

TANZANIA / JUDGMENT

20110727 TZCA Mbeya

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27 July 2011

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IN THE COURT OF APPEAL OF TANZANIA . -ro Tr r.J oNGS ,. AT MBEYA 1:1-ns -s<?:'"K :;\;{~
couKr 1 U/ """) o. ~ NO I (CORAM: MBAROUK, I.A. MASSATI, I.A., And ORIYO;J!i?A.);:~v,A.1, oF
TAN,,,,,, CRIMINAL APPEAL NO. 119 OF 201Q ,ti DAUDI PAPIAS
@SABUNI APPELLANT ·vERSUS I ! THE
REPUBLIC RESPONDENT (Appeal from the judgment/decision of
the High Court of Tanzania at Sumbawanga) (Kihio, I.) Dated this 11th day of December, 2009 In
Criminal Sessions Case No. 25/2007 JUDGMENT OF THE COURT Date 23 & 29 June, 2011
MBAROUK, I.A.: The appellant, Daudi Papias @ Sabuni appeared before the High Court of
Tanzania sitting at Sumbawanga (Kihio, J.) where he was charged with the offence of murder
contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. He was found guilty as charged and
sent~nced 'i to death by hanging. Believing that he was wrongly convicted the appellant has
preferred this appeal. The summary of the evidence that led to the appellant being convicted of
murder is as follows. On the ih day of February, 2008 at Kilida Village Mpimbwe, within the
District of Mpanda, in Rukwa Region, 1 ,y the appellant murdered Maria d/o Msele. Papias s/o
Sabuni. (PW6) testified to the effect that, he resided at Kilida with his family with two children
and two wives. He said one of his wives Maria d/o Msele is now dead, and his second wife was
Valalia Lemi who is the mother of the appellant. PW 6 added that, he was in good terms with his
two children, Sekisi Sabuni and Gravin Sabuni, but not the appellant. He further stated that the
appellant came to his house three days before 7.2.2006 to greet him. On 7.2.2006, PW6 saw the
appellant leaving the house and went to the village centre. At 22.00 hours, the appellant returned
and forced open the door of the house, entered inside and pulled out Maria d/o Msela (PW6's wife
who is now deceased). PW6 followed the appellant outside where he saw the appellant hit Maria
d/o Msele (the deceased) on the head three times using a small club (Exhibit P4). The appellant
further kicked the deceased and when PW6 tried to help his wife, he was kicked too and fell
down. PW 6 said, the small club (Exhibit P4) used by the appellant in hiting the deceased was tied
with a string of beads and a rubber. The club contained blood drops. Thereafter, PW6 told the
trial . court that, the deceased managed to run away leaving the appellant behind shouting that,
he (PW6) was living with a witch who bewitched his children. The appellant was later arrested by
the ten cell leader Fedast 2 :ie s/o Nkana (PW1), the Village Executive Officer (V.E.O), Hamisi Saidi
Mayunga (PW3) and two militiamen and sent to PW3's office. The deceased who sustained
injuries, died before reaching Mamba hospital where she was sent by two militiamen. Thereafter,
the appellant was sent to Usevya Police Post and then to Mpanda Police Station where he was

accordingly charged. In his defence, the appellant set the defence of insanity and intoxication. He claimed that while at Kilida village, on 7-2-2006 at 5:00 p.m. his father's neighbours invited him to a pombe shop at the village centre. He said, he drank "komoni" local brew mixed with "gongo" alcohol without his knowledge. He contended that he did not remember the time he reached at his father's house, because he was already drunk. He claimed not to be aware of what happened thereafter, until he found himself in Mpanda Police Station lock up where he was informed that he killed his step mother. After a period of two years, he said he was sent to Isanga Mental Institution on 5-1-2008 where the doctor asked him whether he had the habit of drinking alcohol and smoking bhang. While at Isanga Institution, the appellant said he was mentally fit, having stopped smoking bhang. He categorically denied to have killed his 3 - :). deceased step mother because she bewitched his children, as he was in good terms with her. At the hearing, Mr. Victor Mkumbe, learned advocate appeared for the appellant, whereas Mr. Tumaini Kweka, learned State Attorney represented the respondent Republic. I Two grounds of appeal were preferred by the appellant, namely:-

- (1) That the trial court erred in law and fact in holding that, the cause of death was as per the Post Mortem Report which was irregularly admitted in evidence contrary to section 192 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002.
- (2) That the trial court erred in law and fact in holding that the appellant was sane at the material time in the absence of sufficient evidence to that effect, and, in particular, the medical Report from the Isanga Mental Institution. 4 Mr. Mkumbe, through his written submissions filed earlier in terms of Rule 74 (1) of the Court of Appeal Rules, 2009 submitted on the first ground of appeal to the effect that both the Post Mortem Report as well as the PF3 were irregularly received in evidence. In essence, Mr. Mkumbe submitted that both exhibits were admitted when the learned State Attorney was still recounting the facts - of the case at the stage of the preliminary hearing and before the memorandum of agreed facts had been agreed and signed contrary to the provisions of section 192(4) of the Criminal Procedure Act, Cap 20 R.E. 2002. Mr. Mkumbe further submitted that, the said two exhibits were to be admitted after the memorandum of undisputed facts had been prepared and signed. He then urged us to expunge from the record the two exhibits. In support of his argument, he cited to us the decision of this Court in Yassin Thomas Nyumayo v. Republic, Criminal Appeal No. 63 of 2008 (unreported). Secondly, on the ground concerning the question of sanity or drunkenness of the appellant, Mr. Mkumbe submitted that a report from Isanga Mental Institution is not listed in section 59 of the Evidence Act, 5 \, Cap 6 of R.E 2002 as one of the facts to which the court is obliged to take judicial notice of. He further submitted that, before the court disagrees with any medical report, it must have had a chance to see, peruse and determine on any such report. But in this case, the trial court was not availed with the chance to see and peruse the medical report. Mr. Mkumbe was of the view that, for those two glaring procedural irregularities, the trial court wrongly convicted the appellant of the offence of murder. He thus prayed for this appeal to be allowed, the conviction quashed and sentence set aside leading the appellant to be set at liberty unless detained in another case. On his part, Mr. Kweka from the outset submitted that the

respondent did not support the appeal. In arguing the grounds of appeal, he said, in this case the record is silent on whether the memorandum of the matters agreed and facts in the post-mortem report were read over and explained to the appellant in compliance with section 192 (3). However Mr. Kweka submitted that the record shows at page 8 after the memorandum of matters which are not in dispute had been framed, both the appellant/accused and his advocate signed to acknowledge that they were correct. For that reason, he said, that implies that they had agreed. 6 ·" He then tried so distinguish the case of Yassin Thomas Nyumayo v. R, (supra) from this case. Apart from what he had submitted, Mr. Kweka said, as this Court is the first appellate Court it can examine both facts and law in determining this appeal. He submitted that even if the Court decides to discount the evidence found in the post mortem report and the PF3, however there is enough evidence which shows that it was the appellant who killed the deceased. He said, the evidence of PW6, PW1, PW2, PW3, PW4 and PWS is enough to prove the offence against the appellant. He pointed out that, the evidence of PW6 clearly shows how he saw the appellant take the deceased from his house and took her outside and hit her with the club (Exhibit P4) three times on her head and then kicked her. He said the evidence adduced by PW1, PW2, PW3, PW4, and PWS corroborated the evidence of PW6. He added that PW1 at page eleven of the record shows that the deceased knocked at his door and informed him that she was beaten by the appellant. PW2 who was the Area Chairman of Kilida village testified to the effect that when the deceased was inside PW1's room, he interrogated her and the deceased informed him that she was beaten by her son (the appellant) using a club, alleging that she was a 7 witch and she bewitched his children. PW2 said, he saw a big wound on the deceased's head. PW3 the Village Executive Officer (V.E.O.) testified to the effect that he saw the deceased Maria d/o Msele lying on the ground at PW2's house and saw the injuries and a wound on the deceased head with blood coming out. PW3 (V.E.O.) also told the trial court that it was himself and the militiamen who went to PW6's house and arrested the appellant. PW4 Rashidi Kageta and PWS as the militiamen, testified to the effect that they went at PW6's house with PW3. PW4 said, they met the appellant shouting "Nataka nisafishe mji huu. Mama Maria unaniloea watoto wangu". He saw the appellant holding a small club tied with a string of beads and had blood drops. Thereafter they arrested the appellant. As the record shows, Mr. Kweka further submitted that, the evidence as a whole shows that it was the appellant who killed the deceased. As to the second ground of appeal, Mr. Kweka submitted that the record does not show that the medical report from the Isanga Mental Institution was admitted as an exhibit in Court. Also the PF3 was 8 admitted contrary to the requirements of section 291(3) of the Criminal Procedure Act. All in all, he urged us to find that the evidence adduced by the six prosecution witnesses was enough to prove the offence against the appellant even without the post mortem report and the Isanga Mental Institution Report. He therefore asked us to dismiss the appeal. As to the first ground of appeal, we agree with Mr. Mkumbe that the post mortem report was irregularly admitted as it is contrary to section 192(3) of the Criminal Procedure Act (the Act) which states that:- "At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matter agreed and the memorandum shall be . read over and explained

to the accused in a language that he understands signed by the accused and his advocate (if any) and by the public prosecutor and the filed". (Emphasis added) 9 The record in the instant case does not show that section 192(3) of the Act was complied with in admitting the post mortem report. For that reason, we are constrained to discount the evidence found in the post mortem report (Exh. Pl.). As to the second ground of appeal the record speaks by itself that the medical report from the Isanga Mental Institution was not admitted as one of the exhibits in this case. Hence, without wasting much of our time, we cannot discuss and examine a document which was not part of the admitted documents in court. Also as to the PF3 (Exhibit P3) the same was admitted without compliance to section 291(3) of the Criminal Procedure Act, hence it ought to be discounted too. Having discounted the evidence from the post mortem reports, the PF3 and the medical report from the Isanga Mental Institution we are now obliged to look as to whether the remaining part of the prosecution evidence on record proves the offence of murder charged against the appellant. Generally it was the duty of the prosecution to prove that:- 10

1. The appellant caused the death of Maria d/o Msele (the deceased) and that
2. The appellant acted unlawfully and with malice aforethought in killing the deceased. In the instant case, as pointed out earlier by Mr. Kweka, that the six prosecution witnesses proved beyond reasonable doubt that the appellant caused the death of the deceased. We fully agree with him that PW6 as a main witness who physically saw the appellant breaking the door of his house and took the deceased outside and hit her three times on her head with the club (Exhibit P4). Thereafter, PW1, PW2, PW3, PW4, and PWS corroborated the evidence of PW6 as pointed out earlier PW1 and PW2. testified to have heard the deceased declare that it was the appellant who caused the injuries she sustained. PW2, PW3, PW4, said they saw a ~ wound on the deceased head and blood coming out from her head. The evidence of PWS supported that evidence of PW2, PW3, and PW4 on that the said injuries led to the death of the deceased. For that reason, we are increasingly of the view that the evidence adduced by those six prosecution witnesses did prove beyond 11 reasonable doubt that there was no one else other than the appellant who caused the death of the deceased. Having established that it was the appellant who caused the death of the deceased, let us examine whether the appellant acted unlawfully and with malice afore thought. We are of the considered opinion that the record clearly shows that the appellant acted with malice aforethought. This is for the reason that firstly, the appellant intentionally took the deceased from inside the house. Secondly, that the appellant hit the deceased with a club (Exhibit P4) three times on her head. In the case of Tunutu s/o Mnyasale v. Republic [1980] TLR 204, this Court held that:- "malice afore thought can be proved by the fact that the accused stabbed the victim several times with a knife." [Emphasis added) In the instant case, the record shows that the appellant hit the deceased three times. We think, the act of repeated stabbing on the deceased head proves that he intended to kill or cause grievous harm to. 12 the deceased. Apart from that, the record shows that the appellant uttered the words like:- "Nataka nisafishe mji huu. Mama Maria unaniloge watoto wangu". A combination of all those acts clearly shows that the appellant acted unlawfully and with malice aforethought in killing the

deceased. The appellant also set up the defence of insanity and intoxication. The erstwhile Eastern Africa Court of Appeal in the Case of Cheminingwa v. R, [1956]23 E.A.C.A. at 452 stated that:- "It is of course correct that if an accused person seeks to set up a defence of insanity by reason of intoxication the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove". In the instant case, there is no evidence which clearly established that the appellant was insane. As pointed out in the case of 13 Cheminingwa v. R, (supra) the appellant sought to set up a defence of insanity by reason of intoxication but the burden to establish such a defence rests upon the appellant himself. Without such evidence, we are constrained to find that the appellant acted intentionally to kill the deceased. In the event and for the reasons stated herein above, we are of the considered opinion that, the appeal has no merit. In the circumstances, we accordingly dismiss the appeal. DATED at MBEYA this 21h day of June, 2011. M.S. MBAROUK JUSTICE OF APPEAL S.A. MASSATI JUSTICE OF APPEAL K.K. ORIYO JUSTICE OF APPEAL I certify that this is a true copy of the original. ZIKYA SENIOR DEPUTY REGISTRAR 0 •. COURT OF APPEAL 14

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Prepared on 14 October 2026 · Esheria