IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LUBUVA, J.A, MBAROUK, J.A., And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 97 OF 2008

(Appeal from the decision of the High Court of Tanzania
At Sumbawanga)

(Mmilla, J.)

Dated the 12th day of September, 2006
In
Criminal Sessions No. 15of 2000
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JUDGMENT OF THE COURT

4 & 14 July 2008

MBAROUK, J.A.:

This is an appeal against both conviction and sentence passed on the appellant by the High court (Mmila, J.) sitting at Sumbawanga.

Briefly stated, the facts giving rise to the case are as follows: In 1999, PW1 Japhet Wailes Kipisya as the owner of Tumaini bar at Jangwani area in Sumbawanga Township employed the deceased Exavery s/o Michael Mwambelwa Makoti and the appellant at the bar. The deceased was the manager while the accused was a disco jockey.

On the night of23/01/1999, the deceased and the appellant were on duty at that bar. Close to the winding up of the day's work according to the appellant's account a misunderstanding arose between them. The incident took place when there was no other person apart from the deceased and the appellant. It was further alleged that near the closing hours, the appellant was offered a bottle of beer by one of the customers in appreciation of his dancing skills. However, since he was not taking alcohol, the appellant asked the deceased to pay him money in exchange for the beer. The appellant intended to use the money to buy food because he was hungry. The deceased accepted the requests, but did not appellant the money despite repeated request by the appellant to be given the money.

The appellant felt that he was ignored, anger mounted, and he took a knife from the meat vendor's place and attempted to threaten the deceased, with the knife but it did not work. Thereafter the deceased too became angry and engaged the appellant in a fight. It was at this time when the appellant stabbed the deceased with the knife in the course of dodging a first directed at him. The deceased ran into the store and appellant followed and found the deceased dead. The appellant covered the dead body with empty crates of beer and escaped. Before his escape, the appellant took some money from the counter and other properties therein. He boarded a bus bound for Dar es Salaam.

On the morning of 24.01.1999, the appellant was arrested at Mbeya and was sent back to Sumbawanga on 26.01.1999. On 27.01.1999 he was interrogated by Insp. Mwamakula, 9PW3) who recorded his caution statement (Exh. P2). In the caution statement, the appellant, admitted to have killed the deceased with the motive of stealing the properties which were in that bar. At the trial, the appellant retracted the caution statement. As a result, a trial within trial was held as a result of which the statement was admitted (Exh. P2). On the basis of the caution statement the trail judge found the appellant guilty and sentenced him to suffer death by hanging. Aggrieved, the appellant has preferred this appeal.

In this appeal, the appellant is represented by Mr. Mwakolo, learned advocate, and Mr. Luoga, learned State Attorney appeared for the respondent Republic.

Mr.Mwakolo, learned advocate, has filed three grounds of appeal, namely:

1. That the Honourable High Court Judge erred both in points of law and facts when he did not find as a matter off act and law that the death of the deceased was caused by the fight between the appellant and the deceased and that the Honourable trial judge erred in not convicting the appellant to an offence of manslaughter.

2. The trial Honourable High Court Judge erred both in points of law and facts when he admitted both the caution statement and an extra-judicial statement Exhibit P2 and P3 respectively and totally negated the defence case on the part of the Appellant.

3. That the Honourable High Court Judge erred both in points of law and facts when he did not put any weight on the defences of provocation, self defence and killing in the course of fighting raised by the appellant.

Mr. Mwakolo opted to argue the three grounds together. In his submission, he contended that, the learned trial judge erred in convicting the appellant of murder instead of manslaughter. He further contended that as far was none of the prosecution witnesses were present at the scene of the crime, the whole case relied upon thed3efence of the appellant.

Mr. Mwakolo said that the only evidence against the appellant was the caution statement (Exh. P2) taken by Insp. Dickson Mwamakula (PW3). However, he maintained that section 10 (3) of the Criminal Procedure Act, 1985 Cap. 20 R.W. 2002 was not complied with. He argued that the word "shall" has been used in that section. Hence he was of the view that it is mandatory for a caution statement to contain a certificate in terms of the provision of section 10 (3) of Criminal Procedure Act. For that reason, he said, if a certificate is not included in the caution statement it is a fatal omission which renders the statement invalid. He urged that the trial judge erred in admitting the caution statement (Exh. P2) after conducting a trial within trial. He maintained that Section 10 (3) of the Criminal procedure Act ought to have been complied with as a mandatory provision of the law. He further urged us to disregar4d the caution statement (Exh. P2). With the exclusion of the caution statement (Exh. P2). Counsel maintained that there would remain only the defence of the appellant at the trial.

Mr. Mwakolo urged us to take the appellant's version that the death had occurred in the cause of the fight as the only reasonable account of what led to the death of the deceased. He firmly maintained that the circumstances of the case were such that there was no malice aforethought established and that the appellant resorted to steal the money and other items from the bar after the death of the deceased. As such, the theft cannot be used as a basis for establishing the intention to cause death, Mr. Mwakolo, maintained. He prayed for the appeal to be allowed.

On his part, Mr. Luoga, learned State Attorney, supported the conviction. He was of the strong view that the appellant with malice afore thought killed the deceased. This, he said, can be seen from the appellant's conduct before and after he killed the deceased. Headed that the evidence in this case shows that the appellant intended to kill the deceased. He added that the evidence in this case shows that the appellant intended to kill the deceased. As the record shows the appellant had been paid Shs.500/= for his work that day, he could not validly complain that he had no money for food. He also stated that, the appellant intended to cause the death of the deceased because he took a knife with which he stabbed the deceased. He cited section 10 (1) of the evidence Act, Cap.6 R.E. 2002 which reads as follows:

> "Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue o0r relevant fact."

Mr. Luoga added that the conduct of teasing the deceased with a knife which is a dangerous weapon indicated that the appellant had malice aforethought to kill the deceased. In support of his submission he cited the decision of this Court in **Michael Joseph v. Republic** [1995] TRR 278 AT P. 281. Furthermore, Mr. Luoga stated that apart from the appellant's conduct before he killed the deceased, his conduct after the death is also indicative of malice aforethought. For instance, Mr. Luoga said after killing the deceased the appellant covered the body of the deceased with creates of beer.

In the circumstances, Mr. Luoga stated that becauws3e the appellant had already been paid his money, his defence at the trial that he had not been paid Shs. 500/= in exchange of the beer he had given to the deceased was an afterthought. He urged us not to accept the appellant's defence version that the killing happened in the heat of passion.

Mr. Luoga was of the firm view that as the appellant killed the deceased with the intention of stealing the items and money from the bar, the appellant caused the death of the deceased intentionally. Alternatively, Mr. Luoga urged that even acting on the basis of the doctrine of recent possession, the appellant was found with the items which had recently been stolen from the bar. He was properly convicted, the learned State Attorney submitted.

The central issue in this appeal is whether the killing of the deceased amounted to murder or manslaughter. There is no dispute that the appellant killed the deceased. Both in the caution statement (Exh. P2) and in his defence the appellant admitted killing the deceased. However, different motives for the killing of the deceased were in evidence. In his caution statement (Exh. P2) the appellant contends that he killed the deceased with the aim of stealing. On the other hand, in his defence at the trial he maintains that he killed the deceased because he was provoked by the deceased's refusal to pay him the money in exchange of the bottle of beer.

From the record it is clear that the d eceasewd died on 24th January, 1999 and the caution statement (Exh. P2) wastaken by insp. Dickson (PW3) on 27th January, 1999. This means that it was taken only three days after the death of the deceased. At that time it is apparent to us that the appellant was still fresh in his memories of what had happened. On the other hand, the appellant's defence at the trial court took place on 27/9.2005. This is about six years after the death of the deceased, which means that the appellant's memories of what has happened was faint. For that reason, we think with respect to Mr. Mwakolo that what is stated in the caution statement is more likely to reflect the true position of what happened on the day the deceased was killed. It seems to us, therefore, that the version given in the appellant's defence at the trial was nothing but an afterthought.

This now brings us to the issue raised by Mr. Mwakolo regarding the caution statement. It was his submission that the caution statement (Exh. P2) was invalid. He advanced the reason that in the statement there is no certificate in terms of the provisions of section 10 (3)of the Criminal procedure Act, 1986#5, Cap. 20 of R,E. 2002 (the CPA). This is so he said, because the word "shall" has been used in section 10 (3) of the CPA. On our part we are of the considered opinion that not in every situation where the word "shall" has been used that a mandatory requirement is imposed.

It is common knowledge that the word "shall" implies a mandatory requirement in so far as that goes to the root of the matter. See for instance, the decisions of this Court in **Herman Henjewele v. Republic,** Criminal Appeal No. 164 of 2005, **Victor Bushiri and 135 Others v. AMI Tanzania Ltd.,** Civil Application No. 64 of 2000 and **Arcado Dennis Ntagazwa v. Buyogera Julius Buyambo,** Civil Appeal No. 51 of 1996 (both unreported).

In **Herman Henjewele v. Republic** (supra) it was stated:@

> "…that whether or not the use of the term "shall" imported a mandatory requirement depended on the circumstances of any particular case."

The circumstances in the case under consideration we think as the learned trial judge in the ruling of the trial within trial were that the non-compliance with section 10 (3) of the CPA was a minor irregularity which occasioned no miscarriage of justice in anyway.

We are in agreement with the learned trial judge on this point because we think the appellant was not prejudiced. As shown in the caution statement (Exh. P2) the same was read over and explained to the appellant who thereafter put his thumb print in place of a signature. This means that the appellant does not dispute the statement which he found to be correct and true. For this reason we find no ground for faulting the learned trial judge in his ruling that the caution statement was not invalidated by the irregularity in the certificate.

Consequently, on the basis of the caution statement which we find to have been properly admitted by the trial court, it would follow that as stated in the statement, the motive, for killing the deceased was aimed at stealing. With this motive, the deceased was killed. His defence at the trial was nothing but an afterthought as correctly held by the trial judge. In the circumstances, we are satisfied that the appellant killed the deceased with malice aforethought. His conviction was justified.

For the foregoing reasons, we find no merit in the appeal.

Accordingly the appeal is dismissed in its entirety.

DATED at MBEYA this 14th day of July, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

M.S.MBAROUK
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

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

DEPUTY REGISTRAR

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