

TANZANIA / JUDGMENT

republic vs abdillah abdallah muya 2014 tzhc 2238 20 june 2014

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IN THE HIGH COURT OF TANZANIA i AT KOROGWE CRIMINAL SESSION CASE NO. 11 OF 2013
REPUBLIC VERSUS ABDILLAH ABDALLAH @ MUYA 4 I »

JUDGMENT

^ . j • U. MSUYA. J. Abdillah Abdallah •@, *-Muya is accused of murdering Herbert Merijori contrary to section 196 of the Penal Code [Cap.16 R. E. 2002]. As alleged, the incident happened on the 1st day of October, •% 2008 at Kabuku 3 area within Handeni District and in Tanga Region where the accused was watching video in pombe shop owned by Geoffrey Moshi. The accused denied the charge. The prosecution called six witnesses and produced two exhibits to prove the charge. Briefly, these witnesses testified that on the material day, Ombeni Mbenea [PW1], a security guard and generator technician at Geoffrey Moshi's pombe shop and Honorina Geoffrey [PW2], a wife of Geoffrey Moshi were at the pombe shop offering services to various customers. That while the accused was getting in the pombe shop and the deceased going out, accidentally the deceased stepped on .the foot of the accused. The deceased asked for pardon but the accused refused. A fig h t' arose. PW1 intervened and asked them to get out of the compound. Both the accused and the deceased left the place. After 10 minutes the witnesses heard a whistle and shouts. The whistle was made by Isack Moshi [PW3], the father of Geoffrey Moshi f ^ t who has a residential house near by .the pombe shop. In his testimony, Isack Moshi confirmed the incident and ■s - i c - ^ adduced that on the material day around 8.30 pm he was in his house sleeping, he heard a brawl noise outside of his house and woke up. He went outside of his house and with the aid of a torch light, he saw the accused and the deceased fighting. The witness whistled to ask for help. PW3 added that he heard the deceased " complaining that the accused stabbed him with a knife. This made PW3 who was too old to whistle again. It was further adduced that when the deceased was stabbed he fell down, woke up and tried to chase the accused and after about 5 steps he' fell down again. People gathered to assist him. They found a lot of blood coming out of the deceased's stomach and his small intestine had already protruded out. PW4 Pantaleo Jerome, a brother of the deceased was called, found the deceased lying down and he assisted to trap the intestine of the deceased with a khanga.1 The deceased was carried in bed and taken to Kabuku police station. •PW6- E. 2571 DCLP Evarist, a police officer from Kabuku police station was on duty f and received the deceased. He recorded his statement, issued a PF3 to the deceased and

directed PW4 and other people to take the deceased to Magunga Hospital for treatment. PW5- Gasper w y Kundeni Kasingo, a doctor from Magunga Hospital was on duty received the patient and tried to save his life but in the following day [i.e 02.10.2008] the patient died. PW5 performed post mortem examination and found that the cause of death was imbalance of minerals and water. The post mortem examination report, was I- produced and admitted as exhibit P I. Following the death of the deceased, PW6- E. 2574 DCPL Evarist, investigated the matter, went to the scene of crime and drew a sketch map which he produced as exhibit P2. PW6 testified further that after the commission of the --Offence, the accused disappeared and he was arrested on 26.08.2012, four years after the incident. The witness interrogated him, charged and arraigned the accused in court to answer the charge of murder. In his affirmed defence, the accused adduced similar evidence to that of prosecution. He testified further that, he killed the deceased in the course of self defence. Finally, he accused i testified that he did not maliciously kill the deceased. Against that background the only issue which is in dispute and which should be determined by this court is as to whether the accused maliciously killed the deceased. 3 In addressing the issue in final submissions Mr. Mfinanga and Mr. Magumbo both Learned State Attorneys contended that the accused killed the deceased maliciously. In supporting this position, the Learned State Attorneys pointed out that the accused person stabbed vulnerable part of the body of the deceased i.e stomach and cited the case of Maulid Hassan V. R. [1994] T. L R. 143 to the effect that the accused's act of stabbing the deceased on his t^ t vulnerable part indicates that the accused had malice aforethought to kill the deceased. 7 i" ■%- j • # Two, that the nature of the weapon used to inflict wounds on the body of the deceased was a lethal weapon i.e knife which demonstrates that the accused had intended to kill the deceased and he also caused a serious wound on the body of the deceased. They supported this stance by referring this court to the case of Jamhuri V. Mohamed Nichte [1994] T. L R. 76 where it was held that "by using a lethal weapon such as a knife the accused may be presumed to have formed an intention to kill or cause grievous harm. Three, that the accused's conduct was not positive from when the deceased was apologetic but the accused wanted to fight. Four that the accused person escaped after he committed the offence and he was arrested after four years. The Learned State Attorney pointed out further that in view of the provisions of section 200 o.f the Penal Code [supra] and the case of Saidi Ally Matola @ Chumula V. R. Criminal Appeal No. 129 of 2005 [unreported] the t• 4 above listed factors demonstrate that the accused killed the deceased maliciously. >•

