IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 19 OF 1979

B E T W E E N

TUNUTU s/o MNYASULE . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction of
The High Court of Tanzania
at Tanga) (Mnzavas, J.)
dated the 30th day of May, 1977,

IN

Criminal Sessions Case No. 21 of 1977

JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant Tunutu s/o Mnyasule was charged and convicted in the High Court sitting at Tanga for the offence of murder and was sentenced to the only penalty allowed by law, that is, to suffer death by hanging. He was aggrieved by the conviction and hence this appeal to this Court. Mr. Kiritta, learned advocate, was assigned to represent him in this appeal whereas the Republic was represented by Mr. Ntabaye, learned Principal State Attorney.

It is apparent from the proceedings in the High Court and in this Court that the following material facts are not in dispute between the parties: That one Mwanaisha d/o Musa Msanguka died violently on the 30th January, 1974; that the appellant and the deceased had been husband and wife but at the time of her death were divorced and living separately in Kwabota village; that on the evening prior to her death on the 30th January, 1974, the deceased together with P.W.6, who is her sister, and the appellant were at P.W.1's pombe shop in Kwabota village; that later, the deceased, P.W.6 and the appellant left for their homes but on the way there was some argument between the deceased and the appellant in the course of which the deceased sustained stab wounds from a knife of the appellant. The appellant immediately left the scene and hid in the bush before leaving the village. Many people,

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including P.W.1, P.W.2, P.W.3 and P.W.7 came to the scene but found the appellant had already left. The deceased was taken for treatment but died on the way to hospital. A post-mortem examination was made by a doctor who made his report which was produced at the trial under the provisions of section 275 of the Criminal Procedure Code as Exhibit A, as the doctor in question could not be traced. According to Exhibit A death was due to severe haemorrhage and shock. Furthermore, the deceased had sustained two cut wounds on the left arm and a cut wound on the left hypocondriac region where the small intestine was protruding.

Furthermore, there is no dispute that about two years later the appellant was arrested in Kilombero District and was charged with this offence.

From the same proceedings in the High Court and in this Court it is evident that the following material facts are in dispute between the parties. It is alleged by the prosecution that on the way from P.W.1's pombe shop the appellant demanded to be accompanied by the deceased to his home but the deceased refused on the ground that they were already divorced and the bride price had already been refunded to the appellant. Upon this refusal the appellant was annoyed and consequently stabbed the deceased several times with the knife which he had.

On the other hand, according to the defence of the appellant, it is said that on the way from P.W.1's pombe shop the deceased herself demanded to accompany the appellant to his home so that she could collect her clothes which she had left there. The appellant refused and a physical struggle occurred between the deceased and the appellant in the course of which both fell to the ground, the former falling on top of the latter and thus accidentally falling on the knife which the latter had in his pocket. Furthermore, it is alleged, on the defence side, that the appellant was so drunk at the time that he was incapable of forming an intention to kill the deceased.

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The first point for consideration and decision in this case is a point of fact, that is, whether the appellant stabbed the deceased with a knife or whether the deceased accidentally fell on the knife. The learned trial judge considered this point and rejected the story given by the appellant by stating that:-

> "I totally fail to understand how the same knife would have accidentally injured the deceased's left arm twice. The location of the two wounds on her left arm, and the nature of the wounds, are clearly inconsistent with the defence that the deceased was injured accidentally.".

Mr. Kiritta, learned advocate for the appellant, has conceded in this appeal that the story given by the appellant is untenable. We are of the same view. We may mention here that we have noted from the list of exhibits appearing in the prepared record of this appeal that there is an extra-judicial statement purportedly made by the appellant apparently after his arrest in which he completely denies any knowledge of the killing of his former wife. This extra-judicial statement, though apparently produced at the preliminary inquiry, was not produced at the trial. Had it been produced at the trial, it would have tended to show that the appellant is a liar by contradicting the statement he made in his defence at the trial. We have considered whether this Court can take the extra-judicial statement into account in this appeal. Both Mr. Kiritta and Mr. Ntabaye have submitted that this Court is precluded from doing so. We agree by virtue of the provisions of section 154 of the Law of Evidence Act, 1967, where it is stated:-

> "154. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.".

Mr. Kiritta has submitted that even if the appellant is taken to have lied in Court the lies cannot be taken to be the basis of his conviction.

We agree. This Court, in a recent case decided a week ago, that is the case of Zabron Msua vs. The Republic - Criminal Appeal No. 7 of 1979, has confirmed the rule stated by the Court of Appeal

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for Eastern Africa in the case of R. vs. Mbologa 14 E.A.C.A. page 121 where it was stated:-

> "That an accused person is proved to have lied in his evidence in his defence on a charge of murder does not, however, itself justify a conviction of murder or absolve the trial court from ascertaining from the whole evidence whether the crime was murder or manslaughter, and it is this question which now confronts us in this appeal.".

