

TANZANIA / JUDGMENT

19710906 TZHC Dodoma

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TZHCDECIDED
6 September 1971

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U, 2Q HIGH COUT.. 'C' -TAL JURISDICTION (Dar es, Salan Registry) \ 9/ Criminal Pe 9L.7! 14.
TPJBIIC versus I4ATI S/0 PATRIS CHARGE: MURDER - Contrary to section 196 of the: Penal Code;
J U D G Ii N - The accused, Matel s/a Patris, is charged with i"1urder c/s 196 oL the Penal Code.
The prosecution alleed that the accused on or about the 8th day of July 1969, at Udindaiisi 'village,
Kigre division, in the district and region of Dodona, murdered one, Mnyatobe s/o Nakanya. It is
not at all in dispute in this case that it was the act of the 'cused' that caused the death of the
deceased. qually it is not seriously ii diepute that this act of the accused was an iui2wful act; what
is serb- 4.sly in dispute is, whether the accused in inflicting the unlawful fatal blow did so with
malice aforethought.. The Republic argued that there was ample evidence that the accused had
formed the necessary malice aforethought when he inflicted the fatal wound. The defence on the
otT::er hand was of the view that the Republic had failed, to prove that the fatal wound was
inflicted by the accL1sud with malice atorethought, and that the evidence was uore consiatont
with the lesser offence of manslaughter. The facts of this case are as follows:- On the night of
7/7/69, accused's fffty head of cattle were stolen from his .kraai. He raised an alarm and
neighbours went to his house. The accused and his neighbours followed hoof—marks on the
ground for some distance but lat3r abandoned the search as, due to darkness, they could not
clearly follow the hoofmarks. They decided to wait till next morning when they would start
searching for the cattle. Next day, (8/7/69) 'ly in the morning they resumed the search. According
to the evidence William (P.W.2) the search started at 6.00 s.m. and that all the people were armed
with bows and arrows and others with spears and sticks. He told the court that he himself was
armed with a bow and arrows and that the accused was armed with a ...and, a stick. In his
testimony he said that the search continued up to 1 p a m. but was fruitless. At this :time
theyciecided to gofor lunch at Kigwe, According to his evidence they did not get food and
therefore they decided to buy n.tive liquor worth shs. 11/= . They drunk the pombe up to 'about'
2.30 p.m when they left the pombe sp and z'es'umec1 their searo1, He said that as they were
approaching a bush they heard people in the bush making noises as if they were chopping
firewood. According to his evidence the group thought that these peôple were the cattle—thieves
and they decided to divide themselves into three groups and advanced towards the suspected
thieves in three differenct directions. According to his evidence as he was approaching the
suspected thieves he heard someone in front of him crying for help. He ran to the ,laco the oios
were coming from and he saw an old man lying on the ground and an old lady standing near him.
He also saw the accused standing near the old man, He told the court that as he Wa5 arriving at

the scene he heard Matei Msonge (P.w. 4) asking the accused why he (the accused) had speared the oldman and the accused replying that they should run away as villagers would beat them up if they found them there. According to this witness all the people in the searching party got worried, got worried, and ran to accused's house. ... 0/2 -2- Lendeme (P.13) gave almost similar evidence as William. He also told the court that he saw the accused spearing the deceased and that the deceased was standing when the accused speared him. Matei Msonge (PW4) gave similar evidence to that of William and Lendeme in his examination in Chief. He also said that he saw the accused attacking the deceased with a spear. He however materially differed from the other witnesses when cross-examined by the defence. The wife of the deceased (Pwi) also gave evidence in her testimony she related to the court that on the material day she and her husband were in the bush chopping firewood. She said that as they were doing so suddenly people came and started attacking them. According to her evidence she herself was attacked with an arrow by one, Mazengo who has since died. She told the court that she received injuries on her arm and on her thigh and that she was sent to Hospital for treatment in a motor vehicle. She also told the court she saw the accused attacking her husband, the deceased with a spear. She said that she did not know why they were attacked and that as far as she knew there was no enmity between the deceased and the accused. The doctor (F19) who performed post-mortem examination on the deceased told the court that the deceased had a wound scalp-deep on his head, and a stab-wound on the left hypochondriac region measuring 1+x-- wide penetrating to the abdominal cavity. This wound according to the doctor is the same wound which injured deceased's spleen. The wound in the spleen was said to be of 1-xI .wide and two inches deep. The doctor was of the opinion that the penetrating wound to the abdominal cavity was caused by a sharp instrument and that a spear could have caused such a wound. The doctor formed the opinion that the cause of death was due to ruptured spleen intra-peritoneal haemorrhage and shock. According to his observation considerable force have been used in inflicting the blow. The doctor also examined the accused (Exhibit C) and found him to be mentally normal. He found no marks of violence on his body and he estimated his age 25 years. The accused in his unsworn statement did not deny inflicting the fatal wound on the deceased... He however said that the deceased accidentally fell on his (accused), spear when he (accused) was intervening a fight between the deceased and another man. Egidi (PW2) related to the court that he was one of the searching party. According to his evidence he did not see the accused attacking the deceased but he heard Itatei (F14) asking the accused why he (accused) had speared the deceased and the accused replying that he did not know whether he had speared the deceased. G'rifan Ma, busila (PT:13) an inspector of Police testified to the court that he recorded Matei Msonge's (PJ4) statement on 17/7/1969. He read the statement to the court and the statement was without objection by the Republic admitted and marked as Exhibit D. After summing up to the assessors one of the assessors was of the view that the accused is only guilty of manslaughter. The remaining two assessors were of the opinion that the accused intentionally caused the death of the deceased and returned a verdict of murder. In his address to the court the learned defence counsel argued that there was such a confused atmosphere at the time the accused inflicted soon after the searching party had left apombo shop where they had been drinking and that drunkenness should be considered, when dealing with the question of Malice aforethought. It was also argued that if the court accepts accused's unsworn statement