- Finally, they urged the court to ground a conviction of murder against the accused person. In rebuttal, Mr. Akaro Learned Counsel for t.he accused pointed out that the evidence demonstrates, that the incident happened while the deceased tind accused person was fighting. In that regard, the Learned Counsel stated that the offence is not murder but manslaughter. Mr. Akaro. supported his. position by referring this court to the decision in the case of Moses Mangasian Laizer@ Chichi V. R. [1994] L L R. 222 to -the effect that where death occurs as a je su lt of a fight the accused should be found guilty of a lesser offence of manslaughter and not murder. The Learned Counsel also pointed out that the nature or issue .of weapon used in this case is immaterial and in that regard, he stated that the case of Said Matola [supra] cited by State Attorneys is distinguishable. The Learned Counsel

contended that the 'accused escaped because he was afraid of the seriousness of the offence. Finally, the Learned Counsel urged the court to find the accused guilty of manslaughter on account that the accused stabbed the deceased once, ran away and the incident happened in the course of fight. This case was tried with the aid of three assessors, namely: Ms. Sauda Munga, Mr. Julius Mbelwa and Mr. Ibrahim Mohamed. They unanimously opined that the accused is responsible for the offence of murder on the reasons that the deceased asked for pardon but the accused refused, persisted with a fight and that he fled away without reporting the incident to relevant authorities. As indicated earlier, the issue for determination in this case is whether the accused killed the deceased maliciously. In this case both the evidence of the prosecution and the defence, the case indicate that the incident started when the accused was getting in the pombe shop and the deceased going out. It is a common ground that the deceased accidentally stepped on the foot of the accused. It is also a common ground that prior to this incident there was not any quarrel between the deceased and the accused. It is also clearly brought from the prosecution case and the defence that the incident happened when the deceased was fighting with the accused. That is to say, it was in the course of fighting when the accused used a knife and inflicted a wound on the stomach of the deceased. Now, it has been said times without number that where death is caused as a result of a fight an accused person should be found guilty of lesser offence of manslaughter and not murder. One of the authorities of which the Court of Appeal reiterated this principle and in which the accused used a knife to stab the deceased is the case of *Moses Mungasiani Laizer Alias Chichi V. R. v*

[1994] T. L R. 222. Basing on that principle, it is immaterial as to whether the accused used a knife and sparked the fight. Further to 6 that, the fact that the accused ran away after the commission of offence is also immaterial. This is because in the case of *R. V. John Wimaana* [1968] HCp 49 death resulted from a fight, the accused persons inflicted serious injury on the head of the deceased, ran away and left the deceased unconscious. i Despite of this fact, still the accused persons were held responsible for manslaughter and not murder. In this case, it is 4 therefore immaterial that the accused run away and did not report the incident to relevant authorities. Moreover, there is no exceptional circumstances' in this case which attracts a verdict of murder. The accused had not planned to kill the deceased. Therefore, the accused did not kill the deceased maliciously. For that matter, I defer with assessors who opined that the accused maliciously killed the deceased. • From the above analysis, I find the accused guilty of a lesser offence of manslaughter contrary to section 195 of the Penal Code [Cap. 16. R. E. 2002], and he is accordingly convicted. 7 State Attorney: We have no records previous convictions. Sgd: U. MSUYA, J. 20/6/2014 MITIGATION BY MR. AKARO FOR ACCUSED: The accused is 'a first offender. He admitted to kill the deceased. As the accused stated in his defence the deceased is the one who attacked him so he contributed to his death. The accused has been in remand for 20 years so he has served part of the Sentence. I pray for leniency. U. MSUYA, J. 20/6/2014 Sentence: I have considered that the accused is a first offender. The period spent in prison which attracts leniency, despite that considering the conduct of the

accused of running away after the incidence to such an extent that he had/to be arrested after 4 years and the seriousness of injury inflicted upon the deceased and the nature of the weapon used that is the. knife the accused is sentenced to a deterrent punishment to be a lesson to himself and other wrong doors. Therefore the accused is sentenced to twelve

- (12) years imprisonment Right of Appeal is explained. U. MSUYA, J. 20/6/2014 Order: Judgment is delivered on the 20th day of June 2014 in the presence of the Learned State Attorney Mr. Mfinanga and Mr. Akaro Learned Advoc'dte:for. fhe Accuse^and the accused. • ':

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