IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 26 OF 1979

BETWEEN

SYLVESTER FULGENCE . . . . . APPELLANT

AND

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Bukoba) (Lugakingira, J.) dated the 3rd day of April, 1978,

IN

Criminal Sessions Case No. 113 of 1976

JUDGMENT OF THE COURT

MAKAME, J.A.:

At about 9 in the evening of 3rd August, 1975, at Mishoye Village, Bukoba District, the deceased FULGENCE KAYOZA was mortally wounded shortly after he had left his house to see off the appellant, SYLVESTER FULGENCE. At his trial the appellant was found to be the premeditated donor of the fatal violence and he was duly condemned to suffer death. He was dissatisfied with the High Court decision and in this appeal he is represented by Mr. Matemba, learned Counsel. Learned Senior State Attorney, Mr. Kinabo, advocated for the Republic and supported the conviction.

At the trial the province was common that earlier that evening P.W.4, one MELCHIOR BARONGO, a domestic help in the household of the deceased, took some liquor to the appellant on the instructions of the deceased. This liquor was for free as, according to P.W.1 LEONSIA KAGOMA, the deceased's wife, the appellant and the deceased were friends. The appellant then gave to P.W.4 shs. 10/- so that he might purchase for him, from the deceased, some pombe. According to the appellant,

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he wanted that pombe because he was expecting some visitors the following day.

Going by the evidence of the two relevant witnesses on this, P.W.1 and P.W.4, just after the deceased had told P.W.4 to take back the shs. 10/- to the appellant as there was no more pombe, the appellant arrived, carrying a bottle and a torch, nothing else. The appellant says that he left his place about fifteen minutes after P.W.4 had left to go to the deceased's, and that this was because P.W.4 had advised that the appellant should follow thither should P.W.4 tarry. P.W.1 and the appellant agree that the deceased gave the appellant a little pombe and, according to P.W.1, this was a friendly gesture.

It is evident that the appellant did not stay long at the deceased's house. When he left the deceased rose to see him off. The night was dark and the path the two men trode on had banana plants on either side. Shortly afterwards P.W.1 heard a loud cry outside and when she got out she found the deceased prostrate on the ground, and bleeding. Soon after that, in response to the alarm raised by P.W.1, P.W.4 and P.W.2 arrived. According to P.W.1, it was so dark that she was unable to see the appellant. She was however so certain that it was the appellant who had injured her husband that she cried out "Sylvester you have killed my husband". Whereupon the appellant asked "Otai?" meaning "What do you mean?", turned round and walked back, with his torch on. P.W.1 says the appellant was then some thirty paces from the deceased; the appellant puts it at 80 paces. We appreciate that in both cases these are mere estimates and we take into account that P.W.1 could not have seen exactly how far the appellant had gone at the precise moment she first made the sorry discovery.

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Be it as it may, the appellant did go back to view the deceased and then went home. The trial Court seems to have been greatly influenced by the fact that the appellant left in a hurry and the fact that, according to P.W.2 RWESHABURA, the cell leader, when they went to the appellant's place to arrest him the same night the appellant was at first clearly reluctant to open the door and when he was eventually reached inside the house he was found to be trembling and urinating. There was also the fact that the appellant said that he had seen CYRILO, the deceased's son, attacking the deceased. There was further the allegation that although the appellant had two pangas only one was found that night and that neither he nor his mother would say where the second panga was.

Both assessors advised that there was no cogent evidence of the appellant's guilt. We too find it impossible to sustain the conviction. We remain unconvinced that the circumstantial evidence points irresistably to the appellant's guilt.

It appears to us correct, as Mr. Matemba has urged, that if what P.W.1 said was true, that there had been a quarrel between the deceased and the appellant over a "shamba the previous year, the enmity had spent out itself. The appellant had taken steps to effect reconciliation and, from the evidence, it would appear that the two, Deceased and Accused, were friendly to each other right up to that evening. There would appear to be no motive.

P.W.1 conceded that the night was dark and that one would not have been able to see a person hiding himself in the verdant foliage of the banana grove. We feel that P.W.1 might have sincerely believed that the appellant was her husband's assailant but we are unable to say that her belief was necessarily well-founded. We cannot safely exclude the possibility that some other person was hiding himself close to the deceased's house,

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among the banana plants, and emerged to deal the deceased the savage blow as soon as the deceased and the accused had parted company. We believe that it is true the appellant left the scene hurriedly but this has to be considered in the context of the particular circumsstances. Here was a friend just discovered seriously injured; he had very shortly been in the company of the appellant and now the friend's wife was loudly alleging that the appellant was the assailant. The appellant did not flee when he was first told what had happened. Instead, he walked back to see what had happened, which he knew would have established his presence at the scene, and which would be strange if he was the assailant. P.W.1 was taxing him with the assault and neighbours were now converging upon the scene in answer to the alarm. We feel it is not impossible that the appellant feared that the clansmen of the deceased would soon want to have his scalp on their belts, and so decided it was more discreet to leave, and leave quickly, rather than start giving explanations to potentially hostile persons. Indeed according to P.W.3 ANTELIUS GABONE, this was the reason the appellant gave to him before P.W.2 and others arrived at the appellant's house. The same fear seems to us to be capable of explaining his alleged behaviour when P.W.2 and others arrived at his home to arrest him. We respectfully disagree with Mr. Kinabo that the appellant's behaviour was necessarily indicative of his guilt.

Mr. Kinabo is factually inexact to say that the appellant said that he did not know that the deceased had been killed until people came home. According to the record, the appellant did not say any such thing. The learned Senior State Attorney submitted that two other factors incriminate the appellant: the Cyrilo story and the absence of the second panga. We agree that the appellant

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told a lie when he sought to implicate Cyrilo. However, we cannot make a conclusive adverse inference from this. People sometimes fabricate lies, stupid lies which can easily be proved to be lies even, out of fear that their own evidence will not be enough, and in an effort to make quite sure that they steer clear of trouble. We think such was the case in the present matter. Regarding the panga, apart from the fact that the evidence about it is weak, we wish to say that it was not established that the alleged panga was usually being used exclusively by the appellant in the household, so that no one else could have been using it, if there was indeed such a panga.

We feel it would not be safe to sustain the conviction, which we therefore quash. We order that the appellant should forthwith be released unless he is otherwise lawfully in custody.

Dated at Mwanza this 1st day of December, 1979.

F. L. NYALALI
CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L.M. MAKAME
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR