IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 110 OF 2018

RUTU QAMARA @ QARES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Moshi, J.)

Dated 1st day of March, 2018
in
Criminal Sessions Case No. 18 of 2016

JUDGMENT OF THE COURT

26th November, & 3rd December, 2021

MWAMPASHI, J.A.:

The High Court of Tanzania at Arusha (Moshi, J) convicted the appellant, Rutu Qamara @ Qares, of the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019], having been alleged that he murdered one Josephina d/o Meta (the deceased) on 19.11.2014 at Endabash village within the District of Karatu in Arusha Region. Upon the conviction, he was duly sentenced to suffer death by hanging. Aggrieved, he has now preferred this appeal.

The background facts leading to the apprehension, arraignment and the ultimate conviction of the appellant, may be briefly given as

follows: On 19.11.2014, Maria Nade (PW1) was seated outside her house with her grandchildren when the appellant, who is her neighbour, came and stood behind her in silence before he entered in the kitchen where the deceased was. She heard the appellant asking the deceased to stop troubling him. Having sensed that something was not okey, PW1 asked the deceased to get out of the kitchen. The deceased came out, fetched her children, got in the main house and locked herself in. The appellant too came out of the kitchen with an axe in his hands and pursued the deceased while ordering her not to lock herself in. At this point, PW1 decided to raise an alarm and rushed to their nearby farm to seek help from her husband leaving the appellant at the compound. Luckily, she found her father-in-law but when they got back home, they found the deceased already dead.

The evidence from John Nade (PW2) was to the effect that he was passing by PW1's home when he heard an alarm being raised from PW1's house. Responding to the alarm, he rushed to PW1's house but before getting there, he met the appellant who had, in his hands, an axe which had blood. He tried to stop him but he could not as the appellant kept on running away. PW2 continued chasing the appellant till when the appellant met Patrice Bombo (PW3) who succeeded to block him though he ended up being cut and injured by the appellant. By then

other people had joined them and they managed to apprehend the appellant who admitted to have just killed the deceased. Later the police officers came, took the appellant and proceeded to PW1's house where he saw the deceased's body with wounds on her head. PW2's evidence on how the appellant was apprehended was supported by PW3 who told the trial court how he first heard the alarm, met the appellant who was being chased by a group of people and managed to block him.

PW1's husband Godfrey Tluway, testified as PW4 telling the trial court that on the material day he had gone to attend the funeral at Dagha's home. Sometime later after the burial, he was informed of the incident that had happened at his home by one Malkiad Ero and when he got home, he found a lot of people had already gathered there and the deceased's body was lying on the ground.

Daniel Philipo Simpa, an assistant medical officer (PW5), conducted a post-mortem examination on the deceased's body and established that the cause of the death was bleeding to the brain tissue and the fracture of the skull. He also testified that he observed that the deceased had sustained two cut wounds on her forehead. A post mortem examination report to that effect was tendered in evidence by him as exhibit P.1.

Sgt Elia (PW6) and D/Sgt Vendelinus (PW7) were among the police officers who rushed to the scene of the crime. The first to get there was PW6 who before getting at the scene, he first rescued the appellant from angry people who were holding him. He was also handed a bloody axe which he later tendered in court as exhibit P.2. Thereafter, while in the company of the people who had apprehended the appellant, went to the scene of the crime where they found the deceased's body lying on the ground. He arranged for the body to be taken to the hospital and took the appellant to the police station. PW6 did also record the statement of PW1's father-in-law one Tluway Manimo which was tendered in evidence as exhibit P.3 as the maker could not be called as a witness. On his part, PW7 inspected the scene of the crime and drew the sketch map which was tendered in evidence and admitted as exhibit P.4. PW7 did also transfer the appellant from Endabash Police Station where he was being held to Karatu Police Station where he recorded the appellant's cautioned statement which was tendered and admitted as exhibit P.5.

In his sworn defence, the appellant told the trial court that on the material day he returned home from his farm and found a woman in his house who was busy searching his bag. He asked the woman what was going on, the woman gave no answer but ran into another house where

he followed her and cut her with an axe. He did also tell the trial court that the woman he attacked, died instantly in his house. He went on defending himself by stating that after killing the woman he headed to town while still holding his axe and that is when he was stopped by a group of people including PW3 who attacked and beat him before he was taken to Karatu Police Station. The appellant complained that the contents of the cautioned statement were changed by the police. He maintained that his story was not that he killed the deceased at PW4's house but that he killed a woman at his house using an axe belonged to him and not to PW4. He insisted that he killed the woman because he thought she was a thief and therefore that he did not intend to kill her.

The learned trial High Court Judge found it established that the deceased's death was unnatural and violent. Under the circumstances of the case, the trial Judge singled out the main issue to be whether the deceased was killed with malice aforethought or not. After a careful evaluation and examination of the evidence on record, the issue was found in the affirmative. The learned trial Judge was satisfied that it was proved to the required standard that it was the appellant who killed the deceased, hence the conviction and sentence as earlier on alluded to. Aggrieved, the appellant has preferred this instant appeal.

At the hearing of the appeal the appellant was represented by Mr. Kelvin Edward Kwagilwa, learned advocate, while the respondent Republic, was represented by Ms. Tarsila Gervas Assenga, learned Senior State Attorney, who was assisted by Ms. Naomi Joseph Mollel and Ms. Eunice Otto Makala, both learned State Attorneys.

In support of the appeal, two sets of memoranda of appeal were filed. The first one comprising six grounds of appeal was lodged by the appellant on 29.06.2018 whereas, the second containing three grounds which was prepared by Mr. Kwagilwa was lodged on 18.11.2021. In the course of the hearing, however, the six grounds contained in the first memorandum were all abandoned by Mr. Kwagilwa who maintained and argued the appeal on the three grounds of appeal contained on the second memorandum of appeal. The said three grounds are as follows:

1. *That the trial Judge erred in law and in fact to convict the appellant by heavily relying on the evidence of PW2 and PW3, despite that their evidence is weak, deficient and unreliable.*
2. *That the trial Judge erred in law and fact to convict the appellant relying on the circumstantial evidence which was tainted with unreliability and inconsistencies.*
3. *That the trial Judge erred in law and fact in failing to properly analyse the Appellant's defence, hence erroneously reached at*

conclusion that the Appellant with malice aforethought killed the deceased.

Before we proceed any further, we find it apposite to make it clear at this very point that as it was rightly found by the learned trial Judge, the fact that the deceased was killed by the appellant, was settled from the early stages of the trial. During the preliminary hearing, as it can be evidenced at page 28 of the record of appeal, it was admitted by the appellant that, using an axe, he cut the deceased to her death. The appellant and his counsel are on record admitting the killing of the deceased as demonstrated hereunder:

"***Defence Counsel:***

We admit accused's name, his residence and he admits to have Cut deceased with an axe.

***Accused person**:*

***I admit** my name and residence and **I hit deceased once with an axe on the head**"*
[Emphasis added]

The fact that the appellant admitted to have killed the deceased by cutting her with an axe on the head, was also listed as one of the undisputed facts in the memorandum of the undisputed facts, as shown at page 28 of the record of appeal. Further, in his defence at page 64 of the record of appeal, the appellant is on record stating that "*I attacked*

the deceased with an axe because I thought that she was a thief, I pray the court to have mercy on me. I will not commit a crime like this again, I did not intend to kill". In addition to all the above pieces of evidence on the appellant's admission that he killed the deceased, there is the cautioned statement (exhibit P5) which was admitted in evidence without any objection and in which the appellant admitted to have killed the deceased.

We have taken pains to demonstrate above that the appellant admitted to have killed the deceased, not just for fancy, but for emphasizing that it was never in dispute that the appellant caused the death of the deceased by cutting her on the head with an axe. That being the case, therefore, the focus and the only issue before use is on whether the killing was with malice aforethought or not. In other words, the issue for our determination in the instant appeal, is on whether the learned trial Judge erred in concluding that the appellant killed the deceased with malice aforethought.

In his submissions in support of the appeal, Mr. Kwagilwa, who argued the three grounds together, contended that it was wrong for the learned trial Judge to have concluded that the appellant intended to kill. He argued that the appellant's conduct after the incident does not show

that he intended to kill the deceased. He further submitted that the evidence given by PW2 and PW3 contradicted on whether the appellant was arrested while fleeing from the scene of the crime or not. He insisted that there was no good evidence to prove that the appellant committed murder as malice aforethought was not established. Mr. Kwagilwa did therefore urge us to allow the appeal and set the appellant at liberty.

At the very outset, Ms. Assenga intimated that she was not supporting the appeal. She submitted on the issue of malice aforethought, that the same was proved. She argued that it was established that the appellant intended to kill the deceased. Ms. Assenga pointed out that the weapon used to attack the deceased, the number of blows, the part of the body the blows were directed at, the fact that after killing the deceased the appellant ran away from the scene of the crime and that in doing so, he even wounded PW3 who attempted to apprehend him, proved beyond any reasonable doubt that the appellant intended to kill the deceased. In support of her argument, Ms. Assenga relied on the cases of **Semburi Musa v. Republic**, Criminal Appeal No. 236 of 2020, **Jackob Asegelile Kakune v. Republic**, Criminal Appeal No. 178 of 2017, **Mark s/o Kasimiri v. Republic**, Criminal Appeal No. 39 of 2017 and **Majuto Samson v. Republic**, Criminal Appeal No. 61

of 2002 (all unreported). Ms. Assenga finally prayed for the appeal to be dismissed.

