IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CRIMINAL APPEAL NO. 435 OF 2018

1. **MINANI JOHN**
2. **DIONIZ GEREVAZI**
3. **WILLIAM JULIUS** ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania, at Bukoba)

(Kairo, J.)

dated the 31st day of October, 2018
in
Criminal Sessions Case No. 30 of 2015
.....

JUDGMENT OF THE COURT

3rd & 10th December, 2019

MMILLA, J.A.:

The appellants in this matter, Minani John, Dioniz Gerevazi and William Julius (herein to be referred to as the first, second and third appellants respectively), are contesting the judgment of the High Court in Criminal Sessions Case No. 30 of 2015 in which they were convicted of the offence

of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code). It was alleged that on 1st day of August, 2014 they murdered one Bigiramungu Tadeo (the deceased). They were sentenced to suffer death by hanging. The conviction and sentence aggrieved them, hence the present appeal to the Court.

The appellants were residents of Mubitasha village within Ngara District in the Region of Kagera. On 1.8.2014 in the evening, they attended a meeting at their hamlet, the purpose of which was to discuss about the construction of a modern laboratory for the secondary school in their locality, as well as the problem of wandering cattle. After they had exhaustively discussed the main agenda, the chairman of that meeting invited the people to air any other matters or issues. At that point, the deceased raised a hand and complained that Dioniz Gerevazi (the second appellant), was bullying him in that whenever they met at the local brew pombe shop, he would force him to buy him that stuff. Dioniz protested and demanded him to produce evidence to substantiate his allegations. Fortunately, that problem was resolved.

Immediately thereafter, the deceased raised yet another complaint that Minani John (the first appellant), was having a love affair with his wife. Like Dioniz, Minani John protested that accusation and demanded explanation. Once again, the deceased did not substantiate his assertion. However, that claim too was resolved. At that point, the meeting was closed and people dispersed.

Joas John (PW2) was one of the key eye witnesses. According to him, on leaving the meeting place most of the people went to Mkapela Center, including himself and the deceased. Later on, the first appellant too arrived at that place. On seeing Minani John, the deceased told him that "*You are my friend please do not repeat to make love to my wife.*" The first appellant responded that "*You have already killed me, go on killing me.*" After Minani's response, PW2 went on to explain, the deceased became furious and wanted to beat Minani, but the third appellant stopped him. However, the two continued bickering and exchanging bitter words, as a result quarrel ensued and it culminated into a fight. Soon thereafter, other people joined the fight, including the second and third appellants, all of

whom were attacking deceased. According to PW2, the sun was still shining, and that the fight continued for about half an hour.

On 2nd August, 2014 in the morning, PW2 heard that Bigiramungu had died. He went at the scene and found the deceased's body on the road.

The case was investigated by No. E. 5296 D/Sgt. Charles (PW3). On getting information about that incident, he went to the scene of crime in the company of the Officer Commanding Station (OCS) Insp. Ruchiba, and a doctor. They saw the deceased's body on the road, and it had several injuries. The doctor examined the deceased's body before the police allowed the deceased's relatives to continue with burial arrangements.

According to PW3, the villagers told him that all started when an argument cropped up between the deceased and Minani John at the stall of one Stanslaus, and after a heated exchange of words they began fighting. In the course, the other people joined the fight, including Dioniz Gerevazi, William Julius and Jacob Sigini. They traced them with the help of the villagers and arrested them.

The appellants' defences were fairly short. First to give evidence in defence was Minani John (DW1). He said he attended the hamlet meeting of 1st August, 2014 at which the deceased blamed him of having had an affair with his wife. After his protestations, the complaint was resolved. Upon closure of the meeting they dispersed. He headed home, but passed at Mkapela Center.

On arrival at Mkapela Center however, he found the deceased at the stall of Stanslaus. It was at that point that the latter told him that *"Minani do not repeat again (sic) to love my wife."* He reminded him that the issue had been resolved, whereupon the deceased threatened that *"I can kill you and eat your flesh,"* and pledged to hire Rwandans and Burundians to track and kill him. That was allegedly spoken in the presence of Stanslaus's wife who pulled the deceased away in a bid to stop him from going on with those threats, but the latter pushed her away. Meanwhile, DW1 said, the deceased took some sand and threw it in his face and began beating him. He added that after removing the sand from his face, he left for home. He denied the allegations that he participated in beating the deceased.

On the other hand, Dioniz Gerevazi (DW4) too said he attended the hamlet meeting of 1st August, 2014. He related that after they had exhausted the main agenda, the deceased used the opportunity given for airing other concerns to accuse him that he was bullying him by regularly forcing him to buy him local brew whenever they met at the pombe shop, an allegation he denied. The matter was nevertheless resolved.

