hon Assessor suggested that the accused should be penalized.

Otherwise she said it was Meng'oruu who attacked the deceased and ran away. The accused is therefore, according to her, not guilty of the offence he stands charged.

The 2nd assessor Zubeda Konje, held a completely different view.

She said the prosecution's case had sufficiently been proved. She said PW1 eye witnessed the attack. She saw bit the deceased with their sticks. She said PW1 raised an alarm. She said Meng'oruu escaped with a stick. Therefore the stick (EXH P2) was the accused's.

She talked about PW2's story that he saw the deceased and his assailants engaged in a dialogue and how he was no sooner informed of the deceased's severe attack.

She said the assailants had come from far away in search of grass to feed their cattle. She joined issues with the 1st assessor that the Masai traditionally value cattle than anything else.

Regarding the accused's state of mind at the time the crime occurred, she did not appear to have any quarrel with the 1st assessor's opinion that he could not figure out between the wrong and right. But she cautioned that when it comes to the cattle's' welfare, a Masai minor is as wild as an adult.

The Hon Assessor said with the support of PW1 & 2's evidence she is convinced that the accused committed an offence. She advised this court to convict the accused with the offence he stands charged.

Any judgment or verdict which not supported by evidence is per incurium. It is no good decision. During my summing up to assessors I was very detailed to the Hon Assessors that our decisions should be guided by evidence and law as nearly as possible. With respect to the Hon. Assessor Luciana, I regret to say that her opinion is not supported by evidence at all. There was no evidence from either the prosecution or defence linking Meng'oruu with the stick (EXH P2) as she stated. PW1 told this court that she was at the scene and infact she raised an alarm. It is not fair for the Hon Assessor to say PW1 did not do anything to attempt to rescue the deceased.

The assessor concluded that the prosecution had not proved the charge of murder. She however suggested

that he should be penalized for grazing cattle on the deceaseds reserved grass.

The honourable assessor's advised is to be treated with caution as in some aspects, it is far from reality. There is a complete departure from evidence and no reason has been assigned.

I wish to comment something at this juncture, that is whether trials in our courts of law both the subordinate and High Courts still necessarily require the assessors' assistance as is conditioned u/s 7 of the Magistrates' Courts Act for the Primary Courts and S.265 of the Criminal Procedure Act.

In my views, the assessors' role in the administration of justice should be reviewed. I feel the disadvantages of having the assessors, lay as they are, in the chain of administration of justice, weigh heavier than the expected advantages. The disadvantages range from lack of legal knowledge where necessary, misuse of power especially in the Primary Courts where the decision is on majority basis, and what I will refer to as oppressive and segregative practices. Experience has established that the aforesaid highly contribute to corrupt practices especially in the Primary Court

As for the High Court, I find material contradiction in the provision of S.298 and 265 of the CPA. I feel the judge's powers vested to him u/s 298 (2) S.265- From practical experience such as what I confronted in this case whereby the assessors are surprisingly divided, The judge's powers as specified under S. 298 (2) should prevail. That all trials before the High Court shall be with the aid of assessors is in my view uncalled for, wastage of time, duplicity of judge's obligation, unproductive, and in some worse instances an exercise condoning constitution contravention when it comes to the assessors' remunerations. This is a wide subject. Suffice to say, personally, I am not comfortable with the incorporation of assessors in the administration of justice. I find it not a sin to say that they should be abolished.

I now revert to the case at hand. I have already expressed my dissatisfaction with the 1st assessor's (Luciana) opinion. In exercise of powers vested to me by S.298 (2) of the CPA I feel not bound to conform to what she opined because of what I feel to be clear unjustified departure from evidence. The issue now is whether PW1 was present at the scene. PW1 Alphoncina was very clear. She told us that she was at the scene. She saw both the

accused and one who escaped (whom we now know) to be Meng'oruu), each beat the deceased once. She said they then ran away. She said it is herself who raised an alarm. It is the result of her alarm that people gathered. PW2 and the accused himself said they did not know who exactly attracted the crowd to the scene.

What comes out clearly is that, it was consequent to some alarm that people happened to know that something was wrong at the deceased's place. There is no evidence whatsoever that the deceased was in a position to raise an alarm. We know that he became flatly unconscious immediately after the strike, so much that not even a dying declaration was procured from him.

We were told by PW2 that the deceased's son one Focus was also around, but he was drunk.

I understand PW1 might have some interest to serve following the death of her father in law. In this connection I looked at her demeanor with intent to assess her credibility's I was satisfied that the witness told the court what she saw.

If PW1's intention would have just to implicate the accused, she would not hesitate to implicate Lohay. She told the court that Lohay did not confront the deceased. As a result of PW1's exoneration of Loaya in her evidence,

the prosecution dropped the charges against her, as there was no more fulcrum to build the case.

PW2's evidence was in some instances corroborative to PW1's statements. PW2 told the court that he saw the accused and Meng'oruu engaged in a dialogue with the deceased shortly before the later was harmed. He had been with the assailants equally shortly before the fracas. He said he knew them long, before the event. The piece of evidence was not contradicted at all. The witness (PW2) further said upon arrival at the scene of crime, and after the crowd had multiplied, the accused surfaced from the hiding. He told to his heels. He was overcome and contained.

PW1 had initially stated all this.

In view of what I have stated, I share the second assessor's opinion. I find that PW1 was at the scene. She saw all what transpired. I find she was closed as she said. I find that she told the court the truth when she said she saw the accused beat the deceased. I find that indeed, the accused also struck the deceased only once with a stick he held.

