IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KISANGA, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CRIMINAL APPEAL NO. 45 OF 1994

BETWEEN

1. NOCOLAUS NICOLAUS KAPINGA)
2. DESTERIUS ATHANAS KAPINGA)
3. MARIANUS NICOLAUS KAPINGA) .... APPELLANTS
4. VENANT NICOLAUS KAPINGA)
5. THEOFOLD NICOLAUS KAPINGA)

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Songea)

(Kileo, PRM, Ext. Jurisdiction)

dated the 1st day of November, 1993

in

Criminal Sessions Case No. 13 of 1992

JUDGMENT OF THE COURT

LUBUVA, J.A.:

The appellants, Nicolaus Nicolaus Kapinga, Desterius Athanas Kapinga, Marianus Nicolaus Kapinga, Venant Nicolaus Kapinga and Theofold Nicolaus Kapinga are appealing against conviction and sentence. They were charged with and convicted of the offence of murder contrary to section 196 of the Penal Code.

At the trial, the appellants were respectively referred to as the first, second, third, fourth and fifth accused. The appellants who are sanguine brothers lived at the village of Ngima in Mbinga District, Ruvuma Region. It was the prosecution case that on the fateful day, 10.7.1992, Bosco Basilius Kapinga, the deceased, together with Juma Narsis (PW1), Joseph Mathias (PW2) and Florian

Nicodemus (PW5) were taking the local brew, pombe, at the house of Alois Malwaji (PW4). They had earlier been to Litembo Police Station following a reported incident of robbery. Except for Venant Nicolaus Kapinga, the rest of the appellants were also present at the house pertaking the drink. After sometime, the appellants' group left the pombe drinking house for their respective homes leaving behind the deceased's group. They took the general direction of a route that goes across a river. A short while later, the deceased and his companions also left for home taking the same route the appellants had taken. At the riverside, the appellants' group waylaid the deceased's group. The appellants jointly and together assaulted the deceased's group. In the process, the deceased was seriously injured. In critical condition, the deceased was taken to Litembo Hospital where he died on 12.7.1992. The appellants who had disappeared after the attack, were arrested and charged with the offence of murdering the deceased. Principal Resident Magistrate Kileo (Ext. J.) convicted them of murder and imposed the statutory sentence of death. Aggrieved by that decision, this appeal has been instituted.

Mr. K. R. Hyera, learned advocate, represented the appellants in this appeal. In his memorandum of appeal, the following grounds are advanced:

1. That the learned trial Principal Magistrate Extended Jurisdiction erred in law and in fact in holding that all the appellants jointly and together assaulted the deceased. The learned trial Principal Magistrate Extended Jurisdiction ought to have noted that the evidence before her had not directly

and conclusively established that the appellants jointly and together assaulted the deceased.

2. That the learned trial Principal Magistrate Extended Jurisdiction erred in law and in fact by not considering the testimony of the 1st accused and the circumstances that prevailed in the event. The learned trial Principal Resident Magistrate Extended Jurisdiction ought to have noted that the 1st appellant was acting in self defence

... ...

With regard to ground one Mr. Hyera submitted that it was erroneous on the part of the learned trial magistrate, extended jurisdiction to convict the appellants on the evidence adduced by the prosecution because of the following reasons: First, there was no direct and conclusive evidence to establish that all the appellants assaulted the deceased. If it was not proved conclusively that the appellants assaulted to death the deceased, Mr. Hyera further contended, it was unsafe and dangerous in a criminal charge to base a conviction on such evidence. Second, the contradiction in the prosecution witnesses. Elaborating on the contradiction, Mr. Hyera referred to the evidence of Joseph Mathias (PW2) who, in his evidence had stated that the second appellant, Desterius had hit the deceased with a big stick on the knee. This, he said, was different from what PW1 and PW3 had stated. According to these two witnesses, Mr. Hyera contended, the second appellant hit the deceased with a stick on the shoulder. This, Mr. Hyera stated, shows how unreliable the prosecution witnesses were. Thirdly, that the prosecution

evidence is not supported by the medical evidence. From the Post Mortem examination report, the deceased's death was due to three cut wounds on the head. Such evidence, Mr. Hyera urged, raises doubts on the credibility of the prosecution witnesses PW1, PW2 and PW3 whose testimony was to the effect that the deceased was seriously assaulted by the deceased's group all over the body by use of an axe, sticks and a fan belt. Lastly, Mr. Hyera also submitted that the learned trial magistrate (Ext. J.) did not consider the defence of the alibi raised by the fourth appellant Venant Nicolaus Kapinga which was supported by his wife (DW6). Had the trial magistrate evaluated and considered the evidence of DW5 and DW6, Mr. Hyera concluded, she would well have come to a different decision because the prosecution case was not free from doubts which should have been resolved in favour of the appellants.

We shall first deal with the complaint regarding the alleged discrepancy in the evidence. Mr. Sengwaji, learned Principal State Attorney on behalf of the Director of Public Prosecutions strongly submitted to the effect that there were no material discrepancies in the evidence of the prosecution witnesses PW1, PW2 and PW3 regarding the injuries sustained by the deceased. We agree with Mr. Sengwaji in this submission. From the record, the witnesses PW1, PW2 and PW3 have testified to the effect that the first appellant Nicolaus Nicolaus Kapinga hit the deceased with an axe three times on the head. Again it is in their evidence that the second appellant, Desterius Kapinga also assaulted the deceased with a stick. The only difference is that while according to PW1 and PW3 the deceased was assaulted on the shoulder, PW2 says the assault was on the knee.

In a situation where a victim is assaulted by several people at the same time, it is not inconceivable that witnesses to the incident give varying accounts of the details of the incident. If the salient features of the incident are well brought out from the evidence, minor variations in the witnesses' account are, in our view, immaterial. Such we think, was the case in the instant case. Variations of this nature, are, in our considered opinion, inconsequential.

Then Mr. Sengwaji, learned Principal State Attorney briefly dealt with the prosecution evidence of PW1, PW2 and PW3. It was his submission that this was sufficient, direct and conclusive evidence which established that the appellants assaulted the deceased. He contended that these are the witnesses who saw the deceased being assaulted, it was therefore a matter of credibility on the part of these witnesses, Mr. Sengwaji urged. Furthermore, Mr. Sengwaji went on in his submission, once these witnesses are believed as witnesses of truth as the learned trial magistrate (Ext. J.) did, then the prosecution had proved its case against the appellants. While he conceded that the evidence of PW1, PW2 and PW3 does not directly connect all the appellants with the assault of the deceased, Mr. Sengwaji was quick in pointing out that once it was established that the first and second appellants assaulted the deceased to death and that they acted in concert with the other appellants, by invoking the doctrine of common intention, all the appellants would be guilty of the offence.

As regards the evidence of PW1, PW2 and PW3, there is no gainsaying that their evidence was direct. These witnesses were present at the time when the deceased was being assaulted.

For that reason, we need not labour much on the complaint that there was no direct evidence. For our part, we think the issue for determination is whether there was sufficient and conclusive evidence to sustain the conviction against the appellants. In resolving that issue it is important to closely examine and consider the relevant aspects within the context of surrounding circumstances of the case. In this case, Mr. Hyera vigorously contended that one aspect touching on the evidence was not addressed by the learned trial magistrate (Ext. J.). That is that the medical evidence does not support the prosecution case. It was Mr. Hyera's submission that according to the prosecution case, (PW1, PW2 and PW3) the deceased was seriously assaulted on the head and other parts of the body by the appellants' group. The weapons used consisted of an axe, sticks and fan belt. It is curious however, Mr. Hyera observed, that the post mortem examination report does not show any sign of violence or injury on any other part of the body apart from the head injury which incidentally, the first appellant admits to have hit the deceased on the head. Had the learned trial magistrate (Ext. J.) addressed herself to this aspect, Mr. Hyera stated, a different decision could have been reached. Responding to this submission, Mr. Sengwaji was categoric in his submission that even if the issue was addressed, the trial magistrate would have come to the same conclusion.

With respect, we do not agree with Mr. Sengwaji, learned Principal State Attorney in his categoric assertion that the same conclusion would have been reached. It is nothing but a matter of conjecture. In order to have a meaningful assessment of the prosecution and defence cases, the medical report has to be looked into as against

both the prosecution and the defence cases. In doing so, it would then be possible to gauge which of the two sides is more plausible. In this matter, the defence as regards the first appellant is simple. That he was attacked by the appellants' group in the course of which in an effort to defend himself, he hit the deceased with a hoe thrice on the head. Furthermore, the first appellant claimed that he sustained an injury in his left leg 4½" x 1" deep when he fell on a stone as he was running away from the attackers, the appellants. The injuries on the first appellant are born out from the PF3 Exh. "D1". Applying the medical evidence to the two cases, the following scenario, in our opinion emerges. In the case of the prosecution, the medical report does not support it. That is, if the deceased was severely assaulted by the group of the appellants in the manner described by the witnesses PW1, PW2 and PW3, ordinarily, the medical report would have revealed marksof violence not only on the head but on the other parts of the body as well. This was not so in this case. Why? It casts doubts on the prosecution case. On the other hand in the case of the first appellant, his case is fully supported by the medical report. That is, the three cut wounds inflicted on the deceased's head which he does not dispute are shown in the report and in the PF3 Exh. "D1" the injury in the left leg of the first appellant is also reflected. On balance therefore, it appears to us that the first appellant's version that he inflicted the injuries on the deceased in the course of defending himself is more plausible than the prosecution version. In her evaluation of the evidence, the trial magistrate (Ext. J.) deals with the Doctor's report on the injuries sustained in what seems to us a cursory manner. Addressing on it she stated inter alia:-

"Admittedly, apart from the injuries noted on the head the report is otherwise silent regarding other parts of the body. The fact that the report is so silent does not mean that others did not assault the deceased. ... The Doctor's report in its omission should not otherwise blind us as to what we know to be the truth ..."

It is apparent from that while the trial magistrate (Ext. J.) came to the conclusion that the absence in the Post Mortem Examination report of other injuries in the body of the deceased, does not mean that apart from the first appellant, the other appellants did not take part in assaulting the deceased, it is our view that that conclusion was not based on a proper evaluation and analysis of both the prosecution and defence cases on that point. Had she done so, it is doubtful that she would have come to the same conclusion as urged by Mr. Sengwaji.

While dealing with the defence of the first appellant, we think it appropriate at this juncture to make a brief observation. This again is an aspect which was not considered at the trial. As already indicated, in his defence, the first appellant had categorically stated that he caused the death of the deceased under circumstances which have already been indicated. That at the time, he did it all alone and that none of the other appellants was involved. The question that arises is why the first appellant should take the responsibility of exonorating the rest of the appellants in a serious charge of murder. What does he stand to gain in holding out himself as a sacrificial lamb. If anything at all, we are of the view that

such an act on the part of the first appellant is more likely indicative of being truthful as regards what happened on the fateful day. This again with respect, was not considered at the trial while assessing the defence case.

There is yet another aspect which was not considered by the learned trial magistrate. That concerns the fourth appellant, Venant Nicolaus Kapinga. In his defence, Venant denied any involvement in the incident leading to the death of the deceased. In effect though no notice had been given in terms of section 194 (5) of the Criminal Procedure Act he (Venant) had raised the defence of an alibi. This was to the effect that he was not at the scene of incident that day. He was at his shamba for most of the day after which he went to his house. He was supported by his wife (DW6). Considering that Venant had not been at the pombe drinking place (PW4) with the rest of the appellants, it is curious that the prosecution did not explain how it happened that the 4th Appellant, Venant, was seen present at the scene where the deceased was attacked. We agree with Mr. Hyera that apart from taking note of the defence raised by the 4th Appellant, the learned magistrate (Ext. J.) did not consider his defence and decide on it one way or the other. It is common knowledge that the 4th Appellant cannot at the same time physically be both at the scene of crime and at the place claimed in his alibi. We are inclined to the view that it was important for the trial magistrate (Ext. J.) to consider his defence. It thus remains a matter of speculation whether she would have come to the same conclusion had the defence been considered. In our view, and as urged by Mr. Hyera, we think it is doubtful whether the learned trial magistrate would have come to the same decision if she had considered the 4th Appellant's defence.

To summarise, had the learned trial magistrate (Ext. J.) addressed on these issues which we have endeavoured to analyse, we think she would have come to a different decision. In our view, the position of the case would be as follows: First, the first appellant whose version of the incident leading to the death of the deceased is, as already explained, more preferable than that of the prosecution would be accepted. That is, he caused the death of the deceased in the course of defending himself. Second, that the fourth appellant's defence of an alibi was plausible in which case, once it is believed and accepted, there would be no evidence to connect him with the death of the deceased. Third, if the first appellant's account of the incident in which he admits to have been involved alone is accepted, consequently it follows that there would be no basis upon which to link the rest of the appellants with the deceased's death. In the event, the appeal in regard to the 2nd, 3rd, 4th and 5th appellants is bound to succeed.

Finally, we revert to consider whether the first appellant is entitled to be convicted of manslaughter or to an acquittal. The law on self defence is well settled. In the Penal Code Section 18 which provides for the defence of person or property was amended by Act No. 4 of 1980 by introducing a new section 18B (1) which reads:

> 18B - "In exercising the right of self defence or in defence of another or defence of property, a person shall be entitled only to use such reasonable force as may be necessary for that defence."

From case law, it is apparent to us that clear pronouncements on the law have also been made. In the case of JOHN NYAMHANGA BISARE

v REPUBLIC (1980) TLR 6, where, in a charge of murder, a plea of self defence had been raised, this Court inter alia stated the position of the law as follows:

> "... it seems clear to us that where an accused person honestly and reasonably saw himself as defending himself, the issue is manslaughter or acquittal, not murder or manslaughter or acquittal."

In this case, going by the evidence of the first appellant, which as already explained, was plausible, the first appellant while under the attack by the deceased's group, picked up a hoe and with it, struck the deceased on the head. That he was overpowered by the group and so, in order to get himself released he hit the deceased with the hoe which had no handle. It would appear to us that in the circumstances of the case, the hoe he picked was the material available within his reach at the time. In that situation, we are satisfied that the appellant who, honestly and reasonably believed that his life was in imminent danger, used the weapon (hoe) with such force as was in our opinion, necessary to defend himself. In the result, having regard to the circumstances of the case and the applicable legal principles on self defence, we are satisfied that the conviction for manslaughter against the first appellant cannot be sustained either.

In the event, the appeal is allowed, the conviction is quashed and the sentence in respect of the first, second, third, fourth and fifth appellants is set aside. The appellants are to be released from custody forthwith unless otherwise lawfully detained.

DATED at DAR ES SALAAM this 1st day of July, 1998.

R. H. KISANGA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

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

N. M. MWAIKUGILE
SENIOR DEPUTY REGISTRAR