

TANZANIA / JUDGMENT

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I GH .QF TANZANIA ATSINGIDA ORIGINAL JURISDICTION (DODOMA REGISTRY) CRIMINAL SESSIONS CASE NO. 76 OF 1977 THE REPUBLIC VERSUS PHILLEMON HUSSEN HAMISI MDABI CHARGE: M U D E R c/s 196 of the Penal Code 11 J U D G M E N T CHIPETA, J. .4 P. I The accused in this cas'e, Phi11em6n slo Hosea stands charged with the offence of murder c/s 196 of the Penal Code. The Republic has alleged that on or tout 7th October, 1975, in Singida Region, the accu4ed murdered one Gidamuguja s/o Mornoya. The acused denid the charge. The prosecution's evidence isto the effect that on or I about 7/10/75, one Enos brewed pombe f or people who had cut poles for constructing his house. Although only about 18 people had taken part in cutting the poles, very many other people w:nt to the pombe party, and it wuld appear that some of it was for sale. Present at the pombe party were Wanyiramba and Barabaigs, and they all sat in various groups. Those people who had taken part in cutting the poles, apparently all of them Wanyirartha, were given their own pombe some of which was in a pot. These people were drinking in their own group some 70 paces from the rest of the people. At about 300 p.m. or 4.00 p.m. a dispute arose over the. pot of pombe. The Brabaigs wanted t partake in the dr nking of the pombe which had b en given to the Wanyiramba who had taken part in cutting the poles, while the latter were trying to restrain the forrn.r from doing so. There was a hysicl struggle betw.en the two groups for possession of the pot. The Wanyirarba were trying to take the pot into the house while the Barabaigs were trying to take it away from the Wanyiranbi. The struggle over the pot worried the owner of the pot one Wándege d/o Malula (P.W.3) who then rushed to the scene of the struggle in order to take the pot away lest it he broken. As P.W.3 stooped to pick up the pot, the deceased, who was Barabaig, struck P.W.3 with a stick on the left side of the head ner the ear. AS a result of that blow, P.W.3, who is a Nyiramba by tribe, fell down unconscious and was apparently taken for dead o reupon th accused picked up a piece of wood, apparently firewood, and struck the deceased on the left side of the head above the ear just as the deceased Was preparing to strike P.W.3 again. As a result of th t single blow, the deceased fell down and never stood up again. 0 —2.- From that.mom&-nt, or at about that time,... the. Wanyiriha and Barabaigs started fighting on another, on tribal basis with complete abandon. People ran about eithtr iii flight.or as they £ ought. After the deceased had fallen down, one Hamisi sb Mdabi, a. Nyiranib by tribe, and who was jointly charged with the accused but has since died in remand prison, also picked UP:C piece of wood and struck the deceased with it as the deceased lay sprelei on the grotind. In turn. some Barabaigs assaulted the aëcused. and Hamisi and at least thre other,people. The Wanyirarnba then took their wounded in the house of Enos, no doubt to save

them from further assaults from the Barabaigs. . , Eventually, apparently after the Wanyirombá had run away or barricaded themselves inside Enos's house,, the Barabaigs also left scene leaving the deceased still lying on the ground. Later, however, they returned and carried away the dead body of the deceased who had died at the scene, and took it to his house where police found it next morning.. . News of the fight reached the police who went to the scene - that same evening, and on information received, they arrested the accused and Hamisi, and took them and other injured persons to Iambi hospital. Next day police took the dead body to the hospital where Dr0 Namilikua (PW2) conducted a post-mortem examination on the body of the deceased. As a result of his examination P.W.2 observed the following injuries: (1) a 4" long but superficial wound on the left cheek and a fracture of the cheek bone; (2) a 4" long but superficial wound on the left cheek and a fracture of the cheek bone; (3) a 4" long but superficial wound on the left cheek and a fracture of the cheek bone; (4) a two-inch long wound on the left elbow; (5) superficial bruises on the left shoulder, left side of the back, the right scapula and left iliac crest. P.W.2 then pinned that the death of the deceased was due to cerebral haemorrhage as a result of severe head injury. He further opined that the fatal injury was that which was inflicted on the left side of the head above the ear, and that the above injuries were caused by one or more blows. In his final submission, Mr. Mbezi, learned counsel for the defence, submitted that although the killing took place in broad daylight, the surrounding circumstances suggest a reasonable possibility that P.1.1's view was obstructed and so could have made an honest mistake in his identification. S.S.3-Learned counsel submitted that if the court believed that P.1.1 did in fact see the accused strike the deceased on the head, it should hold that it is not certain who caused the fatal injuries, in which case the accused would only be guilty of assault, unless the prosecution proved common intention which, in his submission, the prosecution had failed to do. He went on to submit that if the court finds that it was the accused who inflicted the fatal injury, the killing must have been done in defence of P.W.3 or in defence of self. On the question of the evidence of P.W.1, Mr. Mchora, learned state attorney, submitted that P.W.1 had ample time and opportunity to see the accused because (1) the incident happened in broad daylight, (2) he knew the accused before, and (3) that the actual confrontation started after the deceased had

