

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (JUDGE: L. BUVA, J. AO, MUNUO, J. AO, AND NSEKELA.) - CRIMINAL APPEAL NO. 50 OF 1999 GODLUCK MAGANGA APPELLANT AND THE REPUBLIC OF TANZANIA, RESPONDENT (Appeal from the conviction of the High Court of Tanzania at Tabora) : (Ithema. J.) dated the 1st day of June, 1999 in Criminal Session No. 49 of 1999. JUDGMENT OF THE COURT In this appeal, the appellant Godluck Maganga, was charged with and convicted of murder c/s 196 of the Penal Code and was sentenced to death. Dissatisfied with the conviction and sentence of the High Court, (Ithema, J.) he is appealing to this Court. Arguing in behalf of the appellant, Mr. Byabusha, learned defence Counsel preferred two grounds of appeal. In the first ground he complained that the learned trial judge failed to direct himself and the assessors that the defence of self-defence was available to the appellant and secondly, that the learned trial judge failed to consider what he called the possibility of mob justice and accomplice evidence of PW1. PW1, Hawa Sbabani @ Mama Mento was a neighbour of the appellant who was looking after cattle belonging to one Mr. Shio. She testified that one day which she

- 2 could not remember at about 9:00 pm she heard someone crying for help. She proceeded towards that direction where the appellant's house was, and found the appellant holding a panga whilst the deceased was lying on the ground. The panga had blood on it. The appellant told her that the deceased was attempting to steal cattle. Both of them took the deceased to PW1's home and as the deceased's condition was deteriorating, PW1 telephoned the police from a nearby house and upon their arrival she informed them that the appellant had wounded the deceased. Under cross-examination, PW1 testified that she was the first to arrive at the scene, but other people arrived soon thereafter. They carried no weapons nor did they attack the deceased. And during re-examination PW1 stated that he saw accused go into the latrine with a panga and when he came back, he had no panga and when we queried he did not answer properly. PH2--C-694 C/Sgt Zacharia is a policeman who arrived at the scene. He saw a big stone stained with blood and prepared a sketch plan, exhibited it to P2 and took the deceased to hospital. He recorded the statement of the deceased at the hospital before he died and this was admitted in evidence as exhibit P3 despite objections from Mr. Kayaga, then learned defence Counsel. We shall revert to this issue later on. P-14 was one Fabian Kija, a clinical officer at Nzega Hospital. He testified that on the 30.11.92 a patient called Peter Masanja (the deceased) was brought to the hospital. He was taken to

the theatre for medical attention and added that - "Deceased was still able to talk after coming out of theatre and hence able to make a statement. Deceased could have been in position to sign his statement. It is not possible to take a statement while medical staff handle victim. I was present and assisting the police. It is possible for a patient like the deceased to be in a state of confusion not to know what he is saying." The appellant gave evidence on oath. He testified that on the 3.11.92 at about 9.30 pm he was on his way home with his wife DW2, Fatuma Selemani. At a distance of about 100 yards from his house, he heard a heavy knock on the door. He rushed towards his house and ran on the way three people he did not know. He asked for their identity, but there was no response from them. Understandably he suspected that they were thieves and raised an alarm. The appellant continued in his evidence as follows - "After arresting the person whom I do not know, the mob started assaulting him. I was present all along. I did not participate in the assault as I had no weapon. I appealed to the crowd not to continue to harm him. The mob dispersed immediately upon the arrival of the people

- ... because of the serious condition in which the victim was. These people who ran away were armed. I know that this victim eventually died and following his death I was arrested. It is not true that I cut the victim even though PW19 and her husband alleged that it was me who attacked the victim. DW2, the wife of the appellant testified that on hearing a knock on the door of their house while some 100 to 200 yards away the appellant rushed to the house and she followed him. On reaching home, she found the appellant holding an old man. They raised an alarm and about fifteen people responded. She did not see any wounds on the victim. During cross-examination she confirmed that on her arrival, the appellant was holding the deceased, DW3 was another neighbour who responded to the alarm raised. He found people had gathered at the scene but he retired home soon thereafter because he was ... drunk. It is against this background of the evidence that Mr. Byabusha, learned defence Counsel thought that the defence of self-defence was available to the appellant. As correctly pointed out by Mr. Mutaki, learned State Attorney for the respondent, this defence was not raised during the trial before the learned trial judge. However, she went on to submit that there is no evidence on the record to that effect. We are in agreement with the learned State Attorney. PW1 testified that when she arrived at the scene, it was the appellant who was holding a panga and the deceased was lying on the ground. DW2 also testified that on reaching the scene she found the appellant holding an old man who happened to be the deceased. The clear message here is that it is in fact the appellant who had subdued the deceased who was helpless. There is no scintilla of evidence that the deceased had attacked the appellant in any way. This is not all. The appellant himself in his evidence categorically denied that he took part in assaulting the deceased together with other persons who had responded to the alarm. It is therefore very surprising to us that Mr. Byabusha had the courage to raise this defence. It is certainly misconceived. It is totally unmeritorious. In a further attempt to distance the appellant from the murder of the deceased, Mr. Byabusha sought to discredit the evidence of PW1 suggesting that she was an accomplice and hence there was need for

corroborative evidence in respect of exhibit P3, the dying declaration of the deceased recorded by PW2. The learned State Attorney strongly resisted that Fw1 was an accomplice in the commission of the murder. She added that DW2 in her evidence did not implicate PW1 in the commission of the offence. On our part we find no difficulty in rejecting Mro Byabusha's argument. PW1 was the first to arrive at the scene and found the appellant slashing the deceased with a pangao. There is no evidence that PW1 participated in assaulting the deceased. Instead, with the appellant, they took the deceased to her home. She reported the matter to the police. She did not passively witness the appellant attack the deceased but pleaded with him to stop his criminal actions. On these facts, we do not consider that PW1 was an accomplice. We now turn our attention to exhibit P3, the dying declaration recorded by PW2, D/Sgt Zacharia. The conviction of the appellant was largely dependent on the testimony of PW1 taken together with the dying declaration. The learned trial judge stated thus: "To crown it all the affirmative evidence of PW1 was on all fours with the dying declaration of the deceased - exhibit P3. It is corroborative evidence which in law is admissible, and I find it to be so in the case before me. I have seen PW1 giving her evidence; she was steady, credible and consistent to a great extent. She was indeed an eye witness contrary to what the lady assessor had observed." As stated before, at the trial the then learned defence Counsel objected to the admission in evidence of exhibit P3 but the learned trial judge overruled the objection and admitted exhibit P3 under section 34-B of the Evidence Act, 1967. Section 34B (1) and (2) provides in part as follows: "134-B (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or has been, a witness shall, subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it, in lieu of direct oral evidence."

- (2) A written statement may only be admissible under this section -
 - (b) if the statement is, or purports to be, signed by the person who made it;
 - (c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;"
- (2) Mak21: e Senzi Zongol2... Criminal Appeal No 46 of 2001 (unreported) held that the provisions of section 34-B (2) are cumulative and all the paragraphs (a) to (f) have to be satisfied and none can stand on its own. If one condition is violated, then a statement is not admissible in evidence. Exhibit P3 did not comply with paragraphs
 - (b) and (c). It was therefore wrongly admitted in evidence.
- 18 Apart from this as a general rule a court can act upon a dying declaration if it is satisfied that the declaration was made, if the circumstances in which it was made give assurance to its accuracy, and if it is in fact true. (See: CAT Criminal Appeal No. 34- of "1995 between ("1) g_ amisi Nzunda

(2) Anson Tuyai. £ (3) emson Tu. I. n v R (unreported). Having admitted the declaration in evidence in terms of section 7-B of the Evidence Act, the trial judge did not consider the above circumstances. We have no doubt that the deceased made the declaration in view of the evidence of PW2 and PW4- at the hospital after coming out of the theatre. Before being taken to hospital however, the deceased did not utter any words to PW1 and PW2 and this was soon after the event. PW4 in his evidence also stated that - "It is possible for a patient like the deceased to be in a state of confusion not to know what he is saying." Under the circumstances, we find it unsafe to act upon a declaration that was made at the hospital. If exhibit P3 is excluded from the evidence, as it should have been, then there is only the evidence of PW1. Is this evidence sufficient to found a conviction for the murder of the appellant? This takes us to the first limb of the second ground of appeal, namely, what the defence Counsel termed as 'the possibility of mob justice.' It is not in dispute that after the alarm was raised, neighbours and other people responded to the call. It must be remembered that 00/9/03...

- 9- it was night time and there is no evidence that there was moonlight. There is the evidence of RJ1 and H-12 that other people had come to the scene of the incident; stones were found nearby. PW3 testified that the appellant admitted to have beaten the deceased with a sharp instrument and stone. The evidence of Pd1 and Pv/3 corroborated the post-mortem examination report, exhibit P1. The essence of the defence case is that the deceased was a victim of mob justice whatever that means. There is no dispute however that the appellant participated in one way or another together with other people who responded to the alarm in inflicting injuries upon the deceased. We are satisfied that the appellant was joined by other people not before the court who participated in assaulting the deceased. There is evidence of stones with blood at the scene. The appellant was part of the crowd that inflicted injuries upon the deceased resulting in his death. This unorthodox defence of mob justice/instant justice has caused us considerable anxiety. We are not aware of any law of the land which sanctions such a course of action. Article 14 of the Constitution of the United Republic of Tanzania provides "Kila mtu anayo halici ya kuishi na kupata imtoka kwa jamii hifa dhidi ya maisha yake, kwa mujibu wa sheria. II Our country espouses the rule of law and good governance. We cannot countenance this indiscriminate taking of law into one's hands. No person should take shelter under the so called defence of "mob justice" in violation of the laws of the land. This is totally unacceptable. In the upshot, unlike the trial judge, we are unable to "irresistibly and affirmatively" point to the appellant as the sole cause of the appellant's death and that he caused it, if at all, with the requisite malice aforethought. He hereby quash the conviction for murder and sentence and substitute therefore a conviction for manslaughter c/s 195 of the Penal Code. The appellant is sentenced to ten years imprisonment. It is so ordered. DATED at MWANZA this 1st day of July, 2003. --- of D. Z. LUBUVA Jo. ft --- JUSTICE .. Q.F. APPEAL 00 E. N. MUNUO \ JUSTICE OF APPEAL H. R. NSEKELA JUSTICE ... OF APPEAL ... I certify that this is a true copy of the original ... i, ... t. \ \ I \ . J . - - , ... , ... \ . , ... (FoLoKo WAMBALI)

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