In his brief rejoinder, Mr. Kwagilwa, maintained his stand that malice aforethought was not established because even the nature of the wounds the deceased had sustained do not suggest that the appellant had intended to kill the deceased.

In holding that the appellant killed the deceased with malice aforethought, the learned trial Judge said:

> *"All in all, it is my view that, the type of weapon, the fact that the deceased was not armed, the fact that the offence was committed during broad day light, the accused was able to see and follow the person whom he was attacking, the nature of the wounds which were inflicted, his attempt to escape with a bloody murder weapon and the accused 'conduct before and after the attack points to no other explanation but to the guilt of the accused person. All circumstances prove that the accused person had intention to kill the deceased".*

It is the above findings and conclusion of the learned trial Judge that is being challenged in the instant appeal. The issue we are invited to determine obliges us to first revisit and observe the position of the

law. The circumstances under which malice aforethought shall be deemed to be proved are provided for under section 200 of the Penal Code, thus:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

(a) An intention to cause the death of or to do grievous harm to to any person, whether that person is the person actually killed
or not;

(b)knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused'

(c) an intention to commit an offence punishable with penalty which is graver than imprisonment for three years;

(d)an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence".

It is also a common ground that in most cases it is not expected for an attacker who kills another to have declared or expressly exhibited his intention to kill that another person or cause grievous bodily harm to him. In the case of **Enock Kipera v. Republic,** Criminal Appeal No. 150 of 1994 (unreported) which was quoted by the Court **in Mark s/o Kisimiri** (supra) the Court held among other things, that:

> *"...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 by various factors including the following:*
>
> > *The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing."*

The above factors were also restated by the Court in the case of **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 (unreported) to include:

(i) *The type of weapon used in the attack leading to the death of the deceased.*

(ii) The amount of force which was used by the attacker in assaulting the deceased.

(iii) The part of the body of the deceased where the blows of the attacker were directed at or inflicted.

(iv) The number of blows which were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;

(v) The kind of injuries inflicted on the deceased's body;

(vi) The utterances made by the attacker if nay, during, before and after the attack; or

(vii) The conduct of the attacker before or after the incident of attack".

Applying the law and principles stated in the above cited cases and provisions of the law, to the instant case, it is our considered view that, as rightly argued by Ms. Assenga, the fact that the appellant killed the deceased with malice aforethought was proved to the required standard. Most of the relevant factors, if not all, were met in the instant case. The appellant used an axe which is a lethal weapon to cut the deceased twice on the head which is one of the most sensitive and vulnerable part of the human body. That the wounds the deceased sustained were fatal was confirmed by PW5 and the post-mortem report (Exhibit P.1). The evidence that the skull was fractured causing the brain matter to come

out, implies that excessive force was used. The appellant's conduct before and after the incident is another piece of evidence proving that the appellant intended to kill the deceased or cause her to suffer grievous bodily harm. There is evidence from PW1 which is to the effect that after the deceased had been asked to get out of the kitchen, the appellant while armed with an axe pursued her to the house where the deceased had locked herself in, and that he later broke the door and killed the deceased. After killing the deceased, he ran away from the scene of the crime and in the process of apprehending him, he cut and injured PW3. Under these circumstances, the findings and conclusion by the learned trial Judge that malice aforethought was established cannot be assailed.

In his three grounds of appeal, the appellant did also complain that his defence was not properly evaluated and considered. The appellant raised a defence of property and not self-defence as perceived by the learned trial Judge. What the appellant claimed in his defence was that he found the deceased searching his bag in his house and that he therefore killed her thinking that she was a thief. The defence raised by the appellant was based on sections 18 and 18A (1)(b) of the Penal Code under which it is provided that:

"S. 18. Subject to the provisions of section 18A, a person is not criminally liable for an act done in the exercise of the right of self-defence or the defence of another or the defence of property in accordance with the provisions of this Code.

S. 18A (1) Subject to the provisions of this Code every Person has the right;

(a) [omitted]

(b) To defend his own property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence".

Although the learned trial Judge approached the appellant's defence on wrong premises, her conclusion that the defence was an afterthought and that it did not raise any doubt on the prosecution case, was right. We have painstakingly examined the defence and found that it is nothing but an afterthought. It does not even slightly fit to the facts established in evidence. While it was the appellant's claims that he killed the deceased in his house, the evidence on record is clear that the deceased was killed at PW4's house. Even if we buy the appellant's story and agree with him that the deceased was killed in his house, still under the circumstances of this case where the deceased was not armed and where she exhibited no resistance, the force used by the appellant was

far beyond the reasonable force required by section 18B (1) of the Penal Code.

In the event and for the foregoing reasons, we find no merit in the appeal and we dismiss it in its entirety.

DATED at **ARUSHA** this 2nd day of December, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of Mr. Kelvin Kwagilwa, learned counsel for the Appellant and Ms. Akisa Muhando, learned State Attorney for the Respondent/Republic, is hereby certified as true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL