

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CC: M: Nyalali, C.J., Mustafa, J.A. and Mwakasendo, J.A.)

CRIMINAL APPEAL NO. 7 OF 1979

B E T W E E N

ZABRON MSUA APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction of
The High Court of Tanzania
at Morogoro) (Makame, J.)
dated 14th day of July, 1978

IN

Criminal Sessions Case No. 39 of 1977

JUDGEMENT OF THE COURT

NYALALI, C.J.:

The appellant Zabron Msua was charged and convicted in the High Court for the offence of murder contrary to section 196 of the Penal Code, and was sentenced to death by hanging. He is appealing to this Court against the conviction. Mr. Lakha, learned advocate, was assigned to represent him in this appeal and the Republic was represented by the learned Director of Public Prosecutions - Mr. Meela.

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 Anastasia Mgasa is dead and her death occurred through violence on the 14th May, 1976; that the appellant and the deceased were husband and wife and at the time material to this case had two residences, one being a temporary camping hut in the farm used by the married couple for guarding their crops against wild animals and the other was their usual house situated in the village at Kidatu; that for some time up to the 14th May, 1976, the appellant and the deceased had been living in the camping hut of their farm and that P.W.5, who is the sister of the deceased, and her husband (P.W.6) had been living at the usual house of the appellant and the deceased in the village.

During that day of the 14th May, 1976, there was a quarrel between the appellant and the deceased. Subsequently on the same day the deceased went to her usual house in the village. The appellant also arrived there and stabbed the deceased with a spear and then went away. The deceased died that same night while being carried to the hospital. Later, a Post Mortem Examination was performed by Doctor W. L. Gianotten whose report was tendered at the trial under the provisions of section 275 of the Criminal Procedure Code as he personally happened to be abroad. The appellant was arrested that same night while on his way to surrender himself to the police.

Similarly, it is apparent from the proceedings in the High Court and in this Court that the following material facts are in dispute between the parties. According to the prosecution it is said that some time before the appellant arrived at his usual house in the village, the deceased had been escorted there by P.W.7, who is a ten cell leader together with two other persons in an attempt to trace the appellant and effect a settlement of the quarrel which had erupted between the appellant and his wife earlier in the day. Nothing however could be done as the appellant was not found at the usual house and so P.W.7 and his companions went away leaving the deceased in the company of P.W.5 and P.W.6 - that is - her sister and her brother-in-law, respectively. The appellant later arrived, after the departure of P.W.7 and his companions, and found the deceased outside the house attending to a call of nature, and stabbed her with a spear and then ran away.

On the other hand, there are two stories given on the side of the defence. The first is contained in the extra-judicial statement made by the appellant to the justice of the peace (P.W.4). The appellant at his trial adopted that statement in which he claims that he arrived at his usual home in the village in search of the deceased who had left the camping hut in the field without the appellant's knowledge. The appellant further claims, in effect, that he found the deceased having a love affair with a man in the house.

The man ran out of the house and escaped. But another person, whom the appellant believed to be a man, also came out of the house and the appellant stabbed him with a spear only to learn that he had not stabbed a man but his wife.

The second story is contained in the unsworn statement made by the appellant in his defence at the trial. In it he claims that he arrived at his usual house in the village to take refuge from rain which was falling, and he had the impression that he found some thieves who were attempting to escape from his house. He further states, in effect, that one of these thieves in the course of attempting to escape butted him in the face and the appellant retaliated by stabbing him with a spear only to learn soon afterwards that it was his wife that he had stabbed.

It is apparent on the record that the learned trial judge rejected the conflicting stories of the appellant and proceeded to convict the appellant for the offence charged without considering whether there was sufficient evidence adduced by the prosecution to justify conviction.

Mr. Lakha has submitted in this appeal that the learned judge, in effect, convicted the appellant because he disbelieved him. This appears to be the case. We agree with Mr. Lakha that it was wrong to convict the appellant on the weakness of his defence without considering the strength of the evidence adduced for the prosecution. As it was stated by the Court of Appeal for Eastern Africa in the case of R. vs. Mbologa 14 E.A.C.A. page 121:-

"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."

The same rule was stated earlier on by the same Court in the case of R. vs. G.M. Ibrahim 13 E.A.C.A. at page 106:-

"If an accused person in giving evidence in his defence commits perjury he can be punished for that offence. But his perjury cannot be prayed in aid to secure a conviction for murder where the evidence for the prosecution does not justify that conviction.".

The question arises whether it is open for this Court to do what the lower court failed to do, that is, to assess the evidence of the prosecution and see whether it supports the charge. Mr. Lakha has conceded that this being a first appeal, this Court is empowered to make its own assessment of the evidence and come to its own conclusion. But he submits that in this particular case it will be impossible to do so because the exercise would involve making decisions on credibility of witnesses when this Court has no opportunity of seeing the prosecution witnesses testifying.

We have examined the record of the proceedings in the High Court and we find no evidence whose evaluation necessarily involves assessment of the demeanour of witnesses. There is therefore nothing in this case to put us at a disadvantage in evaluating the evidence adduced by the prosecution at the trial.

The first point for consideration and decision in this case is whether the appellant knew that he was stabbing his wife at the material time. As already mentioned, the appellant gave two contradictory stories regarding the circumstances in which he stabbed his wife with a spear. The learned trial judge was of the view that these contradictory stories meant that the appellant was lying in court. We are of the same view.

P.W.5 and P.W.6 testified to the effect that apart from the deceased there was no other person in the house beside themselves at the time the appellant arrived there. Moreover, they also testified to the effect that there was moonlight at the time. Mr. Lakha has submitted that the evidence of these witnesses has to be treated with caution as they are bound to hide the presence of another man to avoid blame for complicity in the alleged misconduct of the deceased.

From the nature of the wounds and the weapon used, we are unable to come to any other conclusion except that the appellant had malice aforethought in killing the deceased. This means that the appellant was properly convicted and this appeal cannot succeed and is dismissed.

Dated at Dar es Salaam this . 6th. day. of. November. 1979.

(F. L. NYALALI)
CHIEF JUSTICE

(A. MUSTAFA)
JUSTICE OF APPEAL

(Y. M. M. MWAKASENDO)
JUSTICE OF APPEAL

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

A. J. M. M. Mwakasendo
DEPUTY REGISTRAR