

TANZANIA / JUDGMENT

ex f 5842 dc maduhu vs republic 2015 tzca 229 3 september 2015

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IN THE COURT OF APPEAL OF TANZANIA ATMBEYA (CORAM: MASSATI, J.A.. MUSSA. 3.A. And MUGASHA, J.A.^ CRIMINAL APPEAL NO. 26 OF 2015 EX. F. 5842 DC
MADUHU..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mbeya) (Teemba, J.1 dated the 19th day of November, 2014 in Criminal Session Case No. 16 of 2013 JUDGMENT OF THE COURT 31st August & 3rd September, 2015 MUSSA. J.A.: In the High Court of Tanzania, sitting at Mbeya, the appellant, along with two others, were arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. It was common ground that all accused persons were ex-police constables and, during the trial, the appellant stood as the first accused person. His co-accused persons were, namely, EX. F. 7769, Detective Constable Shaban and EX WP. 6545, i Detective Constable Neema, who were, respectively, the second and third accused persons. After a full hearing, the gentleman and two ladies assessors who sat with the presiding Judge (Teemba, 1), unanimously found the appellant as well as the co-accused persons to be guilty of the offence charged. For her part, the learned trial Judge shared the assessor's verdict with the respect to the implication of the appellant but disagreed with their finding on the culpability of the co-accused persons. In the result, the learned Judge found the co-accused persons not guilty and acquitted them. As regards the appellant, he was found guilty, convicted and handed down the mandatory death sentence. He is aggrieved by the conviction and, hence his present quest to impugn the decision of the trial court. At the hearing before us, the appellant was represented by Mr. Mika Mbise, learned Advocate, whereas the respondent Republic had the services of Mr. Pande, learned Principal State Attorney. Mr. Mbise fully adopted the memorandum of appeal which goes thus: - "1. The High Court\ erred on convicting the A ppellant with m urther, when that offence was n ot a t a ll proved to the standards se t by law.

2. The High Court erred on resting its judgm ent on wrong facts.
3. The High Court d id n ot consider serious contradictions and inconsistencies in the prosecution case in its judgm ent

4. The High Court did not address its minds on the Principles necessary to be considered to ground a conviction on circumstantial evidence." The learned counsel for the appellant additionally lodged a written statement through which he expounded his views on the grounds of appeal. The statement was lodged pursuant to the provisions of Rule 74(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). On the terms of Rule 81(1) of the Rules, Mr. Mbise prayed and we allowed him to adopt the statement. For his part, Mr. Pande resisted the appeal and fully supported the conviction and sentence meted out by the trial court. But, before we address the learned rival arguments, we deem it necessary to briefly explore the factual background. From a total of eleven witnesses, the prosecution version during the trial was to the effect that on the 15th day of February 2012, at the Uyole suburb, within the City of Mbeya, the appellant, with his co-accused persons, jointly and together murdered a certain Daniel Mwakyusa. We shall henceforth refer the latter to simply as "the deceased." The day immediately prior to the fateful incident was a valentine's day and, to commemorate the event, there was a huge gathering at the Universal pub which is located at the Uyole suburb. The pub attendees were merry-making as they were being treated to drinks and music. The deceased and his friend, namely, David Libson (PW11), were amongst those in attendance. In the meantime, around 7:30 p.m. or so, a team of four policemen and a police woman were bracing themselves for a routine night patrol which was nicknamed "Doria Kenda" in the police fraternity. To facilitate the exercise, the armoury keeper called No. D. 6708, Corporal Peter (PW9), issued three Sub-Machine Guns (SMG) with 30 rounds of ammunition on each of the three patrolmen. Those issued with the three guns and the rounds of ammunition were the appellant, the second accused and No. 5438 Detective Constable Edwin. From the testimony of PW9, it is discernible that the gun issued to the appellant had a belt attached to it. The two joined hands with the third accused and Detective Staff Sergeant Manase to comprise the members of the Doria Kenda of the day. It is, perhaps, pertinent to observe here that the team was led by D/SSgt Manase. In their first move, the patrol team assembled at Uyole Police Station where they recorded their names in the occurrence book. No. G.5938, Detective Constable Hekima (PW7) who was at the Uyole police station witnessed the occasion. From there, the patrol team proceeded to Mlima wa Nyoka area in the outskirts of the City and remained there for quite some time up until 10:00 p.m. when they reported back at Uyole police station with two suspects, a man and a woman. Within a while, the patrol team left towards a destination unknown to PW7. If we should now go back and unfold what was happening at the Universal pub, it is Alexandra Timothy (PW4), the then pub salesman, who picks the tale. Around 1:00 a.m. or so, while the Valentine revelries were still on, the salesman was accosted by two men who ordered him to close the bar and accompany them to the police station. The two men did not identify themselves but PW4 knew one of them thoroughly well. The man he recognized was the appellant whom he also knew was a policeman. As it turned out, two weeks ahead of that day, the appellant had arrested PW4 for operating the pub beyond the prescribed time. Thus, the salesman obeyed the order and promptly announced to his customers that he was closing the pub. He also directed the disco joker to similarly switch of the music, which the latter did. At that particular point in time, one of the policemen picked a quarrel with the

merry-makers after slapping a lady who was sitting at the counter. Within a while, the policeman was engaged in a duel with a male pub customer. The encounter which initially began inside the pub was extended outdoors after Otieno Edward Kasom (PW3), the pub's security guard, pushed the fighters outside the pub. As to the minutiae of the duel and what transpired thereafter, we should best let the telling of PW3 speak for itself:- "In the course of the fight the two fell down. I went there and pulled the one on top of the other. The police was on the ground. The man who was on top of the body of police escaped when I was trying to assist the police to stand up. The police had a gun with belts. As he stood up, I noted the gun which dropped. The belts were loose (Hiachia) and that is why the gun fell down. The police picked the gun and shot in the air. He then proceeded inside the pub. The gun shot did not cause any harm at the scene. I followed the police inside. He ordered the customers to lie down. They were drunk and they did not obey him. The police came out and once again he shot in the air. Nobody was injured. He went inside again and then outside. There was a customer seated at the back near the door of the washroom. He stood up and wanted to get out. The police who had arrested the first man came back to the pub. He arrested this second man and they went to the direction of Uyoie police. The civilian was taken by two policemen each by holding either the left or right hand. Nobody was hurt at the scene or when leaving the pub. The man who was arrested when leaving the pub was not involved in the fight with the policemen. He was seated near the washroom while the fight was between the police and the customers at the counter. A few some time, I heard another bullet fired. I did not suspect anything but I thought it was shot in the air as it was done previously. It was not near the pub and I could not see far..." 7 Similar accounts were narrated by Ambokile Mwakajila (PW2), who was then a security guard at adjacent premises and, the already mentioned David Libson (PW11). It is noteworthy, however, that PW2 and PW11 were not as detailed, for instance, in their narration of the encounter involving the police officer and the male pub customer. Their respective testimonies nevertheless, concurred with the telling of PW3 to the effect that the shots fired at the scene did not result in any casualties and that the man who was ultimately picked by the police was in good health up to the moment when he boarded the police van and driven away. As regards the particulars of the man who was picked and ultimately driven away by the police, there was a detailed account from PW11, the deceased's friend who, as earlier hinted, was in his company at the pub. After giving a brief narrative of the ensuing fracas outside the pub, PW11 told the trial court as to what exactly befell on his friend: - "My friend Daniel Mwakayusa had remained inside the pub. He did not participate in any way. He did not even see what was happening outside the pub. The police got into their car and started to drive towards Uyole weigh bridge. I then decided to go inside to join Daniel. Suddenly I saw two police officers who returned to the pub armed with guns. They were walking. Daniel was also leaving the door. They arrested him and told him he was under arrest. He asked them what wrong he had done. They told him that he would be informed at the police station. By then Daniel was fine. They ordered him to kneel down. Then they picked him. Each police was pulling one hand. He was at the middle. The rest of us did not follow up. The police proceeded while walking towards the direction of police Uyole. I

was not worried much as I knew we would make follow the following morning." Thus, according to PW11, the deceased was arrested by the police from the pub whilst in good health. He even conversed with his captors as he enquired the reason behind the arrest. As to what transpired a little later, was testified to by Sivian Malimi (PW5), who is a nurse at Mbeya referral Hospital. Between 1:00 and 2:00 a.m., PW5 was busy boiling surgeon kits when, suddenly, there was a knock at the door. She opened it and, at the door step, there were several policemen who informed her that they have brought a dead body which they wanted to be kept at the mortuary. The nurse then opened the mortuary for them following which the police officers alighted the body from a police car and laid it in the morgue. But, as the lady was locking the morgue, the police vehicle was hurriedly driven away. According to PW5, in the ordinary run of business, where a dead body is submitted to the hospital by the police, the leader of the police team would record his name, as well as the name and address of the deceased (if known), the time when the body was submitted to the mortuary and the registration number of the police van or whatever vehicle which ferried the body to the mortuary. These details were not availed, as already revealed, on account of the unceremonious departure of the police team. A few hours later, more precisely, at 4:20 a.m., the entire patrol team paid a visit to the Mbeya Central Police Station. At the station, they found Assistant Inspector Kiyeyu (PW8), who was the inspector on duty. The leader of the team (S/sgt Manase) told him that whilst they were at Uyole police station, they were informed by a whistle blower that there was a robbery suspect at Universal pub. Upon the information, he continued, the patrol team drove to the pub where they saw and arrested the suspect. As they were clearing away from the pub, the pub customers started to stone them, whereupon the appellant released a gunshot which was directed in the air to disperse the mob. He further informed the Inspector on duty that, from the stoning, the suspect and some of the police were injured. The 10 patrol team leader also revealed that at that point in time, the suspect was at the referral hospital in critical condition. The patrol leader obviously lied in his account about the robbery suspect for there was none and his detail about the deceased's condition. No wonder, a little later, in the morning, PW8 was informed that the arrested suspect had actually died. He did not reveal the source of the information. Upon receiving the information, PW8 visited the Universal pub where he and other unnamed police colleagues inspected the scene. Three empty cartridges were retrieved from the scene. PW2 who walked the police team around the scene confirmed the detail about the three cartridges being picked there around 5:00 a.m. in the morning. What is more, the armory keeper (PW9) also confirmed to having received the three empty cartridges. In his testimony, PW9 additionally informed the trial court that the appellant did not fully account for the 30 rounds of ammunition which were issued to him. Of the 30 rounds of ammunition issued to him, he returned back only 26 rounds. Three rounds were accounted by the empty cartridges which were retrieved at the pub but one round was not accounted at all. Quite apart, the issued SMG was without its belt. Incidentally, the gun belt was picked by PW3 at the site of the encounter between the policeman and the male pub customer. In the meantime, PW11 visited the Central police station, early morning, in an effort to trace the deceased. He could not trace him there and neither could he at Uyole police station but, the

worst part of it, was in the fact that there was a complete dearth of information from police officers. A good deal later, in the afternoon, PW11 was reliably informed that there was an unidentified person who was lying dead at the mortuary. PW11 grudgingly visited the morgue although he barely believed that his friend would be amongst the dead. But, to his surprise, no sooner, he identified the deceased lying dead in one of the morgue drawers. On the 17th February, 2012 a post-mortem examination was conducted on the deceased's body by Dr. Yunus Ramadhani Mbagi (PW1). The medical officer observed that the body had multiple bullet wounds, six in number. Upon opening the body, he noted that the heart and right lung were also wounded causing serious hemorrhage. He, finally, attributed death to blood loss which was secondary to those bullet wounds. There was some further evidence from an Assistant Inspector, namely, Joram Mtipe Magova (PW10), 12 who attended the autopsy examination in his capacity as the incharge of the forensic bureau department. His account was that the six bullet holes on the deceased's body were inflicted by a single shot whose bullet made an entry at the right side of the hand, travelled through the chest and finally made an exit on the left hand. In the immediate aftermath of the occurrence, there was a misunderstanding between the members of the deceased's family and the police force with respect to the manner in which the latter conducted the initial investigations. This prompted the Director of Public Prosecutions (DPP) to formulate a multifaceted investigation team which was led by Superintendent of Police Jacob Kiango Mhila (PW6). At the end of its deliberations, the team recommended that the entire patrol team should be taken to task. But, when finally the criminal proceedings giving rise to this appeal were commenced, the learned State Attorney who had the conduct of the preliminary hearing informed the trial court, through her statement of facts, that No. E.7676 Ex. Detective Sergeant Manase and No. 5938 Ex. Detective Constable Edwin, were both at large. With this detail, so much for the prosecution version as unfolded during the trial. 13 In his sworn reply, the appellant did not quite refute the detail about being in the patrol team on that fateful day. He did not, as well, deny the fact that the armory keeper issued him with a belted SMG and 30 rounds of ammunition. The appellant also admitted that around 1:00 a.m., the patrol team drove their car and parked it on a road adjacent to the Universal pub. From there, the appellant along with Constable Edwin and their leader (Manase) walked up to the pub's gate where they met the pub's security guard. At that particular point in time both the appellant and Constable Edwin were donned in long jackets which hid their guns beneath. The police team which went to the gate commanded the security guard to tell the pub manager that he should close the pub as it was improper to operate it at that odd hour. The command was apparently heeded but as soon as the music was switched off, some of the pub customers arrived at the gate to express their protest. One of them used foul language in the words: - "W asenge gan i hawa wanatukatisha starehe zetu? W anashindwa kukam ata m ajam bazi wanakuja kutuvurugia starehe." The police officers were unamused by the language which they conceived abusive and, they, accordingly, promptly arrested the utterer. As 14 the police team tried to haul the suspect aboard their vehicle, what followed was a hullabaloo: The disgruntled pub customers physically descended on them in a frenzy of fists and kicks. The appellant who said he was completely engulfed, recollected thus: -

"Unfortunately, I fell down and the person struggling with me also fell on my top. I was still handling the gun by one hand. I did not know where Edwin had gone by then. We fought on the ground for a while. I was trying to avoid the assaults from that mob. The incident took about 2 or 3 minutes. I suddenly heard a shout in the course of that struggle. By that time I did not know the gun used but it was in the same area. The people struggling with me dispersed. As I stood up, I saw a person on the ground "anagaragara chini" indicating that he was in pains. I then saw DC Edwin and SSgt Manase close to me. Then, I saw the car reversing and tried to take that person. As we tried to take the person the mob stoned us and booed. The situation was tense. People were coming close to me. I decided to shoot in the air to disperse people. I shot the air three times at different areas."

15 According to the appellant, the injured person was then assisted to the police van by staff sergeant Manase and Constable Edwin. The appellant said that the victim was "still walking slowly". They took him to Mbeya referral hospital but the nurse who received them at the casualty door informed them that the man was already dead. The police team then put the man on a stretcher and took him to the mortuary where they left him. That, in a nutshell, concludes the appellant's version of the occurrence. On the whole of the evidence, the trial court was in no difficulty finding, as an established fact, that the deceased is, indeed, dead and that his was a violent death. The court fully accepted the medical evidence on the cause of death and, as we understood, in his written arguments, Mr. Mbise had no quarrel with the finding. The appellant's complaint is commenced by the first ground where his counsel faults the trial court for convicting him despite insufficient proof to the standards set by law. It is a general and blanket claim and, no wonder, in canvassing it, Mr. Mbise took pains to recite the testimony of several witnesses before he formulated the contention that: - "With this kind of evidence, it was unsafe to hold deceased left Universal pub while in good health and go to shoot elsewhere. It is from that holding the 16 appellant was convicted with murder. With due respect■, the court erred on that" With unfeigned respect to the learned counsel, the detail to the effect that the deceased was taken from the pub whilst in good health, was testified to by several witnesses. These were PW2, PW3, PW4 and PW11. The appellant riposte, in this regard, was that the deceased was injured after his (appellant's) gun was accidentally triggered off by the mob of pub customers who had descended upon him. Having evaluated the evidence from both sides on this detail, the learned trial Judge, found that given the nature of the wounds inflicted on the deceased, for one, it was impossible for him to walk away unnoticed. For another, the Judge found the allegation implausible as to the effect that the deceased was led to the police van while walking normally. In the end, the Judge remarked that the prosecution evidence was strong on that point and accordingly found: - "Therefore, it was established, in my view, that the deceased was in good condition when arrested by the first accused." We think the Judge was fully justified in arriving at the conclusion which we find unassailable. As we have hinted upon, according to PW11 the deceased even conversed with his captors as they hurled him away and, besides, all the witnesses who were at the pub emphatically stated that no person emerged hurt from the pub shootings. In the second ground, the trial court is being criticized for resting its judgment on wrong facts. To begin with, the learned counsel for the

appellant had in mind the observation by the Judge that the appellant claimed that the deceased was the one fighting him/struggling with him on the ground. If we may express at once, Mr. Mbise did not closely follow the proceedings as he missed that portion on the appellant's account when he said in cross-examination: - "First b u l l e t h it the person struggling with m e and then follow ed b y shooting in plain air. I d id n ot know the area/ part o f the body injured by the b u l l e t." It should be recalled that the theory advanced by the defence was to the effect that the deceased was the only person injured at the pub. As regards the remark about the deceased walking to the police van, that was clearly what the appellant alleged in the extract reproduced from his testimony. To this end, the second ground of appeal is wholly bereft of substance. 18 In the third ground of appeal, Mr. Mbise attacks the trial court for not addressing the contradictions and inconsistencies in the prosecution evidence. In this regard, the learned counsel noted that the trial court considered only one aspect of the contradictions with respect to the number of the cartridges picked at the scene. The other inconsistencies, counsel urged, pertaining to the differing versions of PW2, PW3, PW4 and PW11 were not addressed. We think there is some justification in the criticism. It is noteworthy that in his submissions before trial court, counsel for the appellant enlisted what he conceived to be contradictions or inconsistencies in the testimonies of PW2, PW3, PW4 and PW11. The learned Judge only addressed the alleged contradiction with respect to the retrieved empty cartridges. Nonetheless, this being a first appeal, we are enshrined with the duty to re-evaluate the evidence afresh and draw our own conclusion on this aspect of the evidence. What actually Mr. Mbise did, in this regard, was to recite the evidence of each of the referred witnesses and point out what was said from, say, one witness and missing from the other. From a comparison of the details, counsel urged that the prosecution witnesses materially contradicted 19 themselves. To say the least, to allege that a certain witness was less detailed than another does not necessarily entail that the witnesses were inconsistent with each other. With respect, as correctly submitted by Mr. Pande, the four witnesses were testifying on a fast moving occurrence and in the middle of a commotion involving a huge gathering. In those circumstances it was unlikely for the witnesses to see and tally on every detail which occurred. Added to this, was the fact that the four witnesses were not observing from the same vantage point which is why some were less detailed. In any event, what was vital was the general flow of the information derived from their testimony which was common to all. They all, for instance concurred in the detail that the closure of the pub ordered by the police team triggered off a lot of commotion; that thereafter there were instances of bullets shots in the air and; finally, each testified on the occurrence of the deceased being arrested in good health and put on a police van. (See *Mukani Wankyo v The Republic* [1990] TLR 46). To this end, we so find, the witnesses concurred in their respective telling of the material aspects of the event and, whatever inconsistencies emerged from their testimonies were minor and 20 explainable. All said, we are satisfied that the third ground of appeal is just as baseless. In the fourth ground, the trial court is being criticized for non- consideration of the principles underlying a conviction based on circumstantial evidence. This ground need not detain us. In her judgment, the learned Judge referred to the decision which was, incidentally cited to her by

Mr. Mbise-viz- Republic versus Kerstin Cameroon [2003] T.L.R.

84. She then carefully highlighted the facts from which an inference adverse to the appellant was sought to be drawn and concluded that the unbroken chain of the evidence irresistibly led to the conclusion that the deceased was killed by the appellant. We entirely subscribe to this finding. Finally, Mr. Mbise sought to impress us that the learned Judge did not direct the assessors on the principles underlying circumstantial evidence which was, ultimately, used to convict the appellant. In this regard, we should observe that in his submissions before trial court, Mr. Mbise extensively canvassed the subject. In her summing up the learned judge referred to the submissions by counsel inclusive counsel's telling that "the circumstantial evidence in this case is not sufficient to draw an inference of guilt." We should observe further that the opinions of the assessors were relatively very detailed and alive to the instances of facts from which they drew an inference of guilt against the appellant. To this end, we think the Judge's reference to counsel's submission on the subject sufficed. When all is said and done, we are of the settled opinion that the conviction and sentence meted against the appellant cannot be assailed. The appeal, is without a semblance of merit and we, accordingly, dismiss it in its entirety. DATED at MBEYA this 3rd day of September, 2015. S. A. MASSATI JUSTICE OF APPEAL K. M. MUSSA JUSTICE OF APPEAL S. MUGASHA JUSTICE OF APPEAL I certify that this is a true copy of the original. P. >IKYA SENIOR DEPUTY REGISTRAR COURT OF APPEAL 22

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