

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MAKAME, J.A., KISANGA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 70 OF 1995

BETWEEN

VIDOLE BAKOGWA & ANOTHER. APPELLANTS

AND

THE REPUBLIC. RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Geita)

(Chipeta, J.)

dated the 7th day of August, 1995

in

Criminal Sessions Case No. 52 of 1992

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

On the night of 4.9.90, Msabila Gwalagala, a resident of Ikulwa village in Geita district, met his death at the homestead of Magwamunda Makwa, his father-in-law. The postmortem report gave cause of death as asphyxia caused by throttling and spoke of marks of pressure by the thumb and fingers on the sides of the throat. Magwamunda, along with the appellants, Vidole Bakogwa, his neighbour, and Mlekwa Magwamunda, his son, were arrested and charged with the murder. Magwamunda died before his trial while the appellants were subsequently convicted and sentenced to suffer death.

In reaching the verdict he did, the learned trial judge relied on the evidence of PW2, Magwamunda's nephew who was aged 10 years at the time of the incident, and elements of corroboration from PW1 and PW3, Magwamunda's widow and daughter respectively. PW3 was at the time staying with her parents following estrangement with the deceased, and on the day the latter met his death, he had gone for her. PW2's evidence in chief was brief and went thus:

.../2

Deceased had come to collect his wife Ndakwela. It was at 8 p.m. Ndakwela is also called Sophia. Magwamunda refused saying that deceased would not take Sophia because he was torturing her. Then Magwamunda, Vidole and Mlekwa started assaulting the deceased. I could see them with my own eyes. As I was small I could do nothing. They killed him. Then they tied him with a rope in the neck and carried him to a hut where goats used to be kept. They hanged him to a tree.

In cross-examination PW2 added that Magwamunda, the appellants and himself were seated at a "Kikome" (outdoor fire) when the deceased arrived; that he joined them at the fire and was present during dinner but did not partake of it; that he asked for his wife after food; and that he (PW2) could clearly see the ensuing fight because of the "kikome", although, as he put it, "There was some darkness."

Both appellants denied to have been at the scene when the deceased was killed or when his body was hoisted. The first appellant claimed that throughout that night he was at his employer's home, one Sylvester Anthony, the second said that he came home drunk around 6 p.m. and straight went to sleep. They both learnt of the death the following morning. There were contradictions between PW2's evidence and his police statement, Exh. D1, on the one hand, and between his evidence and that of PW1 and PW3, on the other, but the trial judge looked only at some aspects of the former which he adjudged minor. The substance of this appeal is that the learned judge did not adequately address the contradictions and that if he had done so, he would not have found PW2 a credible witness. The appellants were represented by Mr. Matata after Mr. Mwantembe who had originally filed the grounds of appeal withdrew stating the evidence of PW2 was water-tight.

The respondent Republic was represented by Mr. Mlipano who concurred with Mr. Matata on the contradictions and declined to support the convictions.

We have carefully considered the evidence and we think, with respect, the trial judge's approach to the contradictions left much to be desired. In our view, the evidence of PW2 represented a significant shift from the position depicted in Exh. D1, and it seems the shift was not without a purpose. In Exh. D1, the witness was recorded thus:

... tarehe 4/9/90 kama muda wa saa mbili za usiku hivi marehemu alikuja hapa nyumbani kumtafuta mke wake ndipo nilisikia baba Magwamunda akimwambia marehemu kuwa unatafuta nini hapa ... toka hapa na leo siku zako zimekwisha na mimi wakati huo nilikuwa ndani nikitaka kulala, ndipo wakati huo nilisikia vishindo kama watu wanapigana nilitoka nje nikaona baba na mtoto wake Mlekwa Magwamunda na Vidole wakiwa watu watatu wanamshambulia huyo marehemu ... niliweza kuona vizuri kutokana na mbalamwezi ...

Exh. D1 makes no mention of a sitting at a fire, or the existence of any fire, but moonlight; on the contrary, the witness is inside and about to go to bed when the deceased arrives and he comes out when the fight breaks out. It is clear to us that the shift had wide implications but the learned judge did not appreciate this except to mention only the aspect of the "kikome" and moonlight. In claiming the existence of a "kikome" and the sitting thereat in which the deceased joined, and the passage of time before the latter asked for his wife, PW2 was trying to show not only his presence at the scene, but also his adequate and favourable opportunity to observe the events, matters which Exh. D1 tended to leave in doubt. It seems, indeed, that the "kikome" tale was contrived and false when viewed against the evidence of PW1 and PW3. According to PW1,

.../4

Deceased arrived at home at 4.00 a.m. We were asleep. He wakened Sophia. Then my husband went outside ... I did not go out. Then I heard noise. They were fighting - that is my husband and deceased.

So Magwamunda was not sitting at any fire when the deceased arrived but went out following the latter's arrival. Moreover, the family had already gone to sleep and there was no question of dinner being consumed in the deceased's presence. Similarly, according to PW3,

When he came I was asleep ... I heard deceased say: "I have come to take my wife." It was soon after he arrived ... My father refused ... [She later added:] We had finished eating.

It is also doubtful in the circumstances whether PW2 ever got out and witnessed the fight or he made assumptions from the voices. We say so because he was an infant at the time of the event and because neither PW1 with whom he stayed hinted at such a thing. What is more, the evidence of PW1 suggested that the fight was between Magwamunda and the deceased but the appellants may only have assisted in hoisting the body. She said that when the fight was in progress, the appellants came to the scene and she heard them say: "Father! You are killing him." She also heard Magwamunda tell them to bring a rope. When it was all over, Magwamunda returned to bed and told her that he had killed the deceased and the appellants had assisted him to hang up the body. The learned judge played down her evidence and said:

... this was a reluctant witness who, I think, did not tell the court the whole truth. It is no surprise that at one time she tried to absolve the accused persons.

We are unable to see the justification for this assessment of PW1 since a truthful witness is not necessarily one who promotes the prosecution case. Moreover, the prosecution did not seek to treat her as a hostile witness, which implies that her evidence was not inconsistent with anything she may have previously stated. The prosecution were also perfectly entitled and obliged to put all the material evidence before the court in order to assist it in reaching a just decision. Finally, even PW3 could not be relied upon to find that the appellants took part in the fight for she, too, never went out and she was blind. She could only say that the appellants and her father beat up the deceased because she heard their voices, but she did not mention what they said.

We are satisfied that the stories of PW2 were not only contradictory in themselves but they were also materially contradicted by PW1 and PW3. The trial judge's treatment of the contradictions was limited in scope and depth for he only made reference to the "kikome" and moonlight, but not to the other aspects to which we have referred. It is doubtful that he would have found PW2 a credible witness had he not fallen into this error. In our view the state of the evidence was not such as to lend assurance to the roles played by the appellants and they are entitled to the benefit of the doubt. We note that even the three assessors who sat with the learned judge expressed unhappiness with the prosecution case and advised the appellants' acquittal, and we think the advice was well given. It was impressed on us in the alternative that the second appellant appears as a person of mental instability and may have been so at the material time as to be unable to appreciate his actions; but while we think he is certainly an eccentric character from what we saw of him, we do not consider it necessary to go into that matter.

The appeal is allowed, the convictions and sentence are set aside,
the appellants should be set free forthwith.


DATED at DAR ES SALAAM this 12th day of June, 2000.

L.M. MAKAME
JUSTICE OF APPEAL

R.H. KISANGA
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