

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 116 OF 2006

1. MBUGA MALIKI
2. AKLEY PASCHAL
3. VALERIAN SAGULA
4. EDWARD WILLIAM
5. JUMA MNAPAA
6. SAMWEL CHALO
7. MACHOPA JANUARY

}

..... APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the Resident Magistrates' Court with
Extended Jurisdiction at Dodoma)**

(Somi, PRM – Extended Jurisdiction)

dated 7th day of March, 2006

in

Criminal Sessions Case No. 31 of 2003

JUDGMENT OF THE COURT

19th & 25th November, 2008

MBAROUK, J.A.:

The seven appellants, Mbuga Maliki, Akley Paschal, Veralian Sagula, Edward William, Juma Mnapaa, Samwel Chalo and Machopa January were convicted of two counts of murder contrary to section 196 of the Penal Code by the Resident Magistrate with extended jurisdiction, in Dodoma PRM Criminal Sessions Case No. 31 of 2003.

They were sentenced to suffer death by hanging. Being aggrieved by convictions and sentences they jointly lodged this appeal.

The appellants' joint memorandum of appeal contains the following three grounds of appeal:-

- 1. That, the trial court erred in law and in fact in not holding that the prosecution had failed to prove its case beyond all reasonable doubt in the circumstances of the case.*
- 2. That, the trial court erred in law and in fact in failing to hold that existence of Police Form No. 3 (PF3) prior to arrest of some of the accused was proof that their arrest was pre-conceived and that they were not connected with the incidence.*
- 3. That, the trial court erred in law and in fact in failing to consider the contradiction, which arose in the cause of arresting the appellants.*

In this appeal the appellants were represented by Mr. Kuwayawaya Stephen Kuwayawaya, learned advocate. The respondent Republic was represented by Mr. Prudence Rweyongeza, learned State Attorney.

The facts leading to the conviction of the appellants can be briefly stated as follows:-

On 28.2.1999, homicide took place at Bahi Makuki Village, Mpamatwa Ward within Dodoma Rural District Dodoma. On the fateful day at about 7.45 p.m. Aloyse Daud (PW2) with his friend Pius Obeid was invaded by a group of bandits at his shop armed with "sime", a gun and arrows. The bandits shot in the air to threaten PW2. They managed to steal Shs. 300,000/-, one radio cassette and a bag containing different clothes. When Pius Obeid tried to run away, PW2 testified, he was knifed by Juma Mnapaa (5th Appellant) in his stomach and shouted saying "nakufa nakufa". Beno Mafuta was also wounded while the bandits were running away, but later died at the Dodoma Government Hospital.

PW2 and his wife raised alarm and several villagers including PW3 Malogo Damas responded to the alarm. As he rushed to the scene on his way he was arrested by a group of bandits who

tortured him. PW3 said he identified some of the bandits by the help of the moonlight as the appellants Juma Mnapaa, Mbuga Maliki, Nyangalu Sangula and Makongolo William. He said they were more than ten in number. After the bandits had ran away, PW3 went towards PW2's house. At the scene of the crime, he was shown the dead body of Pius and Beno who was wounded but still alive, was a few paces from the scene. On the other hand PW5 Wilson Muhembe testified to the effect that he heard two gun shots coming from the direction of PW2's shop about 12 paces from where he was. PW5 went to the scene and through the help of the moonlight he managed to see PW2 and Pius Obeid under the arrest of the 1st, 5th, 6th, 7th appellants and others.

Arguing their first ground of appeal, Mr. Kuwayawaya, advocate for the appellants, was of the opinion that the trial court erred in not holding that the prosecution had failed to prove its case beyond all reasonable doubt in the circumstances of the case. He contended that, in an abrupt invasion by ten people, in a "pombe shop" during the night time, it would have been very difficult, for the witnesses to

clearly identify the invaders easily. In such circumstances, Mr. Kuwayawaya said, it could not be said with certainty that the appellants were positively identified as assailants.

He further argued that the prosecution was supposed to prove how the deceased person was killed. But, he said, that there was no witness who testified as to who among the appellants killed Beno Mafuta. Likewise, Mr. Kuwayawaya said, apart from the evidence of PW2, who just heard Pius crying "nakufa nakufa" there was no evidence to prove who killed Pius. He added that PW5 could not have identified the 5th Appellant killing Pius because he was too far.

Furthermore, Mr. Kuwayawaya contended, the record shows that most of the prosecution witnesses were mixing up the identity of appellants while in court. He gave the example of PW3 who purported to have identified the appellants by the help of the moonlight, as he knew them before, but mixed them up in court, a clear indication of lying, he said. Mr. Kuwayawaya submitted that, this clearly shows that PW3's purported identification of the

appellants at the scene of the crime was highly suspect. It ought to have been rejected, he urged. PW5 similarly confused the appellants in court, he stressed. Mr. Kuwayawaya was of the firm belief that the prosecution witnesses were not truthful in their evidence. Hence, he said, their identification evidence was not worthy of credence he concluded.

On his part, Mr. Rweyongeza had nothing much to contribute on this ground after deciding not to support the convictions of the appellants in this appeal. As we shall see later, he centred his decision not to support the conviction on the 2nd and 3rd grounds of appeal.

As to the 1st ground of appeal, we, just like Mr. Kuwayawaya are of the opinion that neither PW2, PW3 nor PW5 satisfactorily identified the appellants at the scene of the crime. Looking at the evidence on record, **firstly**, the incident happened at night, and all the prosecution witnesses have not testified as to the intensity of the moonlight which they said, helped them to identify the appellant.

Secondly, none of the prosecution witnesses testified to have seen any of the deceased, Pius and Beno, being physically killed by any of the appellants. PW2 Aloyse only testified to the effect that he heard Pius Obeid saying "nakufa nakufa". Without seeing anybody he just concluded that Pius was knifed by Juma Mnapaa (5th Appellant). PW3 Malogo Damas, said he was only shown the dead body of Pius and the wounded Beno when he arrived at the scene of the crime. On the other hand PW5 as shown earlier mixed up the identities of the appellants in court. All this casts a lot of genuine doubts on the identification evidence against the appellants. In the decision of this Court in **Africa Mwambogo Vs. Republic** [1984] TLR 240 it was held:-

"Since the conditions of identification were not ideal it was unsafe to convict in the absence of corroborative evidence."

In this case we have found no corroborative evidence in support of the weak identification evidence. Hence, we think, it will be unsafe to sustain the convictions of the appellants relying on such weak identification evidence which did not reveal much about the

incident. For this reason, we find the 1st ground of appeal with merit.

As to the 2nd ground of appeal, Mr. Kuwayawaya contended that the issuing of Police Forms No.3 (PF3) prior to the arrest of all the accused except one, was a proof that their arrest was pre-conceived. However, Mr. Kuwayawaya preferred to argue the 2nd ground of appeal in conjunction with the 3rd ground of appeal. In his submission he said that the record shows about four (4) suspects had been **arrested on 2.3.1999**. This, he said, was confirmed by PW6 D 4030 D/Cpl Bakari while under cross-examination. He also added that the same PW6 testified that the accused **PF3s were written by him on 1.3.1999** and were signed and stamped at the back on behalf of the Regional Medical Officer.

On his part, Mr. Rweyongeza conceded that, the act of writing PF3's bearing appellants names before their arrest was indicative of the fact that the prosecution of the appellants was pre-arranged and

not done in good faith. He accordingly urged us to allow the appeal on this ground.

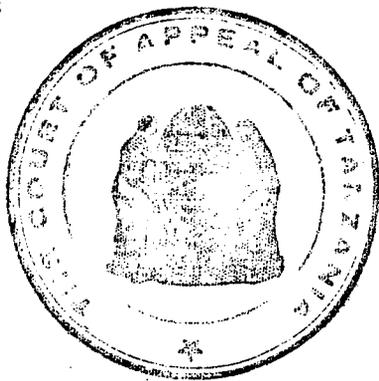
On our part, we are respectfully in full agreement with the sentiments of both counsel on this issue. It is inconceivable that under normal circumstances the police would have issued PF3s for suspects who were yet to be arrested. We have found this unexplained phenomenon truly disturbing. This smacks of a pre-conceived plan to prosecute the appellants at all costs, as urged by both counsel in the appeal. We are, therefore, left wondering whether the prosecution was based on bona fide considerations or other ulterior motives.

In the event, the weak identification evidence coupled with the issuing of PF3s in respect of the appellants prior to their arrest, have cast a lot of reasonable doubts on the genuineness of the accusations against the appellants. We are accordingly constrained to respectfully differ with the learned trial PRM with Extended Jurisdiction and hold that the charges against the appellants were not

proved beyond a reasonable doubt. The appellants might have been used as scape goats to cover up the misdeeds of others.

In the result, we find merit in the appeal, which we hereby accordingly allow. The appellant's convictions and death sentences are hereby quashed and set aside. The appellants are to be released forthwith from custody unless held therein for some lawful cause.

DATED at DODOMA this 25th day of November, 2008.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR