IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 150 OF 1994

BETWEEN

ENOCK KIPELA. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Njombe)

(Kileo-PRM/Ext. Jurisdiction)

dated the 22nd day of April, 1994

in

Criminal Sessions Case No. 87 of 1992

---

JUDGMENT OF THE COURT

SAMATTA, J.A.:

The appellant, Enock Kipela, was convicted and condemned to death for the murder of Desdelia Ndadavala alias Dosea Ngaya, the wife of one Adam Mangula, on 17th January, 1991, at Ikwete "A" Village in Njombe District. The case was tried by a Principal Resident Magistrate exercising Extented Jurisdiction, Mrs. Kileo, as she then was./

The case was a short one. The prosecution adduced evidence from three witnesses, including a policeman, while the accused, who gave evidence, called no witness. The area in dispute at the trial was very narrow, indeed. It was common ground that on the fateful day the cow of one Hosea Ngakala was stolen. And alarm was raised. Many villagers responded to it. A trail of hoof-marks

.../2

led the men, including the owner of the stolen beast, to the house of Adam Mangula. Neither the man nor his wife, the deceased, was found there. A trail of blood stains led the search group to a bush. There, they saw the couple running away. The members of the group chased them out only the deceased surrendered; her husband disappeared and stayed in hiding for two months. It is not in dispute that as soon as the deceased had been arrested, the appellant, who was armed with a big bamboo stick, appeared on the scene. He immediately attacked the deceased, inflicting three blows on her head, and chest using his stick. The deceased sustained serious injuries as a result of the attack and succumbed to those injuries instantly. A postmortem examination carried out on her body revealed that she had sustained fractures of the base of the skull and nasal bones. Her death, according to the undisputed opinion of thedoctor who carried out the postmortem examination, was due to brain compression. It was the case for the prosecution that the attack on the deceased was perpetrated by the appellant only, and that he wielded the large bamboo stick with both hands when inflicting the blows. Essentially, this is the story which Aiton Mlwale (PW.2) and Andreas Mbago. (PW.3) told the trial court. While admitting to have assaulted the deceased, the appellant asserted that he used a small bamboo stick and merely joined a mob which beat the deceased for the purpose of compelling her to show the villagers where the meat of the slaughtered cow was hidden. It was the appellant's case that he intended to cause neither death of, nor grievous bodily harm to,

.../3

the deceased. When, on September 9, 1993, his plea was taken, his counsel offered a plea of guilty to manslaughter, but counsel who represented the Republic declined to accept the offer. A trial became unavoidable.

Both Assessors were of the opinion that what happened on the fateful day was what PW.2 and PW.3 told the court. They rejected as a lie the appellant's assertion that the deceased was a victim of the so-called mob justice. The learned Principal Resident Magistrate analysed the evidence laid before her and unhesitatingly agreed with the Assessors' opinions. In the course of her judgment she said:

> "We have the evidence of the two prosecution eye witnesses who both claimed that it was only the accused and none other who struck at the deceased with a bamboo stick using both hands. All three gentlemen and lady assessors believed these two witnesses. Having observed them on the witness stand I have also to say that I was most impressed by their testimonies and I see no reasons whatsoever to think that circumstances were any other than those presented by them. Admittedly, they held no grudges against the accused and I have seen no reason why they should have lied against him. I believe that they told the court the truth."

.../4

A little later she said:

> "I am satisfied beyond any shadow of doubt that it was the accused Enock Kipela and him alone who struck at the deceased and caused her death."

The learned trial magistrate had no hesitation in finding as a fact that malice aforethought was proved beyond reasonable doubt. She accordingly convicted the appellant of the charge laid at his door, and, as already indicated, imposed on him the mandatory sentence of death.

On behalf of the appellant, Mr. Naali, learned advocate, has advanced two grounds why, he says, this Court should fault that decision. Those grounds are:

> 1. /T/he trial Court erred both in law and in fact in not considering that the death was occasioned over mob justice /administered/ on the deceased.
>
> 2. /T/he trial Court failed to evaluate well the evidence otherwise it could have arrived /at/ the decision that the appellant had no mens rea."

We propose to start with the first ground.

Essentially, the learned advocate's contention here was that the learned Principal Resident Magistrate did not consider the defence that the deceased was a victim of "mob justice" and that it is possible that the fatal blows were inflicted by a person other than the appellant. With a view to strengthening this argument the learned

.../5

advocate reminded us of the practice prevailing in villages in this country whereby those responding to alarms arm themselves. Before dealing with the argument, we wish to observe that as far as we know there is no civilized country in the world in which the so-called mob justice is regarded as justice. Depending upon the particular facts of the case, an attack in the course of administering "mob justice" which results in the death of the victim may, under the law of this country, constitute murder. Provided common intention existed, it would not matter who inflicted the fatal wound or wounds. To revert to the instant case, with due respect to Mr. Naali, we do not find any merit in his argument. Rightly, in our opinion, the learned Resident Magistrate believed the evidence of PW.2, who, in the course of his testimony, said: "It was only Enock Kipela the accused who hit the woman", and that of PW.3, who amply corroborated that assertion. Answering the last question of Mr. Putika, counsel who represented the appellant at the trial, PW.3 said: "There was no mob justice". Naturally, having found the evidence of the two witnesses very reliable, as she did, the learned Principal Resident Magistrate found herself constrained to reject as a lie the appellant's half-hearted assertion that all those who responded to the alarm subjected the deceased to violence. The medical evidence laid before the trial court is, in our opinion, plainly inconsistent with the assertion that the crowd pounced upon the deceased. According to the postmortem report, which was admitted in evidence without any objection from Mr. Putika, the injuries which the deceased sustained were, as already indicated, fractures on the base of the skull and the nasal bones.

.../6

There were no other injuries, not even bruises. It is inconceivable that the deceased would have sustained no other injuries if, as asserted by the appellant, the deceased was a victim of "mob justice". We have no hesitation in agreeing with Mr. Sengwaji, Principal State Attorney, that there is no merit in the complaint in the first ground of appeal.

We turn now to a consideration of the merits or otherwise of the second ground of appeal. Even accepting Mr. Naali's contention that the appellant picked up the bamboo stick on the way and that there was no proof of bad blood between the appellant and the deceased, we have the greatest difficulty in sustaining the learned advocate's submission that malice aforethought was not proved in this case. Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any, used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow or blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing. The evidence which was accepted by the trial court in the instant case - rightly in our opinion - proved that the appellant used a big stick, which he wielded with both

.../7

hands, and delivered three blows, on the head and chest. The deceased died instantly. There is, on the totality of the evidence on record, no room for more than one view as to the appellant's intent. Bearing in mind the factors we have just mentioned, we can find no justification for doubting that in attacking the deceased the appellant intended at least to cause grievous bodily harm to her. We can, therefore, find no merit in Mr. Naali's argument to the contrary. The second ground of appeal must also fail.

For the reasons we have given, we can find no warrant for holding that the learned Principal Resident Magistrate was not, upon the evidence on record, entitled to convict the appellant of the murder of Desdelia Ndadavala and impose on him the sentence of death. We dismiss the appeal.

DATED at MBEYA this 10th day of June, 1999.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

( A.G. MWARIJA )
DEPUTY REGISTRAR