- (2) two punctured wounds on the left cheek and a fracture of the cheek bone; (3) a 4" long but superficial wound on the left cheek and a fracture of the cheek bone; (4) a two-inch long wound on the left elbow; (5) superficial bruises on the left shoulder, left side of the back, the right scapula and left iliac crest. P.W.2 then pinned that the death of the deceased was due to cerebral haemorrhage as a result of severe head injury. He further opined that the fatal injury was that which was inflicted on the left side of the head above the ear, and that the above injuries were caused by one or more blows. In his final submission, Mr. Mbezi, learned counsel for the defence, submitted that although the killing took place in broad daylight, the surrounding circumstances suggest a reasonable possibility that P.1.1's view was obstructed and so could have made an honest mistake in his identification. S.S.3-Learned counsel submitted that if the court believed that P.1.1 did in fact see the accused strike the deceased on the head, it should hold that it is not certain who caused the fatal injuries, in which case the accused would only be guilty of assault, unless the prosecution proved common intention which, in his submission, the prosecution had failed to do. He went on to submit that if the court finds that it was the accused who inflicted the fatal injury, the killing must have been done in defence of P.W.3 or in defence of self. On the question of the evidence of P.W.1, Mr. Mchora, learned state attorney, submitted that P.W.1 had ample time and opportunity to see the accused because (1) the incident happened in broad daylight, (2) he knew the accused before, and (3) that the actual confrontation started after the deceased had

struck P.W.3. On the question as to who inflicted the fatal injury, the learned state attorney invited the court to accept the evidence of P.W.1 on this point, which is supported by the evidence of the doctor, that the accused hit the deceased on the left side of the head above the left ear, and so hold that it is the accused who caused the fatal injury. He went on to submit that even if the court were to hold that it had not been proved as to who caused the fatal injury, from all the surrounding circumstances the court should hold that there was common intention. On the question of self-defence, learned state attorney submitted that self-defence did not arise because the accused did not do anything to avoid using violence, that it was not absolutely necessary for him to use violence in the circumstances, and that in any case, the force used and the nature of the weapon was not unreasonable. After my summing up to the gentlemen assessors, the first gentleman assessor found the accused not guilty of any offence because he was not satisfied that P.W.1 correctly identified the person who assaulted the deceased in view of the long distance from which he saw the fight and in view of the fact that there were many people. The second gentleman assessor, on the other hand, accepted the evidence of P.W.1 and found as a fact that it was the accused who killed the deceased, but that he did not do so deliberately. He then found the accused guilty of manslaughter. On the evidence, there can be no dispute that a person by the name of G/S/O Momoya is dead, and that he died a violent death. The only questions are as to who caused his death, and whether the killing amounted to murder, manslaughter, assault or no offence at all. As I told the gentlemen assessors, the prosecution's evidence as to who assaulted the deceased is that of a single witness - P.W.1. There are numerous authorities for the proposition that subject to well-known exceptions, a fact may be proved by the testimony of a single witness. However, where there is evidence of a single witness respecting identification, there is need to test such evidence with the greatest care: especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, direct or circumstantial, pointing to the guilt, from which a trial court can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error. I have seen and heard P.W.1 as he gave evidence, I am in no doubt at all that he is a truthful witness who described what he saw or what he honestly believed he saw. To that extent, therefore, I respectfully agree with the second gentleman assessor that P.W.1 was not in any way trying to frame the accused. That, however, does not resolve the question of correct identification. A person may quite innocently give an account of what he believes he saw, and yet be quite mistaken. The next question to be considered therefore, is whether P.W.1, although truthful, could reasonably have been mistaken in the circumstances that prevailed at the scene. It cannot be gainsaid that the incident happened in broad daylight, and P.W.1 knew the accused before. Indeed he is the accused's brother-in-law. The Republic further argued that P.W.1 must have correctly identified the accused and must have seen on which part the deceased's head the accused's blow landed because the fight broke out till after the deceased had struck P.W.3. Whether that is so or not can only be discovered from a close examination of the evidence of P.W.1 and P.W.3. To start with, P.W.1 and P.W.3 expressly said that there were very many people at