then the court will have to find that the fatal wound was purely accidntal. The learned counsel alternatively argued that the Republic case showed that the accused had an honest and reasonable, though mistaken, belief that the deceased was the person who stole his cattle when he .. •j7 /• . • P I I .O3; JO SSUI COOE.xqwe .icuo qOTT& 0p03 TUOI 30 IT UOT4Dos ,O SUOSçAOXc et. £q po.iaioo qou C.IOJOtet. puu A JO OjSTW la JV[1E0[O SWt STt eTq4 STT.{ °TOS ot uosJod ;D - qo eq oq. pcioçoq 0Tj, MoTim peseoep 0TT1. UO Aoq; C POq.OUT Otj UOT.t ;oç O. pTUa JTTeT S OT qtq peoToq posmou eqq. p. 'peAopJeq sç osvo UOqfLOOsOIcI eqq ;o OTotk ot. ;ç 'juaddu pij.io rc eeo u q..ou pU oej 09, SO?TE.I eq.sçtu Ot(4 (TTT) !oT q ia uos 'e a .i eq .snw oqsui ot q.w (c) ouop pe etfl. peç;iqsuC etj 'on.1q 3ç 'prnoA paeroq suçtfl. ;o oqq s etr e'tq. (T)

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oqsuodse.1 £TT12UTIUT.10 .OU St p05110012 eq. OJ0J0Je1 t.1? 'J120d5 sçq ttrçq p01012r13 7 a

- 4 - it is/generally accepted principle of law that ignorance of the law is no defence in a criminal charge and this legal maxim is reinforced by section 8 of our Penal Code. The defence that the accused believed that the deceased was the thief when he attacked him is therefore of no consequence because the law does not allow people to attack thieves. I now deal with the question of drunkenness. The argument by the learned state attorney that drunkenness cannot be a defence in a criminal charge is, with due respect, a little too bold. I agree that drunkenness may not be a defence if there is evidence to the effect that by reason of drink an accused's mind was so poisoned that he did not know what he was doing at the time he committed the offence; that is, there was total lack of mens rea. Drunkenness can also be a defence to a criminal charge if it is shown that by reason of the effects of alcohol on an accused's mind he became insane, and was in a state of insanity when he committed the alleged offence. Looking at the evidence in this case there can be no doubt that the searching party in General, and the accused in particular were mentally excited from the time they started looking for the stolen cattle. They became all the more increasingly agitated soon after they had loaded themselves with liquor. That there was an agitated and confused atmosphere, is evident from the way the searching party behaved soon after hearing people chopping fire wood in the forest — They all of them immediately believed that those people were the cattle- thieves. They divided themselves into groups and advanced towards them. On seeing the deceased and his wife the accused speared the deceased to death and one, Nazeno shot deceased's wife (p.w, 1) with an arrow. Taking into account the evidence that relations between the accused and deceased had always been cordial and the further fact that deceased's wife is aunt of the accused; I fail to see any valid reason for the senseless attack on the deceased and his wife. The only reason for the senseless attacks is that the liquor must have inflamed accused's mind and that of Mazengo as well as reducing their self-control — But this cannot, of course, be a defence in a criminal charge. That some of the people in the searching party were under the influence of alcohol is evident from the testimony of William (P.W. 2) who, on cross-examination, said "We were a little drunk". Although L10 used the word "We " I think he meant that he was a little drunk for he could not have been in position to tell how drunk his friends were. Igiti (D.W. 2) also told the court that he was slightly drunk after the pombe. But, notwithstanding this evidence, I am satisfied that none of the people in the searching party was so drunk as to be excused from a criminal offence. As to the conflict of evidence in the prosecution case the Republic has in this case presented two possible views of the facts, The deceased's wife (P.W. 1) told the court that the accused speared the deceased without any provocation. Lendeme (Pir, 3) and William (P.P.2) related to the court that they believed that the accused speared the deceased because he (accused) suspected him as the thief of his cattle. These witnesses did not witness the actual attack. Natei "Isonge (P.W. 4) in his examination in chief told the court that he saw the accused attacking the deceased with a spear and that he asked the accused why he had speared the deceased without seeing him with cattle or meat and that the accused did not reply to his question.. On being cross-examined, he admitted having given a

statement to the police only nine days after the incident. On further cross-examination he admitted that he in his statement told the police that the deceased advanced towards the accused brandishing his bill-hook because the accused was at this time beating deceased's wife (P.w. 1) Inspector Mabusila (DOW. 3) related to the court that he, on 17/7/69, took Matei's statement and that Matei (P.W. 4) told him that the accused was beating deceased's wife (P. 1) when the deceased, advanced towards the accused brandishing his bill-hook in a striking position. If the court is to accept the evidence that the accused attacked and killed the deceased for no reason at all then the court will have to find the accused guilty of no lesser charge than that of Murder. If on the other hand the court is to believe the evidence of Matei when cross-examined, that the accused struck the fatal wound as he was about to be attacked by the deceased with such a lethal weapon as a bill-hook then the killing cannot be murder

- If the deceased, in a bellicose manner, advanced towards the accused with his bill-hook in a striking position the accused was entitled in law to retaliate to ward off the imminent attack. As I have already stated, the prosecution case is of two different versions of what happened just before the infliction of the fatal wound. One of the versions points to the offence of murder whereas the other version is more consistent with manslaughter. In *YtSITO ONGUTI JO OYOO Vs 1J.A. 134* two witnesses for the prosecution differed substantially and in his judgment LIS, J. (as he then was) made no reference to one of these witnesses whose evidence, if it were true, went to establish manslaughter rather than murder. He convicted the accused of murder. On appeal the Court of Appeal held - "It was incumbent upon the trial judge to deal expressly with the conflict between the evidence of the crown witnesses and with the vital question whether, it was safe to convict of the graver offence. The conviction was varied to the lesser offence of manslaughter. This decision quoted and followed an earlier decision on similar facts *L CH'S1) . AOC.A.4*. In this case the evidence of Matei Nsonge (P. 4) when cross-examined, and his statement to the police (Exhibit D 1) cannot be lightly dispensed with. The statement was given to the police only nine days after the incident. At that time the facts were certainly much more fresh in his mind than when he testified to this court on 6/8/71, over two years after the incident. Looking at the prosecution's case in the light of what Matei Nsonge told the police only 9 days after the commission of the crime I cannot, without doing injustice to the accused find him guilty of the serious offence of Murder - Denning, L. J. (as he then was) had this to say in *BTR Vs BATJ[R (1950) 2A11 E.R.48* at page 459 - "In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear". This exposition of the law as to the standard of proof in criminal cases was approved in *EQRNAL Vs NEUBTGJR PRODUCTS (.1956) 3 All E.R. 370* and in *HQTRY_H ILANGA Vs N. MANYOKA B.A. 705*. In this case the accused is charged with one of the most serious criminal offences in our law. It is therefore necessary that for the court to find him guilty of the offence of murder the evidence must be much more clearer than evidence required in support of say, a charge of causing grievous bodily harm or for that matter a charge of manslaughter. Although, on the

evidence, there can be no doubt that it was accused's act that caused the death of the deceased and that the act was an unlawful act, it cannot, in the light of what I have already stated, be safely concluded that the accused in inflicting the blow did so with malice aforethought. Like the first assessor, I find the accused not guilty of murder but guilty of the lesser offence of Manslaughter contray to section 195 of the Penal Code. DODOMP, .. N ./S. Iu.zA& 6th Sopt.e:ber, 19 7 1./6 TUD

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Prepared on 29 October 2026 · Esheria