Upon closure of the meeting, DW4 too proceeded to Mkapela Center at which he found a convenient place and began drinking local brew. Afterwards, he heard noises and came out of the place where he was. He saw Minani quarrelling with the deceased. Also there was William Julius, among others, who was separating them. The quarrel climaxed into a fight which involved several other people, it grew up and seemed like a war. Upon that, he decided to leave the place. According to him, he heard of the deceased's death the next morning.

The account of William Julius (DW5) was that he was a militiaman, and that he attended the hamlet meeting on 1st August, 2014. After the meeting he went to his hotel at Mkapela Center at which he was selling tea. Around 7:30 pm, a quarrel broke out between Minani and the

deceased at a nearby stall of Stanslaus. It ended up in a fight between the two, but soon thereafter other villagers joined the fight and it became uncontrollable. He tried to quell the fight but he was attacked and despaired. He left the place. Later on, he was informed about the deceased's death whereupon he reported the incident to the hamlet chairman one Bisangwe who in turn reported it to police.

On getting information about that incident, the police visited the scene of crime and interrogated the people around. That gave them a lead to the arrest of the appellants whom they eventually charged with murder as it were.

After a full trial, the trial High Court was satisfied that the evidence which was mounted proved the prosecution's case beyond reasonable doubt that the appellants were indeed the persons who killed the deceased. Consequently, they were convicted and sentenced of the charged offence of murder. As earlier on pointed out they were aggrieved, hence the present appeal.

On the date of hearing the appeal on 3.12.2019, Ms. Aneth Lwiza, learned advocate, appeared for and represented all the appellants;

whereas Ms. Chema Maswi, learned State Attorney, appeared for the respondent/Republic.

The appellants filed separate memoranda of appeal. The first appellant's memorandum of appeal raised seven (7) grounds, while that of the second appellant raise six (6) grounds. On the other hand, the memorandum of the third appellant raised six (6) grounds.

At the commencement of hearing, Ms Lwiza dropped grounds 6 in the memoranda of appeal of the second and third appellants, along with the seventh ground in the memorandum of appeal of the first appellant. Noteworthy however, is the fact that except for the fifth ground in the first appellant's memorandum which is different, all the other grounds are identical. While grounds 1, 2, 3, and 4 commonly allege that the prosecution did not prove the charge of murder against them beyond reasonable doubts; ground 5 of the first appellant's memorandum challenges that the trial High Court erred when it failed to find that the defences of provocation and self-defence were available to the first appellant. On that basis, Ms Lwiza proposed to discuss together grounds 1, 2, 3 and 4 in each of the three memoranda, and then ground 5 separately

which concerns the first appellant alone. She elected to begin with the first set of grounds.

It is certain that the appellants' conviction was essentially based on the testimonies of Anna Faustine (PW1) who was 12 years old at the time she testified before the trial High Court, and Joas John (PW2), both of whom were eye witnesses. There was also the evidence of No. E 5296 D/Sgt. Charles (PW3), a police officer who investigated this case. We have found it appropriate to address first question of reliability or otherwise on the evidence of PW1 before we may proceed.

Our concern has been that as at 22nd October, 2018, PW1 was aged 12 years, thus a minor. Looking at page 20 of the Record of Appeal at which the preliminaries towards the recoding of her evidence are reflected, it is apparent that she was subjected to a *voire dire* test, long after section 127 (2) of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the EA) was amended by Act No. 4 of 2016 which came into operation on 22nd July, 2016. The said amendment changed the prerequisites for recording the evidence of a minor; it ended the previous requirement to conduct *voire dire* test, instead it introduced the requirement for a magistrate or judge to

require a witness of tender age to promise to tell the truth to the court and not to tell any lies. Section 127 (2) of the EA as amended provides that:-

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

In the circumstances of this case, the trial judge did not adhere to the requirements of this section as amended, instead, after conducting a *voire dire* test, the trial court recorded that **it was satisfied that PW1 knew the duty to speak the truth.** That was, in our strong view, against the demands of the section under discussion because PW1 did not make a promise to tell the truth to the court and not to tell any lies.

The Court had the occasion to address this situation in the case **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015, which was followed in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 and later on in **Selemani Bakari Makota @ Mpale v. Republic,** Criminal Appeal No. 269 of 2018 as well as that of **Yusuph Molo v. Republic**, Criminal Appeal No. 343 of 2017 (all unreported). It was expounded in **Yusuph Molo** (supra) at page 12 that:-

> *"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution's case . . . if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value, it is as if she never testified to the rape allegation against her (sic: the appellant), It was wrong for the evidence of PW1 to form the basis of conviction."*

Since this is the ailment befalling the evidence of PW1 in the present case, *ipso facto*, her evidence was valueless; therefore it was wrongly relied upon. In consequence, we expunge PW1's evidence from the record. That necessarily means, we remain with the evidence of only two witnesses; PW2 and PW3.

