

TANZANIA / JUDGMENT

ally abdallah kawai vs republic

2016 tzca 699 29 august 2016

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29 August 2016

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IN THE COURT OF APPEAL OF TANZANIA AT MTWARA fCORAM: KIMARO. J.A.. KAI3AGE. J.A..
And LILA, J.A.^ CRIMINAL APPEAL NO.159 OF 2016 ALLY ABDALLAH
KAVAI..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT (Appeal from the
judgment of the High Court of Tanzania sitting at Lindi) (Mzuna. dated the 16th day of October,
2015 in Criminal Session No. 11 of 2014 JUDGMENT OF THE COURT 22nd & 29th July, 2016
KIMARO, 3.A.: The appellant was on 29th of June 2015 arraigned for the offence of murder in the
High Court of Tanzania at Mtwara. He was alleged to have intentionally caused the death of
Hamidu Limbandike, on 2nd November, 2012 at Kililima Village, within Kilwa District in Lindi
Region, an offence which the appellant denied to have committed. When the preliminary hearing
of the case was conducted on 29th June 2015, the appellant did not dispute causing the death of
the deceased. He stated that he killed in self defence. All the parties present in court on that day
when the preliminary hearing was conducted, signed the memorandum. Those in attendance in
court on that day were the appellant himself, Mr. Moses Mkapa, his defence counsel, Mr.
Abdulrahman Mohamed, learned State Attorney who represented the Respondent /Republic and
the presiding learned judge, Mr. F.A. Twaib. What the appellant agreed is that: "/£ is true that I
killed Abdallah Kawai. la m a resident o f Kililim a, Mingumbi. I am now 40 years o f age, Mngindo
by tribe and a muslim. I attacked Hamindu Lim bandike in self- defence. He was the first to
attack me. Signature o f the accused: Sgd RHT Signature o f Defence Counsel: Sgd Signature o f
State Attorn ey: Sgd " Signed F.A. Twaib, Judge 29/6/2015." Thereafter, the case proceeded to full
trial and the appellant was convicted of the offence of murder and sentenced to death by
hanging. The evidence produced during the trial was that Mariam Hamidu Limbandike (PW2) the
prosecution key witness was once a girlfriend of the appellant. In their relationship with the
appellant they were blessed with a child called Ally Abdallah Kawai. During their relationship, the
appellant was cohabiting with the appellant at the house of her father Hamidu s/o of Limbandike
(now the deceased, the victim of the charges facing the appellant). Somehow, a
misunderstanding occurred between the appellant and PW2 because he refused to marry her.
The appellant was forced to move out of the deceased's house. Although he agreed to support
PW2 by supplying maintenance to the child, he did that for a while and then stopped that
provision. Further testimony of PW2 in the trial was that she got another person to marry her,

and the arrangements for the wedding was planned for the Sunday that followed the Thursday when the incident of the death of the deceased occurred. On that Thursday, when PW2 was sleeping in her room with her child at about 1.00 a.m., she heard a "pangd" being pushed on the door which was made of "makuti". When she asked what was the matter, she was slashed with the "pangs" on her face. Then a struggle occurred between the two. PW2 was struggling to take the "pangs" from the appellant. Unfortunately, and that is according to PW2, she held the sharpened edge and it cut her thumb. They both fell down. This time it was for the second time and the appellant threatened to kill PW2. It was then when PW2 called her father who was sleeping in the same house but in another room and informed him that the appellant was there with a "panga". Her father, the deceased, responded to the call by her daughter. Because of an accident which he suffered earlier, he used to use limping sticks in walking. PW2 said as her father went to the scene, the appellant left her and went to cut the deceased with the "pangs" on the head and he, the deceased, fell down. Although the appellant tried to run away, PW2 said she ran after him and held him firmly. They went outside and they fell down again. The deceased was able to stand up and went to assist his daughter to prevent the appellant from running away. He sat on the appellant's legs while PW2 sat on his chest. PW2 raised an alarm and other persons went to the scene of crime. These included Zainabu Saidi Limbakile (PW3) the sister of the deceased. Her testimony was that upon her arrival at the scene of crime she found both the deceased and PW2 bleeding profusely while the appellant was held down by the two. PW3 raised an alarm and other persons responded to the alarm as well. Among those who responded to the alarm and testified in the trial were Saidi Mohamed Mchumgu (PW 1) and Saidi Mohamed Chenga (PW4). Both witnesses corroborated the evidence of PW3 on what they found at the scene of crime. Both said PW2 and the deceased held the appellant on the ground and the deceased and PW2 had cut wounds and were bleeding profusely. The deceased was taken to hospital but the situation did not work in favour of him. He miserably lost his life. The post mortem examination report which was admitted in court without any objection from the defence side during the preliminary hearing was exhibit PI. It shows that death of the deceased occurred because of the severe head injury which damaged his brain. The witnesses who went to the scene of crime tied the appellant and took those who sustained injuries to hospital for treatment. Because the deceased died, the appellant was charged with the offence of murder. In his defence, the appellant maintained his defence of self defence. He corroborated the evidence of PW2 on their friendship and the child that was born out of that relationship and that he was staying with PW2 at the deceased's house. He confirmed the evidence of PW2 that he had to leave the house of the deceased after the deceased had scolded him for being of little assistance in maintaining the child. Accounting for what took place on the date of the incident, the appellant said on the date of the commission of the offence he was called to the house of the deceased by PW2 and informed that the child was sick. His response was that since the matter had been reported by PW2 and his father to the Village Office they should follow the same procedure in making a follow up of the maintenance. While he was in exchange of words with PW2, the deceased appeared and told him that it was customary for those who come, to have an undesired sex with their children and refuse to supply maintenance. He then threatened to harm him so that he can sustain a scar which for him (the appellant) will be something to tell his relatives. It was then when the deceased inflicted injuries

on him by using an identified weapon. He said two bones were removed from his skull. It was in retaliation that the appellant hit the deceased on the skull. As the deceased tried to hit the appellant again, he held his hand and he saw that the deceased had a "p a n g a f". They struggled and they fell down. From there what continued was a struggle between the appellant, PW2 and the deceased for the possession of the "p a n g s". The appellant said he cannot remember how he cut PW2 and the deceased with the "pangs". According to the appellant he gained consciousness after he was taken to the Street Chairman. He (the appellant) found himself tied with a rope on both hands and the legs. The appellant made a caution statement and extra judicial statement. They were admitted in court as exhibits D2 and D1 respectively. In both statements the appellant did not dispute commission of the offence and he reiterated the defence of self defence. After the evaluation of the evidence for the prosecution and the defence the learned trial judge was satisfied that the offence of murder against the appellant was proved by the prosecution beyond reasonable doubt. The defence of self- defence by the appellant though considered, was found to be of less value compared to the prosecution evidence. The finding made by the learned trial judge was that: "Though the accused say he never knew where he hit the deceased and PW2 due to darkness however, there could not have similar scenario for PW2 and the deceased to have cut wounds both at the head. He must have intended to do grievous harm or death which are the factors proving the existence of malice aforethought" In arriving at the above finding, the learned trial judge also considered the motive for the appellant cutting the deceased. He was of the considered opinion that he had formed malice aforethought because of the sour relationship that was in existence between the two, after the appellant had made PW2 pregnant and failed to marry her or provide maintenance to the child Ally who was born out of that relationship of PW2 and the appellant. The appellant was aggrieved by the conviction and the sentence and filed this appeal which has nine grounds filed by the appellant himself and two supplementary grounds of appeal filed by the advocate assigned to defend him. At the hearing of the appeal the appellant was represented by Mr. Moses Mkapa, learned advocate and the respondent by Mr. Kauli George Makasi, learned State Attorney. Although the learned advocate for the appellant adopted the grounds of appeal filed by the appellant personally, he proceeded with the appeal on the supplementary memorandum of appeal he filed. He abandoned the second ground and relied only on the first ground of appeal. The ground says: "That the Honorable trial judge erred in law and fact by convicting the appellant with out taking into consideration the appellant's material defence of 'self defence'" In making a submission in favour of the ground of appeal, the learned advocate for the appellant said that the defence of self defence is available to an accused person in the Penal Code. The provisions read: "Section 18B(1) In exercising the right of self defence or in defence of another or property, a person shall be entitled to use only such reasonable force as may be necessary for that defence." "Section 18B(3) Any person who causes the death of another person as a result of excessive force in defence, shall be guilty of manslaughter." The learned advocate said there is no dispute that the deceased died out of wounds inflicted on his body by the appellant. This evidence is found in the accused person's own evidence, and the caution and the extrajudicial statement he made to the Police and the Justice of Peace respectively. He said throughout the appellant maintained that it was the deceased who first abused him claiming that he made PW2 pregnant but he failed

to maintain the child born out of that pregnancy. The deceased was also the first one to cut the appellant with the "pangaf". It was in self defence that the appellant cut the deceased with the "pangaf" in return, the injuries which led to the death of the deceased. He said the appellant informed the court about the defence of self defence when the preliminary hearing was conducted as indicated in the matters not disputed, and which the prosecution also agreed to by signing the memorandum of matters not in dispute. The learned advocate argued further that in evaluating the evidence the learned trial judge did not give the defence of self defence the weight that it deserved. He said reading from the judgment of the trial court, it is apparent that the learned judge found himself in a lot of doubts in as far as the prosecution evidence and the defence of self defence, was concerned, and he sincerely believed that the appellant was a victim of circumstances. The learned advocate wondered why, after the learned judge found himself in such doubts he ended up in saying that the appellant used excessive force in causing the injuries to the deceased. He said the evidence was supported by the matters not in dispute and the defence of the appellant supported his defence of self defence. It was therefore wrong, said the learned advocate, to convict the appellant with the offence of murder. There was no justifiable reason for the learned judge to believe the evidence of PW2 that she was injured by the appellant and in the process of struggling for the "pangaf" between the appellant, PW2 and the deceased and disbelieve the appellant while the appellant showed the scar which resulted from the injuries that were inflicted on him by the deceased. As regards the health status of the deceased, the learned advocate faulted the learned trial judge for failing to appreciate the evidence of the appellant that he too, suffered injuries which were proved by the scar he showed to the trial court. His failure to produce a PF3, lamented the learned advocate, was not a reason for not giving the defence of the appellant the weight it deserved because he believed the evidence of PW2 much as she did not produce a PF3 to substantiate the injuries she suffered. After all, said the learned advocate, it was not his fault that he failed to produce the PF3. It was the Police who had the obligation to give him a PF3 but they refused to give him one. The learned advocate went on to submit that the defence of self defence is accepted only when there is proof that the deceased was the one who started to injure the appellant. He said that evidence is there. The appellant testified that it was the deceased who was the first to cut him 11 before he retaliated in cutting the deceased and his (the appellant's) aim was to protect himself. At the preliminary hearing the appellant admitted injuring the deceased but in self defence. The prosecution accepted it. The defence was repeated in the defence of the appellant and it is reflected in both exhibits D1 and DW2. The way the evidence of the prosecution witnesses was assessed as compared to that of defence, submitted the learned advocate, was a clear manifestation of double standards in the assessment of the evidence and it was a discrimination on the part of the appellant. He cited to the Court the cases of Daudi Sabaya V Republic

[1995] T.L.R. 148, Nicco Peter alias Rasta V Republic [2006] T.L.R. 84, Bukuluku Ndoma v Republic [1981] T.L.R. 53 and Mathayo Mwalimu & Masai Rengwa v Republic Criminal Appeal No. 147 (unreported) to support his submission. He prayed that the appeal be allowed, the conviction for murder and the sentence of death by hanging be quashed and set aside and be substituted by a conviction for the offence of manslaughter and

punishment be meted out accordingly. In reply the learned State Attorney was adamant that the conviction for murder and the sentence of death by hanging which the trial court imposed on the appellant was appropriate. He reluctantly changed his mind after the Court brought to his attention the matters which were agreed upon by the appellant and signed by all the parties present in court at the time of preliminary hearing. It was then he accepted that the appellant should have been convicted with the offence of manslaughter. Coming to the determination of the appeal, as we have already said, there is no dispute that the cause of the death of Hamidu s/o Limbandike was the injuries that he suffered from the cut wounds which were inflicted on him by the appellant. The issue before the Court is whether under the circumstances in which the appellant cut the deceased he was supposed to be convicted with murder or manslaughter? The learned trial Judge said, rightly in our view, that eye witnesses to the circumstances under which the cut wounds were inflicted on the deceased were PW2 and the appellant. From the evidence that was given by the prosecution witnesses and the appellant in his defence the deceased met his death in a quarrel that occurred between PW2 and the appellant. Apart from the evidence of PW2, who was the only eye witness for the prosecution, the rest of the prosecution witnesses testified to have found the appellant being held on the ground by PW2 and the deceased, and PW2 and 13 the deceased were bleeding profusely. The appellant from the period of his arrest to conviction said he killed the deceased in self defence. In determining the issue of the defence of self defence of the appellant, we hold the view that, and with due respect to the learned trial judge, he failed to solely confine himself to that evidence that was available to him. At page 76 of the record of appeal he said, and he was quite right, that the evidence that was available to him in determining the issue was that of PW2 and the appellant. However, the learned trial judge did not do so. At page 84 of the record of appeal the learned trial judge made the following observation: "Now I go to the raised self defence ...In this case DW1 said he was attacked by the deceased with a "panga" and that there was a struggle between PW2, the deceased and the accused to retain the "panga" and that he managed to grab it and since it was dark he attacked them back without knowing where he was cutting them. However as PW2 said the accused was the first to attack them not that he was defending himself. The defence could not therefore stand as his shield. Though the law allows court to consider the facts as the accused believes them to exist at the material time, however this version is quite untrue...The aim is to satisfy myself if the prosecution has proved the charge to the required standard of proof...it is true the accused was consistent both to the police and the justice of peace that he acted in self defence. This has adversely affected the court during the preliminary hearing (with due respect) where it shows the issue of self defence was among the undisputed facts. This however does not always mean what he says must be what happened on the scene ...Although the prosecution said he was not hurt, however the explanation given suggests he was also the victim of the incident. I have also considered the possibility that since the wedding was on Sunday and the incident occurred on Thursday the witness (PW2) and the deceased sensed danger. From the accused that he might cause havoc on the wedding day

because PW2 said he used to go to their neighbour and insulted her. This however was ruled out because PW2 said he was not aware of the intended wedding. Another point I have considered is that if the accused had intended to do harm he could have done so and run away. However the target was the deceased whom they were not in good terms as the accused never greeted him even when he went there." [Emphasis is ours]. What guides the trial courts in determining the issues brought before them is neither the sentiments of the trial magistrates or judges nor speculations. We reiterate that it is the evidence which must always be assessed well and fairly in compliance with the relevant law. In this case, the issue of self defence of the appellant was determined by the learned trial judge on sentiments and speculation instead of confining himself to the guiding principles. In the case of Ngassa Kapuli @ Sengerema V Republic, Criminal Appeal No. 160"B" of 2014 (unreported) we held that: 16 "The right to a fair trial is an essential component to the rule of law...As a minimum the right to fair trial includes:-

- 1) The right to be heard by a competent impartial tribunal.
- 2) The right to public hearing.
- 3) The right to be heard within a reasonable time.
- 4) The right to counsel
- 5) The right to interpretation." In this case the parties agreed in the preliminary hearing that the appellant killed in self defence. If the prosecution intended to dispute that the appellant did not kill the deceased in self defence, they should have told the trial court so when the preliminary hearing was conducted. They should not have waited until the trial started and then claim otherwise than what they had agreed upon. It was therefore wrong for the learned trial judge to give the remark that by the parties agreeing that the appellant killed in self defence the court was adversely affected. The trial court is always neutral and it has to retain its neutrality all the time. That remark was his sentiments 17 and they impaired the principle of impartiality of the trial judge. The judge should not at any time have any interest in the matters they preside over. Their role is to do justice to both sides. It is therefore important to retain that impartiality from the start of the trial to the conclusion of the same. Another aspect of speculation manifest in the trial is at page 79 of the record of appeal. The learned judge in considering the injuries inflicted on the deceased and the one suffered by the appellant said: "There is a difference in the manner of their wounds. PW 2's wounds show the front parts while the deceased's scar is at the middle at the side of the head. The cut wound is not straight as opposed to PW 2's wounds which no doubt were inflicted by a "panga". Though the accused says he was hurt by the deceased when he was not facing him, I believe possibly he was hurt by the deceased after he had inflicted a fatal blow to the deceased and when he had fallen down and overpowered. I say so because the accused admitted PW2 is shorter than him. The 18 deceased whom he said was taller than him fell down after he slashed him with a panga." The remarks made by the learned judge on how the appellant sustained injuries was his speculation. In his defence the appellant said it was the

deceased who started to cut him. PW2 said the appellant left her and cut the deceased when he arrived at the scene after PW2 had called him and told him that the appellant was there with a 'pangd'. The learned judge should have focused on the evidence of the two witnesses and make his finding on their evidence and not to speculate on what could have happened. Moreover, at the time he was assessing the extent of injuries suffered by the trio, that is the deceased, the appellant and PW2, he had no opportunity to physically see the wounds which the appellant caused on the deceased. His consideration of the wounds the deceased suffered should have been guided by the post mortem examination report (exhibit PI). There is no evidence on record on source of light at the time of the commission of the offence. That is one. Second, in making a comparison between the evidence of PW2 and the defence of the appellant, the learned trial judge believed the evidence of PW2 and disbelieved the defence of the appellant. It was important for him to give reasons. It was important because he also expressed doubts on prosecution evidence on whether the 'panga' that caused the injuries to the deceased and PW2 belonged to the deceased or the appellant and whether the deceased, given his health condition, could hold a 'panga'. He did so when considering the defence of provocation that the appellant raised. At Page 78 the learned trial judge made the following remarks: "The evidence of PW2 again shows that her father responded after calling him baba She then told him Mr. Kawai has come with a panga. That evidence alone shows the accused went there armed. Though even PW2 admits never saw the accused before owning that panga during their marriage however that does not negate the possibility that he could have gone there armed. It is no wonder when PW2 said that the accused person had a tendency of going there drunk and utter abusive language but always unarmed. No one can judge the intention of the guilty mind... It is true it can be argued that it was night time without any source of light as indeed PW2 said, however she concluded he had a 'panga' after she was slashed with it. The argument by the accused that it was the deceased who came with the 'panga' is unassailed because even before the deceased had come to her rescue, PW2 had already been cut with a 'panga' by the accused on several parts of her body. There is no reason why PW2 could manufacture a story against the accused whom they happened to get a child together 'baba m toto'... I cannot base my finding on the prosecution argument that the 'panga' belonged to the accused person by a simple reason that the deceased by being lame was incapable of holding the said 'panga'. Or the accused's argument that since the deceased though lame used to cultivate and cut trees and therefore he was capable of holding a 'panga' and on that day did hold a 'panga'. To rule for or against will be a mere speculation. To say whether he could hold it or not is a non issue." The learned trial judge showed that the offence was committed at night. There was no evidence to amplify on the source of light. He doubted the version of the evidence that was given on who was the owner of the 'panga'. He admitted that the appellant too suffered injuries during the commission of the offence. In criminal trials, the general rule is that it is the prosecution and not the accused, except for exceptional cases, who has the burden of proving the case against an accused person. The cases of Joseph John Makune v Republic [1986] T.L.R. at page 49, Mohamed Saidi Mtula v Republic [1995] T.L.R. 3 and Antony Mutafulungwa v Republic Criminal Appeal No. 267 of 2010

(Unreported) are some of such authorities. Where there is doubt, it is always resolved in favour of the accused person. That principle apart, in this case the defence of self defence was raised and accepted by the prosecution itself. The learned trial judge ought to have convicted the appellant with the offence of manslaughter and not murder. In the case of *Sabaya v Republic supra*, the appellant was a watchman of a "shamba". He found a thief in the "shamba". After he had chased him for a while the thief turned against him holding a knife. The appellant inflicted serious cut wounds on him and he subsequently died. His conviction for murder was set aside. The Court held that: 22 " The appellant used greater force than necessary in the circumstances; he should have been found guilty of manslaughter." A comparative circumstance where the defence of self defence cannot be availed to an accused person was given in the case of *Nico Peter alias Rasta V Republic (supra)*. In that case the evidence did not show that when the appellant stabbed the deceased, he was repelling an actual attack from the deceased. The facts are distinguishable from this case and the case of *Sabaya supra*. In *Bukulukulu Ndomba v. Republic (supra)* the Court in stating the circumstances under which the defence can be raised by an accused person said: "where self defence is pleaded, the conduct which induces the fatal blow injury must have come from the deceased and not from some third person." This Court being the first appellate Court, we have given due consideration to the evidence adduced in court during the trial. We are satisfied as argued by the learned advocate for the appellant and conceded to by the learned State Attorney that the appellant ought to have been convicted with the offence of manslaughter and not murder. Consequently, we allow the appeal, set aside the conviction for murder, and substitute it with the conviction for the offence of manslaughter under section 195(1) of the Penal Code. We also set aside the sentence of death by hanging. Considering that the offence was committed on 2nd November, 2012 and the appellant has been in remand since then, we impose on the appellant a sentence of five years imprisonment. DATED at MTWARA this 28th day of July, 2016. N.P. KIMARO JUSTICE OF APPEAL \ \ S.S. KAIJAGE 5 % i z|| JUSTICE OF APPEAL I N I ----- S.A. LILA JUSTICE OF APPEAL I certify that this is a true copy of the original. COURT OF APPEAL i' 24 4*

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Prepared on 12 October 2026 · Esheria