We were told that among those who turned at the scene included the village chairman who instructed thereafter that both the accused and then deceased should be taken to hospital. One would wonder why such a would otherwise be a neutral witness, not shortlisted and called as a witness.

I have come to a conclusion that his evidence would be a mere hearsay. He would not tell this court a better story than what PW1 and 2 did.

The prosecution's failure to arrest and prosecute Meng'oruu does not diminish the accused's role. He remains highly implicated by PW1 and 2. PW1 saw him personally beat the deceased. At best, The accused's statement that Meng'oruu struck the deceased with a stick reinforces the prosecution's story that the deceased died as a result of assault as found by the doctor.

That said, I am satisfied that the prosecution has proved an aspect of wrongful act (*actus reus*) against the accused.

Wrongful act standing alone, is not sufficient to constitute a crime. It must be complemented with wrongful intention. For the purposes of constituting the offence of murder, the combination of the two constituents must result into the taking away of a human being's life, thus his death.

An intention entails the state of mind. A physiology study of one's state of mind is an uphill task. It can only be manifested by wrongful act.

In the case of HERMAN NYIGO V.R. [1995] TLR – 1798 (CA) among other things, the court considered the appellants wrongful act of hitting the deceased hard with a heavy stick on a vulnerable part of the body, as a manifestation of a wrongful intention.

Lord Denning simplified and formulated it better in his commentary of the case of DPP v. SMITH (1961) AC 290. Therein he said with reference to wrongful intention as one of the constituents of murder that "a criterion, to help to find the intention of the accused man himself and that ultimately the question is. Did he intend to cause death or grievous bodily harm.?"

I find Lord Deming's approach to be a proper during fact to figure out the accused's intention complementing the manifestation of the wrongful act. Indeed, I asked myself whether the accused and his fellow "korianga" Meng'oruu, intended to cause death or grievous harm to the deceased.

There is no doubt that the deceased was hit by sticks. The size of the stick is in my view irrelevant, provided it is not disputed that he died as a result of the assault. In that same vein, a dispute whether or not a stick forming Exh. P2 belongs to the accused is not longer the issue to hold me.

The entire scenario reveal that there was a dialogue, which no doubt heated, and consequently sparked in the assault. There was therefore a quarrel preceeding the attack.

PW1 described to this court how was the attack executed. She said each assailant hit the deceased once. After the strike they all ran away. I do not think they neither plamed nor anticipated the consequences. If their intention was to kill the deceased, I think they could each hit the deceased much more many times. They had

such opportunity before the crowd multiplied. They did not. I feel they become scared after learning that the force used was excessive.

All said, I find wrongful intention to kill was not sufficiently proved. It being a fundamental ingredient of murder, it follows that the prosecution has failed to prove the offence of murder. The accused is acquitted from the charge of murder c/s 196.

The evidence on record amply establish that there was a quarrel which sparked into the deceased's death. Further, that the accused and his colleague fled after only a single strike each, without even assuring themselves that the deceased was dead, as I said, negates the possibility of wrongful intention.

The prosecution has sufficiently proved the offence manslaughter against the accused. He by an unlawful act caused the deceased's death. I accordingly convict the accused with manslaughter c/s 195 of the Penal Code.

N.P.Z. CHOCHA

18/09/2008

Date:- 18/09/2008

Coram: N.P.Z. Chocha, J.

Accused: Present (Represented by Mr. Kinabo E. Adv.)

Republic: Ms Silayo and Nchalla –SAS

Assessors: 1st Luciana Zephania

2nd Zubeda Konje

Republic Silayo: S/A:- On previous records

My Lord and Hon. Assessors. We do not have previous records against the accused. However under the constitution of the United Republic, every person has the right to life. Since the accused attacked the deceased with a stick which costed the deceased's life, the deceased was despired of his right to live.

It is our prayer to this court to punish the accused severely considering that the deceased's live was prematurely terminated.

R.O.F.C.

Mr. Kinabo Adv. – on mitigation:

We pray this court to consider the following aspects in sentencing the accused.

1. The accused is a young person who originated from the society of herdsmen who depend on the youths

of the accused's age. The accused's contribution to the society would be appreciated where he shall be free.

2. This sad event occurred because of the fight. The deceased contributed to all what happened. The deceased on account of his age was in a position to avoid the fight.
3. The accused is a first offender. He repents on all what happened. He is likely to reform.
4. We call upon the court to consider the accused's state of health. He suffers from chest. He has been in remand for the past three years.

We pray for leniency.

N.P.Z. CHOCHA
18/09/2008

SENTENCE

That the youths are a factory of development applies every where. It is not limited to the herdsmen's society only. However the nature of their activities must be screened. Development in one society must not be the risk of another. If achievement of one society's development entails sabotaging another, this is not an acceptable practice.

The accused cannot escape punishment after this wrongful act which costed the deceased's life merely because his act resultantly benefited his society.

I have considered the accused's conduct he demonstrated during the trial. I agree that he is repetant.

In view that his act took a human's life, I sentence him to five (5) years imprisonment.

N.P.Z. CHOCHA
18/09/2008

ORDER:

1. Right of Appeal explained to the whoever is aggrieved to be preceded with a notice of intention to appeal to be filed 14 (fourteen) days from today in terms of R. 61 of the Tanzania Court of Appeal Rules – 1979.
2. Hon Assessors thanked and discharged.

N.P.Z. CHOCHA
18/09/2008

I hereby certify this to be a true copy of original.


Ag. DISTRICT REGISTRAR
ARUSHA