In the present case there is a witness who claims to have been an eye witness to the incident. She is P.W.6 who is the sister of the deceased. She testified to the effect that she was present at the material time and she saw the appellant stabbing the deceased several times before running away. Mr. Kiritta has submitted to the effect that this witness is not a credible witness on the ground that certain parts of her evidence are contradictory to the evidence given by P.W.1. Mr. Kiritta specifically drew the attention of this Court to the testimony of P.W.6 where she claimed that she and the deceased arrived at P.W.1's pombe shop at 3 p.m. whereas P.W.1 testified to the effect that P.W.6 and the deceased arrived at his pombe shop at about 5.30 p.m. Mr. Kiritta also drew the attention of this Court to that part of P.W.6's evidence where she testified to the effect that she and the deceased found the appellant drinking pombe at P.W.1's pombe shop whereas P.W.1 testified to the effect that the appellant did not drink any pombe at his pombe shop.

Mr. Ntabaye, learned Principal State Attorney, has submitted in connection with the first apparent contradiction regarding the time of arrival, to the effect that P.W.6, as found by the learned trial judge, was a raw rural girl and therefore her assessment of the hour of arrival at P.W.1's pombe shop is not to be taken seriously. We agree with this submission after noting that the time gap between that mentioned by P.W.1 and that mentioned by P.W.6 is about two hours. A raw rural country girl may well be unable to know the meaning of 3 p.m. unless she specifically makes reference to the position of the sun at the time.

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With regard to the other apparent contradiction, we are of the view that it can be explained away by the fact that P.W.1 and P.W.6 were not together at the time each claims to have seen the appellant at the pombe shop. The appellant could therefore have been drinking at the time he was seen by P.W.6 but was not drinking when seen by P.W.1.

Moreover, although P.W.1 claims to have been selling pombe and that the appellant never bought any pombe, nowhere in P.W.1's testimony is there any suggestion that P.W.1 was the only person selling pombe on that day. There is the reasonable possibility that the appellant could have bought pombe from another person.

We are therefore of the view that there is nothing on the record to undermine the credibility of P.W.6 regarding matters which are crucial to this case, such as her claim of seeing the appellant stabbing the deceased several times. The learned trial judge accepted the evidence of P.W.6 and we are of the view that he was right in doing so. We therefore find, like the learned trial judge did, that the appellant stabbed the deceased with his knife; and taking into consideration the post-mortem report, we find, like the learned trial judge, that the appellant killed the deceased.

The next point for consideration and decision in this case is whether the appellant had malice aforethought in killing the deceased. The learned trial judge found that the appellant had malice aforethought and he came to that conclusion on the basis of a motive for killing which he found existed and also on the basis of the nature of the weapon used and the wounds inflicted.

Furthermore, the learned trial judge considered the possibility that the appellant could have been so drunk as to be unable to have malice aforethought and he stated that:-

> "I have considered the possibility that the accused may have been so totally drunk on the fateful evening as to be unable to form an intention to kill but have come to the conclusion that he was not so drunk.".

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Mr. Kiritta has attacked the finding of the learned trial judge regarding drunkenness. He submitted in effect that since there was evidence to show that the appellant had been drinking prior to the incident, it was upon the prosecution to adduce evidence to show that the appellant was not incapacitated by intoxication. He cited a number of authorities in his support, and we are only mentioning one of those authorities, that is, the case of Cheminingwa vs. R. (1956) 23 E.A.C.A. at page 452, where it was stated by the Court of Appeal for Eastern Africa that:-

> "It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial Court lays the onus of establishing this upon the accused. See Manyara v. Reg., 22 E.A.C.A. 502 and Festo Shirabu v. Reg., 22 E.A.C.A. 454.".

That case originated from Uganda but the law stated therein is the same as that applicable in this country.

Mr. Kiritta has submitted that the prosecution failed to adduce evidence to remove the probability that the appellant, by reason of intoxication, was incapable of forming the intention of killing the deceased. With due respect to Mr. Kiritta, we are unable to agree with this contention because there was evidence adduced by P.W.6 on the conduct of the appellant immediately before and after the killing of the deceased. On this testimony the appellant had some conversation with the deceased which later developed into an argument with her. Nothing in this conversation or argument shows any excessive intoxication.

Furthermore, the appellant immediately ran away after stabbing the deceased which shows that he was aware of the act he had done. This awareness, in our view, shows that the appellant was not sufficiently incapacitated by intoxication as to be unable to form the intention to kill.

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With regard to motive, the learned trial judge stated that:-

> "From the facts of this case it was the deceased who sought for and obtained a divorce. This appears to have annoyed the accused who still loved her. It was then the deceased's refusal to accompany him to his house that the accused got annoyed and attacked her with a knife.".

This finding by the learned trial judge has been made the subject of the third and fourth grounds of appeal. We agree that the learned judge misdirected himself on the facts in holding that the deceased had sought and obtained the divorce as there is no evidence on record to support that finding. We however agree that the appellant was annoyed by the deceased's refusal to accompany him to his home and retaliated by stabbing her.

Finally, we agree with the views of the learned trial judge that the nature of the weapon used by the appellant and the nature of the wounds inflicted by him, considered together with the conduct of the appellant immediately before and after the stabbing, clearly show that the appellant had malice aforethought.

This means he was properly convicted for the offence charged and we consequently dismiss the appeal.

Dated at Arusha this 22nd day of November, 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