

TANZANIA / JUDGMENT

19750310 TZHC Njombe

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/1c IN THE HIGH COURT OF TNZ.!Ni T NJOMBE ORIGINLL JuRISDICTION (DODOMLL REGISTRY) CRIMINLL. SESSIONS CISE NO. 157 OF 1974 THE REPUBLIC VS. JL.RTIN KIITYJNYU & ANOTHER OHARG-E Murder c/s 196 of the Penal Code.

JUDGMENT

MESIUMO•, AG. J. The two accused. perons Martin s/a nnyunyu and Joseph s/a

- Mwalukubi tand. charged on the informatiOn for murder c/s 1 96 of the Penal Code, it being allagod by the prosecution that the two accused persons jointly and together on or about the 5th day of February, 1973 in IrinRa Region, murdered one Mwozimpra Nliche but each accused parson has 1ldod not guilty to the charge. It was deposed in ovideco by the prosecution that in a village of Lumbala which is situated in Lupomba Division, Njonbe district, Iringa Region, there lived a man by thenarec of Mwozinpya s/a Mhicho whose death is the subject of this case. The 1st accused person Martin s/c Minyunyu used to call that man as his uncle by consanguinity because Martin's mother was the sister of Nwozinpya. One clay the 5th of February, 1973 Mwozinpya disappeared from his home and was nowhere to be soon. Naturally this caused concern to his children Ashen s/o Maicho (2W2) and Lakoli d/o Maiche whose mother had died some years back. The two children started looking for their father within all the vicinity of their house but in vain as they did not trace him at all. Thus they reported the matter to their cell-loader one .Iyatoni s/o Kiwole (PW5) who advised there to try to look for him at the homes of their relatives which sug:est ion the two children conpliod with for one week but still in vain for they did not see him any- where. When they reported their failure to the cell-loader the latter wrote a letter to the TJJ\1IJ Ward Secretary stationed at th9 Bctraza of Lupoioho informing him that one of the subjects in his cell of 10 houses had disapTcoarod and nobody seemed to know his whereabouts. In responso to that message the Ward Secretary detailed a nesssngor from his office one Sariwol s/o Mangula (PvJi) to go to that village to conduct a search for the missing man. On arrival at the village of Mweziupya the messenger called the cell-loader who in turn summoned his pccplo and a thorough search for the missing man was mounted and while the search was going on the son of Mwozimpya named L.shori (PW2) tipped the messenger that he was suspecting his cousin Martin (1st accused) to be connected with the disappoaranco of his father because one day Martin had seen Ashen's father counting iJonty of money and as they wore travelling

together on that very day of the remark from the house of Mwozimpya Martin dodged. Ashen and disappeared with the maize of Mwezirapya which he had asked thou to carry for him to the grinding mill. 02

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- 2 - Acting on that tip the messenger (PW1) arrested Martin, the let accused, who was also present participating in the search for his missing uncle and he was T'ut in a lock-up of Lupombe Primary Court. Acting on further information the messenger learned that during about the same time when Mwozirnpya was alleged to be missing Martin had been soon by two people, a man and a woman, carrying an empty basket made of palm loaves from the direction of his home and later on he was again seen carrying a similar basket on his head but this time the basket was no longer empty for it contained some clothes. This tip of information actuated the messenger to go to the home of Martin (the 1st accused) to search it for the alleged basket and the clothes. In doing so he took with him Ashen s/o Mwozimpya Maicho and another person called Halifa, and a cell- loader of Martin's place and the daughter of Mwezirnpya. When they arrived at Martin's place they sent for his first wife one Kuralalrntwa d/o Siraguti (Pw3) who disclosed in court that actually she had just been eloped by Martin and for one year they had been co-habiting in concubinage. When she arrived at her house those people under the leadership of the messenger told her that they had come to search the house of Martin and at first she was reluctant to allow then but when they pressed for it she opened the door of the house and let them in which they did and shortly thereafter, they saw a basket hanging from the wall and they took it outside. On examining the contents therein they saw a number of cloth materials and clothes out of which Lshori could identify a pair of shorts, two shirts, a cloth cal; and a plastic purse, as being the property of his father. From the house of the second wife of Martin which was about one mile from the 1st wife's house they recovered a blanket which was taken from that other house by the younger brother of Martin called by the name of Jackson s/c finyunyu (PW4). All those items together with the basket were seized by that messenger who later on handed them over to the Police and the said items were identified and tendered as exhibits for the prosecution case. While the messenger was conducting the search in Martin's house the other people who had been left behind at the house of Nwezirnpya continued with the search for the missing man and on the third day they discovered the dead body buried on the slope of Kipea mountain which was about one mile from Nwezirnpya's house and his children recognised that dead body as being that of their missing father whom they had looked for for more than two weeks. The matter was reported to Police who went to that scene with Dr. David s/c Kyendesya who performed a post-mortem examination on that dead body there and then at the scene of discovery of the said dead body. According to the Doctor's evidence though at the time of the post-mortem examination the body was in an advanced decomposition stage, luckily, with the help of formations on the soil which it was, the doctor was able to form an opinion as to what was the cause of death which as he put it was "due to shock following profuse haemorrhage". He went on telling the court that in his opinion the deceased had suffered a violent death with the use of a sharp weapon which had

boon used t' cut his neck in a lngitudinal position cutting the trachea half-way but not cornplotolr severing the head from the rest of the h.dy. The d.ctor tenderred the post-mortem examination report as "P.exh.1" and the FF3 in respect of the 1st accused when he described as being physically and mentally fit, as "P oxh,2 113

- 3 - The most important and, to my mind, decisive evidence for the prosecution case is that of the Justice of Peace Mr. Oben Benson Mwanfupi (2W7). He testified to the effect that after his arrest the 1st accused person was taken before him for ho had expressed a desire to have his extra-judicial statement taken down by a Justice of Peace. Ifter bringing to his n tice all the necessary precautions and implications in the usual manner the 1st accused.still volunta- rily opted to have his statement rocarded which the Justice ofPeaco duly did. That statement turned cut to be a confession by the 1st accused tr. the charge because in it he clearly admits to have killed Mwezimpya instantly with the use of a 'panga'. From that evidence, ab.. ut which I particularly addressed the gentlemen assessors when I was suiring up the case to then, I, like the gentlemen assessors, now find it as a fact that MweziD]ya referred in the infcrnation in this case died a violent death at the hands of the 1st accused person. the 2nd accused person is mentioned in that cnfession as having assisted the 1st accused in chasing the deceased and that the htpangau used by the 1st accused tcstrike the deceased belonged to the 2nd accusod from whose hands the 1st accused said he had snatched it when enraged by the deceased. On that piece •f evidence I directed the gentleman assessors as to the law aprlicable and I told then the law applicable to such evidence is laid down in section 33 of the Law o± Evidence ict 1967 as amended by section 19 of !.dninistraticn of Justice (Miscellaneous Amendments) Act No.26 of 1971. That section gives poission to the court to take into consideration such confesion against such a person, as the 2nd accused pers.n in this case, notwithstanding the alleged assertion that it was only the 1 st accused who has made such incriminating confession to the Justice of Peace. In defence each accused person chose to make an unsworn statement to which they are entitled in law and at length I told the gentlemen assessors of that that meant in law but to my disapointr&nt they seemed to take a strcn view that because the two accused porscns, particularly the 2nd one opted for unswcrn statements and the 2nd accused just in a sentence denied to have committed the offence, then that choice must be inferred as an aim to hide something and thus they concluded should be taken adversely against the accused persons. With due respect to the twogentlemen assessors they seem to have misunderstood the law and rogreably I differ with them and still sound that the two accused were perfectly entitled to exercise the choice in the way they did without any adverse inferences to their defence. The first accused in his unsworn statement informed the court that he was adopting the extra-judicial state:iont he had made to the Justice of Peace (1 1w7). The evidence as deposed is quite clear as I have indicated above that Mweziupya died a violent death by being struck with a panga by the 1st accused person. I entirely agree with the learned State Attorney and 1)0th gentlemen assessors on this factual issue. However, the main bone of contention in respect of the let accused is the defence of provocation raised by the learned Defence4

- 4 - Ceunsel based on the statement of the 1st accused to the Justice of Peace (PW7). At this stage it may be necessary to examine the extra-judicial statement in greater detail. The most important part runs as follows (pp 97 - 103) of the original hand-written proceedings: "One day I went out for a walk and I met one person who is called Haikogi s/o Mwangenyuko who told me to accompany him, to my uncle's place (the deceased) for 'ulanzi' (locally tapped bamboo wine). We went to the home of the deceased Mwezirgiya and we found no 'ulanzi'. The deceased asked me why we went to his place when we regarded him as a witch. He then told me he would hunt me even, if we said he was a witch for we cannot over-power him though, he added, at one time all his hair had been cut to remove witchcraft powers from him. He further stated by way of asking as to whether I had known who had killed my late father. Then Joseph expressed surprise to him that that man was killing even his brothers-in-law. Suddenly I got angry when I heard that he had killed my father. I snatched a 'panga' which was in the hands of the other. When the deceased saw me taking the 'panga' he started running away. I chased him up to the bush where he was caught by grass and he fell down. When he fell down I cut him with a 'panga' on the neck and instantly he died. Then myself and my companion Haikosi who had helped me to chase him left for home leaving the dead body in the bush. When we reached the home of the deceased my companion Haikosi advised me that we should take the clothes of the deceased. We collected one pair of shorts and one shirt, (110 Cal), One piece of cloth and we went with them to my home We also took a blanket of the deceased which is now lying at the Police station". The said statement was tendered before this court as "P.ex.3". After I summed up that piece of evidence and the law applicable to it I told the gentlemen assessors that the most vital question they had to ask themselves if they believed that piece of evidence was and I quote myself now: "If you believe the let accused's story that he was informed for the first time by the deceased that it was the deceased who had actually killed the let accused's father many years ago and that he would also kill him likewise with the use of witchcraft then you should answer the vital question: "What would an ordinary person from the locality of the let accused person's do at hearing such utterances and placed in the position the 1st accused was at the material time? Would he have reacted in the way the 1st accused confessed he did? And if he did so would he in the name of provocation be entitled to some lenient condemnation?" If the answer is yes then that would result in affording the 1st accused the defence of legal provocation with the result that you must find him not guilty of murder as charged but guilty of a lesser offence of manslaughter contrary to section 195 of the 2nd Code. If the answer is no, reasoning an ordinary person of his locality placed in that position would not have justifiably reacted the way the 1st accused allegedly did then you would rule out the defence of legal provocation and consequently you will have to find him guilty of murder as charged".5
- 5 - In their opinion both gentlemen assessors hold the view that that killing was intentional and found the 1st accused guilty of murder as charged. I am much obliged for their great and painstaking assistance but on the strict scrutiny of the evidence I respectfully differ from their view as I think they did not seem to properly grasp the legal question of

provocation in spite of my great endeavour in elaborating the same to them. In our law provocation is dealt with under sections 201 and 202 of the Penal Code but due to their great length in words it would suffice to point out that "provocation" means and includes any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered. Turning on to the instant case we are told by the 1st accused, and in the absence of rebuttal of the same by the prosecution; we must take it to be true and thus hold that the deceased addressed him the gist of which as the learned Defence Counsel put it "I killed your father and I will also kill you". The learned Defence Counsel contended that such a statement is highly provocative provided that the bragging by the deceased towards the 1st accused was believed by the latter and also if it also caused a shock to him and he further contended in the instant case his client believed that confession by the deceased and the said confession shocked his client. The learned state attorney argued that that confession did not come as a surprise to the 1st accused and thus it did not shock him but with respect he did not adduce any evidence to rebut the assertion of the 1st accused that those two elements existed in his mind hence the sudden attack on the deceased. There have been a number of authorities on the question of provocation teaching on the subject of witchcraft. As the learned State Attorney aptly pointed out and conceded by his learned friend for the defence the most well known recent decision is that of Spry J.A. (as he then was) in the case of Masaga s/c Simon vs. Mpelele (unreported) E.A. 10 A. Criminal Appeal No. 170 of 1970 which was followed by Onyiah, J. (as he then was) in the case of Republic vs. Npundekeje Tuvine Criminal Sessions Case No. 264 of 1971 (reportedly unreported). When those two decisions are studied in the light of the instant case they tend to be authorities for the defence case rather than for the prosecution case. With due respect to the two gentlemen assessors and the learned State Attorney, I am of a view like the learned defence Counsel, that the words uttered by the deceased to the first accused bragging that he was a champion of witchcraft who had killed the 1st accused's father and that if the 1st accused bothered him he would also kill him by witchcraft which confessedly was still in his possession, were highly provocative as to be capable of affording the 1st accused the legal defence of provocation with the result that I find, him not guilty of murder but guilty of manslaughter contrary to section 195 of the Penal Code.6

- 6 - As regards the 2nd accused I am of a view that the learned Defence Counsel was quite right when he pointed out to the courts to use his own words, "there is no thread of evidence implicating the 2nd accused with the offence save the extra-judicial statement of the 1st accused" The discovery of the clothes of the deceased from the two houses of the 1st accused person corroborated the confessional evidence only in respect of the 1st accused. The learned State Attorney suggested that since the 2nd accused disappeared from the party which was searching for the deceased soon after the arrest of the 1st accused, that conduct

should be viewed as that of a guilty conscious and as such it should be taken as a *p_oco*' of evidence corroborative to the confession of the 1st accused as against the 2nd accused person. Again with due respect to the learned state Attorney, I am unable to agree with that line of argument. It was not compulsory that whoever joined the searching party should be there up to its conclusion. Like anybody else the 2nd accused might have felt hungry and disappeared for a grab into his stomach. There is no sustainable basis on which to draw such a detrimental inference against him. There being no other evidence connecting the 2nd accused with the alleged offence save the confessional evidence of the 1st accused who is a co-accused we have to go back and check whether by that evidence alone in law the 2nd accused could be convicted. As I had pointed out earlier section 33 of the Evidence Act 1967 as amended by section 19 of Act No.26 of 1971 states to the effect that the court may take such evidence as against the other accused, such as the 2nd accused in the instant case. The repealed section categorically prohibited such consideration. To my mind the new section does not make it mandatory for the court to convict such an accused person on such confessional evidence of a co-accused person for if the legislature had intended such an effect it would not have refrained from saying so expressly in which case it would have used such mandatory words as 'the court shall convict the accused person or such accused person'. In the absence of such mandatory spirit in the wording of the now section it can be reasonably presumed that the courts are still left with the inherent and intrinsic discretion to take into consideration such evidence together with any other evidence of the case as a whole and then determine whether the totality of such evidence is sufficient to warrant a conviction. With this interpretation in mind and having combed the acreage of the evidence as a whole I am left constrained to hold that on the evidence as it is on record before me, it would be hazardous to plant a conviction on such casual mention by the 1st accused of the 2nd accused in the confessional extra-judicial statement. Consequently I find the 2nd accused not guilty of any offence and resultantly he is to be discharged forthwith unless held further for some other lawful cause. In the result therefore, the 1st accused is convicted of manslaughter and 2nd accused acquitted as indicated herein above.7

- 7 -

1975. Delivered in open court at Njombe this 10th day of March, L. E. A. Mwakijuni Jg.. Judge
 Prosecutions I have no record of previous convictions. Mr. Mwakijuni (Defence Counsel)
 in mitigation: The accused is a first offender and aged about 30 years and is married. This was
 a very unfortunate incident. For a long time he had suspected the death of his father to be a
 mysterious one. On the fatal day the deceased bragged as a champion of witch-craft who
 had killed the 1st accused's father. On hearing that the 1st accused lost control of his
 powers. The circumstances of the case point that the deceased was author of his own
 death. Moreover, the accused co-operated with the Police in this case. He openly
 confessed that he killed the deceased and showed that he repented for that offence. I also
 invite this court to take into account the period the accused has been in remand prison for
 almost two years. I therefore ask the court to be lenient to the accused. A stiff sentence will
 not be of interest either to the Republic or anybody else. Many witchdoctors unscrewed

have caused deaths of many people in this country. Thus a stiff sentence will not stamp out witchcraft. If the Papublic is aimed at stamping out witchcraft the courts are not the I.ropor fields for that exercise. Politicdl eucation would hell) more. I thus pray for a lenient sentence for the accused.. S B N T E N C B Admittedly the accused is a first offender and of fairly young age. However, human l±fo, which is sacred to the deceased and to the i;uIJlic as a whole and beneficial particularly to dependants, has been lost by the accused's violent act. People must learn to control their temper and resort to institutionalized means for solving their agriovances and: there are provisions or the lawatoring ±' or thoatmont of witch debtors who can be penalized under the witchcraft ordinance. Taking all the circunsances of the case I am of a view that eight years imprisonment would meat justice of the case.8

- 8 - Ho is so sentenced. Mwesiuro Lg. Judge Right of appeal to T. A. C. A. explained. t E. A. M*esiumo Ag. Judge Assessors thanked and dischargedL L-('\• E • A. Mwe S ±UL1O Date: 10th March, 1975. Ag. Judge For the Iopu1:lic: Mr. W. X. Mbilinyi, State Attorney For accused: Mr, Mwakingwe, Defence Counsel. \$ - 8 He is Sc: sentenced, -. E.. A. Mwosiul?.o Ag. Judge- iihf cf afpeal to E. C. A. oLplalnod.
- .7
- '- L----./ E. A. Mwesiurno A. Judge JissJssors thanked and discharged. E. li.. Mwo siuno Date: 10th March, 1975. Ag. Judgo For the Republic: Mr W. X. Mbilinyi, State Attorney For accused: Mr. Mwakingwo, Defence Counsel.

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