the scene and had started drinking since morning. The physical struggle for the pot was between the group and another, possibly all of whom were not sober by that hour. That struggle, therefore, could not have been a peaceful one. It is true that the fighting was sparked off by the assault on P.W.3 by the deceased. But is it safe to say that there of the sequence of events occurred in the manner in which P.W.1 described them? This is what P.W.1 said in examination - in-chief on this point: "Then I saw many people moving the pot from one place to another. Deceased was also present. When they were near the house, the woman, Ncimalul, was hit by the deceased, and she fell down. Then Philleor hit the deceased on the left side of the head. There were many people involved in the fight." In cross-examination on this point the witness said: "There were very many people. He invited 18. But many other people came. I cannot say the number. - 4 When the woman was hit I was about 49 paces away. The Vjanyiramba were injured after the woman was struck. They picked up sticks and started fighting right there. It was a battle between Wanyiraraba and Barabois. Others ran away. Those who did not run away took part in the fight." The witness added: "People were falling down there. It was ordinary dust, not like dust stirred by animals. As they used to move about I cannot know who hit I know Gadicia Joori. He was involved in the fight. I cannot say whom he hit or by whom he was hit. There was confusion." - 0 / -5- Further on in cross-examination this same witness said: "Between, us and where the woman and the deceased were, people used to move about as they fought at random, even as Phillemon hit the deceased. From the foregoing evidence of P.W.1 the picture that emerges is that there was commotion both before the actual fighting broke out as well as when the first or all fight started. To this evidence we must add the fact that P.W.1 was not at the spot where the fighting took place, but some 49 paces away with people moving about between him and the combatants, either in flight or as they fought with complete abandon. Can it be said, therefore that the circumstances were so favourable for a correct identification as to leave no room for the possibility of an error by P.W.1? In my considered view and on the evidence of P.W.1 alone, it would not be safe to hold that there was no reasonable possibility of error by the witness. The question that should now be considered is whether there, is other evidence, direct or circumstantial, pointing to guilt from which this court can reasonably conclude that the identification, although based on the testimony of P.W.1 alone, can safely be accepted as free from the possibility of error. On this point the Republic submitted that P.W.1's evidence that the accused struck the deceased on the left side of the head above the ear, and that P.W.3 was struck by the deceased on the left side of the head has been corroborated by the evidence of the doctor and P.W.3 respectively. With great respect, I find nothing in the doctor's evidence which suggests as to which injury was caused by the accused. All the serious injuries on the deceased were confined to the left side of the head. Since there is abundant evidence that Hantisi struck the deceased with a piece of wood, how is one to say that a particular injury was caused by the accused. And even if we were to say that P.W.1 correctly saw the part on which the blow landed, is it reasonable to say that that corroborates P.W.1's evidence that the accused is the one who struck the deceased? I am not persuaded that the evidence of P.W.3 or that of the doctor links the accused with the assault on the deceased. In all the circumstances, therefore, I am constrained to hold that it cannot

reasonably be said that there is any evidence, direct or circumstantial which corroborates the evidence of P.W.i. That being so, in view of my finding that it would not be safe to hold that there was no reasonable possibility of error by P.W.i, and since it is for the prosecution to prove its case beyond reasonable doubt, I hold, in agreement with the first gentleman assessor, that the evidence of identification is insufficient to prove that it is the accused who assaulted the deceased. On these grounds, I am of the opinion that the prosecution has failed to prove its case beyond reasonable doubt beyond reasonable doubt against the accused. I therefore find the accused not guilty, and I duly acquit him forthwith. The accused must be released from custody forthwith unless otherwise lawfully detained. 1 B.D.

CHIPETA JUDGE Delivered in open court at Singida this 27th day of October, 1977. 7, - BD'-

i]PETA - JUDGE

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