Submitting in support of her contention that the prosecution did not prove the charge of murder against the appellants beyond reasonable

doubts which is what grounds 1, 2, 3, and 4 are all about; Ms Lwiza said this is on the profound evidence on record that the deceased's death resulted from a fight. She elaborated that if that is the case, it cannot be said that they killed the deceased with malice aforethought. She relied on the evidence of PW1 and PW2 (of course, as of now she only remains with the evidence of PW2).

PW2 had testified that the circumstances leading to the deceased's death started with a quarrel between the deceased and the first appellant, and culminated into a fully-fledged fight which was joined by several other persons who were around, graduating into a deadly end. Ms Lwiza maintained therefore that, in the face of such evidence, it cannot be validly said that the appellants intended to kill the deceased. Had the trial court properly directed itself, she added, it could have found that because death was sparked by a fight, the appellants were not guilty of murder, but were guilty of a lesser offence of manslaughter. She referred us to the case of **Moses Mungasian Laizer @ Chichi v. Republic** [1994] T.L.R. 220, particularly the second holding. She urged us to find that the evidence on

record established the offence of manslaughter and not murder, thus reverse the decision of the trial High Court.

In this regard, Ms Lwiza enjoyed an enormous support from her learned sister Ms Maswi who argued likewise that PW2's evidence was firm that the deceased's death resulted from a fight. She referred to that witness's testimony at pages 28, 29, 30, 32 and 33 of the Record of Appeal. Ms Maswi added that since the deceased's death resulted from a fight, there was definitely no malice aforethought, therefore the trial court ought to have found the appellants not guilty of murder, but to a lesser offence of manslaughter. Like her colleague, she relied on the case of **Moses Mungasian** (supra).

We have carefully followed the arguments of both learned counsel for the parties. We hasten to say that we are fully in agreement with them. We will explain.

As correctly stated by both trained legal minds, PW2 repeatedly said in his testimony that the quarrel between the first appellant and the deceased climaxed into a fight, and several other people, including the second and third appellants, joined the fight. When he was cross-examined

by Mr. Byamungu, the learned advocate who represented the first appellant before the trial court, PW2 was steady that there were several other persons who participated in beating the deceased, including Bukuru Michael and Philipo Andrea. Also, when he was cross-examined by Ms Aneth Lwiza for the second and third appellants before that court, that witness named one Safari as having been one of those he remembered to have actively participated in beating the deceased. He also said that he attempted to intervene and stop the fight, but he refrained because the second and third appellants threatened to beat him too.

There was similarly the evidence of the second and third appellants who said in common that it began as a quarrel between Minani and the deceased, but ended up into a fight. As it were, the fighting intensified and involved several other people who were at Mkapela Center near the stall of Stanslaus.

This being the position, we think that it cannot justifiably be said that the appellants formed an intention to kill the deceased. This is especially so when it is considered that they were not the only persons involved in that

fight, but several others were involved as claimed by PW2 and the appellants themselves.

We are aware that the trial judge found that the killing of the deceased by the appellants was with malice aforethought in view of the nature of the injuries which were inflicted on the deceased's body. She pegged her views on the Post Mortem Report which was constituted in exhibit P1. She also relied on the guidelines which were outlined in **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported).

With great respect, we agree with both Ms Lwiza and Ms Maswi that it was not proper to have thought so because the facts and circumstances under which the killing in **Enock Kipela's** case (supra) arose were different when one compares them to those in the present case. This is because in the former case there was no fighting, while as repeatedly stated the deceased's death in the present case was prefaced by a fight which involved several people, of course, including the appellants. We similarly agree with Ms Maswi that so long as exhibit P1 was not read in court at the time it was received as evidence, the trial court ought not to have relied on it because it was invalid evidence.

We wish to emphasize that since there was strong evidence to establish that the deceased's death occurred in the course of a fight, the trial court ought not to have ignored the aspect that under such circumstances, the appellants could not be said to have formed an intention to kill the deceased.

There are a range of cases in which we had the occasion to underscore that where death occurs as a result of a fight, one cannot infer malice aforethought, with the effect that a charge of murder may be reduced to a lesser offence of manslaughter. We have in mind the cases of **Elias Pau v. Republic**, Criminal Appeal No. 7 of 2004, **Emmanuel Mrefu @ Bilinje v. Republic**, Criminal Appeal No. 271 of 2006, **Mashaka Mbezi v. Republic**, Criminal Appeal No. 162 of 2017 (all unreported) and **Moses Mungasian Laizer @ Chichi** (supra), among others.

In **Moses Mungasian Laizer @ Chichi** (supra), the High Court rejected the appellant's version of evidence that the deceased's death resulted from a fight. The trial judge specifically remarked that even if he was to find that the deceased's death was caused under the circumstances described by the accused, he would still hold that the death of the

deceased was murder. According to him, that was because the accused, having said he was the one who started the fight, he could not turn round and say that he was acting in self-defence. That was reversed by the Court on appeal. It was held that:-

> *"Where death occurs as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder."*

See also the case of **Jackson Mwakatika & 2 others v. Republic** [1990] T.L.R.17 in which it was held that:-

> *"(v) When death occurs as a result of a fight unless there are very exceptional circumstances, the person who causes death is guilty of manslaughter and not murder."*

For reasons we have assigned, we find merit in grounds 1, 2, 3, and 4 because the prosecution did not prove the offence of murder against the appellants in the absence of evidence of premeditation to kill. Therefore, had the trial High Court properly directed itself, we believe it would have found, as we accordingly do, that since the deceased's death resulted from a fight, then there was no malice aforethought, hence they were guilty of a

lesser offence of manslaughter. Consequently, these grounds have merit and we allow them.

We now turn to the fifth ground which, as earlier on intimated, is in respect of the first appellant only. That ground alleges that the trial High Court erred when it failed to find that the defences of provocation and self-defence were available to the first appellant.

On this, both Ms Lwiza and Ms Maswi submitted in common that from the evidence on record, both defences were available to the first appellant. To begin with, they stated that the drama leading to the said death was generated by the deceased himself who, on seeing the first appellant at Mkapela Center, he revived the debate about the latter having had an affair with his wife; long after that matter was resolved at the hamlet meeting. They submitted that the deceased warned the first appellant that *"Minani do not repeat again (sic) to love my wife."* On being reminded by Minani that the issue had been resolved, the deceased threatened that *"I can kill you and eat your flesh,"* and pledged to hire Rwandans and Burundians to track and kill him. They held those utterances to be provocative.

Likewise, both learned counsel for the parties contended that it was the deceased who assaulted the first appellant after a heated exchange of bitter words reached a climax. Thereafter, they said, the deceased picked some sand and threw it in the first appellant's face, soon after which he began beating him. We pose to point out here that though these claims are found in the defence of the first appellant only, we have taken note that this piece of testimony was not shaken by the prosecution, which means it stands. On the basis of that, the learned counsel for the parties commonly maintained that the first appellant had the right to defend himself. They referred us to the provisions of section 18B (3) of the Penal Code.

From the above, the learned counsel for the parties said that had the trial High Court properly directed itself, it would have found that the first appellant was entitled to those two defences, for which it would have found him not guilty of murder, but guilty to a lesser offence of manslaughter. They urged us to find merit on this ground too.

A careful scrutiny of the testimony/defence of the first appellant however, reveals his stance that he did not cause the death of the deceased because after removing the sand which the latter had thrown in

his face, he left for his home. He never admitted that he was involved in the fight, which is why the record does not show that he neither said he acted in self-defence, nor that he was provoked. Surprisingly however, those two defences were raised by Ms Lwiza in her final submission. What then does that entail?

Principally, for any averment to constitute as a defence, it must have been advanced by the appellant in his defence. The rationale is that it is the accused who is supposed to defend himself, and not any other person. Where, as in the present case, the appellant may have not presented any such defence at that stage, he/she cannot raise it at the level of appeal. Thus, his advocate wrongly raised those two defences at the stage of the submissions as the appellant had a different stand in his defence. Accordingly, the fifth ground of appeal lacks merit and we dismiss it.

Nevertheless, having held that there is merit in respect of grounds 1, 2, 3 and 4 because malice aforethought was not established, a conviction for murder cannot stand. In the circumstances, we quash that conviction for murder and set aside the sentence of death by hanging; in its stead, we substitute it with one of manslaughter. Since the appellants have so far

been behind bars for five years, also that the deceased was in the main the one to blame for all what happened because he orchestred the quarrel and hence the fight; we order the immediate release from prison of all the three appellants unless they are otherwise being continually held for some other lawful cause.

Order accordingly.

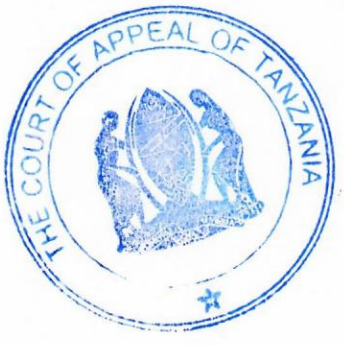
DATED at **BUKOBA** this 9th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of Mr. Remidius Mbekomize, learned counsel for the appellants and Mr. Shomari Haruna, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL