IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Kisanga, J.A. )

CRIMINAL APPEAL NO. 56 OF 1979

B E T W E E N

BOMBO TOMOLA . . . . . . . . . . . . . . . . . . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . . . . . . . . . . . . . . . . . . RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Babati) (Mwesiumo, J.) dated the 3rd day of October, 1980,

in

Criminal Sessions Case No. 10 of 1977

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JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant, Bombo Tomola, was jointly charged with her sister, namely, Tabu Tomola, in the High Court at Arusha for the offence of murder - contrary to section 196 of the Penal Code - but was convicted, jointly with her sister, for the lesser offence of manslaughter - contrary to section 195 of the Penal Code, and was sentenced to twelve ~~months~~ years' imprisonment like her sister. She was aggrieved by the conviction and sentence and hence this appeal to this Court. Her sister is, apparently, not appealing. Mr. Kiritta, learned advocate, appeared for the appellant in this appeal and the Republic was represented by Mr. Mlawa, learned State Attorney.

According to the proceedings in both this Court and the trial court, the following primary facts appear not to be in dispute between the parties: that one Adaa d/o Bombo died on or about the 20th of October, 1976, at Kiru Village in Hanang District

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within the region of Arusha; that prior to her death she had been paying a visit to the homestead of P.W.2 in connection with the sickness of her father-in-law, who was also the father of the appellant and of the appellant's sister as well as of P.W.2; that during this visit a quarrel erupted involving the deceased and the appellant's sister who was jointly charged with the appellant; and that in the course of this quarrel the sister of the appellant, who appeared as the second accused at the trial, assaulted the deceased who died soon afterwards at the scene of the assault; that the sister of the appellant, who was the second accused at the trial, then left the scene, apparently to go and report to the police, but before she could do so was found by her brother who is the husband of the deceased and who escorted her to the police station where she found the appellant already in custody; that later the police visited the scene of crime and drew a sketch plan of the scene; that one Doctor Aloisi Mruashwa, who gave evidence at the trial as P.W.1, also visited the scene of crime and did an autopsy at the scene; that subsequently both the appellant and her sister, who was the second accused at the trial, were taken before a justice of the peace, that is P.W.6, to whom each made an extra-judicial statement.

Similarly, according to the proceedings both in this Court and at the trial court, the following primary and secondary facts appear to be in dispute between the parties: it is the prosecution case that when the deceased was paying a visit at the homestead of P.W.2 she uttered derogatory or mocking remarks regarding the sickness of the appellant's father to the effect that the oldman was not yet sick but would soon undergo real suffering; and that as a result of such remarks both the appellant and her sister (the second accused at the trial)

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beat up the deceased to death. Furthermore, it is part of the prosecution case that in the extra-judicial statements, made by the appellant and her sister, each confessed to killing the deceased.

On the other hand, the appellant in her defence put up an alibi to the effect that she was away washing her clothes when the deceased was beaten up and that it was her sister (the second accused) who beat up the deceased. The defence of the second accused at the trial was consistent with that of the appellant.

The first point for consideration and decision is whether the appellant confessed to the Justice of the Peace in her extra-judicial statement. The appellant admits making a statement to the Justice of the Peace, that is P.W.6, but she says that what she told the Justice of the Peace is the same as what she narrated in her defence at the trial and the magistrate who recorded her statement made up his own story.

P.W.6, the Justice of the Peace, gave evidence at the trial and produced the extra-judicial statement which he claims to have been made by the appellant. In that statement produced at the trial as Exhibit P6 the maker of the statement clearly confessed to killing the deceased.

The learned trial judge considered the issue whether the statement produced at the trial was actually made by the appellant and stated:-

> "After full consideration of the evidence in this case as far as it was given by the Justice of the Peace (P.W.6) I am fully satisfied that the Primary Court Magistrate gave a true version of what was narrated to him. In other words, I fully join hands with one of the gentlemen assessors or generally that all of them that the Justice of the Peace told us exactly what transpired in his office.".

We have also evaluated the evidence on record and we find no ground for differing from the conclusion of the learned trial judge. After all, no objection was made against the production of the extra-judicial statement at the trial and we can see no reason why the Justice of the Peace transformed an alibi into a confession. Moreover, there was evidence to the effect that before the appellant was handed over by villagers to police custody, she had earlier made a similar confession to P.W.4, who is her ten-cell leader.

It is true that the confession was repudiated by the appellant at the trial and the learned trial judge was aware of this and he therefore proceeded to look for corroborative evidence as a matter of practice. He found it in the testimonies of P.W.2 and P.W.3.

P.W.2, who is the sister of the appellant, testified to the effect that she saw the appellant and the second accused, who is not appealing, dragging the dead body of the deceased into the compound of P.W.2's homestead. P.W.3 testified to the effect that on the material day she was passing by P.W.2's homestead when she saw the appellant and the second accused beating up the deceased. P.W.3 thereafter proceeded to report the matter to the appropriate village authorities.

We agree with the learned trial judge that the testimonies of P.W.2 and P.W.3 provide ample corroboration of the repudiated confession. It is also our considered opinion that since the appellant had made an earlier similar confession to her ten-cell leader, that is P.W.4, the learned trial judge could have based his conviction entirely on the repudiated confession without looking for corroboration since, under the circumstances, the confession could not be anything but true.

The next point for consideration and decision in this case is whether the appellant caused the death of the deceased. The learned trial judge was satisfied that the appellant caused the death of the deceased. The evidence on this point is on two levels: Firstly, there are the testimonies of eye-witnesses who claim to have known the deceased, those are P.W.2 (the sister of the appellant), P.W.3 (a neighbour of P.W.2) and P.W.4 (the ten-cell leader). These witnesses claim to have seen the dead body of the person whose death is the subject of this case and whom they knew. Secondly, there are the testimonies of persons who claim to have seen the dead body of a person who was identified to them as being that of Adaa d/o Bombo. There is P.W.1, the doctor who performed the autopsy on the dead body of the person identified to him by one Bura Ntomola and Patrice Cyprian - both of whom were not called to give evidence at the trial - in the presence of one Detective Sergeant Charles. There is also P.W.5, Detective Sergeant Hamisi, who visited the scene of crime and drew a sketch plan of the scene on information given to him by P.W.2. He also claims to have been accompanied by the doctor who performed the autopsy at the scene of crime.

On the evidence of the eye-witnesses, there can be no doubt that the deceased Adaa d/o Bombo died soon after being beaten up by the appellant and the second accused.

Mr. Kiritta, learned advocate for the appellant, has submitted in effect that on the evidence of the eye-witnesses there can be no finding that the death of the deceased was a result of the beating administered to the deceased by the appellant and the second accused. He also submitted, in effect, that in the absence of evidence to show a common intention between the appellant and the second accused and the absence of evidence to show which of the two assailants administered the fatal blow, the appellant cannot be held to have caused the death of the deceased.

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Furthermore, Mr. Kiritta submitted vigorously that the failure to call at the trial the persons who identified the dead body to the doctor renders the medical evidence valueless in so far as the issue of identity of the dead body and the cause of death are concerned. He argues that the identity of the body examined by the doctor is not established as being that of the person whose death is the subject of this case.

We propose to deal with this last submission first. We do not agree that the failure to call the two persons who identified the dead body to the doctor results in a failure to establish the identity of that body as being that of the lady whose death is the subject of this case. We say so because there is circumstantial evidence which irresistibly points to the identity of the dead body as being that of the lady whose death is the subject of this case. There is the evidence of P.W.1 (Doctor Aloisi Mruashwa) and P.W.5 (Detective Sergeant Charles Hamisi) who testified to the effect that both of them visited the scene of crime and the doctor performed the autopsy in the presence of one police Sergeant Charles and that the said Detective Police Sergeant Charles Hamisi drew a sketch plan of the scene which shows quite clearly the location of the house of the lady whose death is the subject of this case, and also the location of P.W.2's homestead. Since, on the evidence, the body of the deceased remained at the scene of crime until the arrival of P.W.1 and P.W.5, the circumstantial evidence is such that it gives rise to an irresistible inference that the body on which P.W.1 did an autopsy is the body of Adaa d/o Bombo, whose death is the subject of this case. We find it fanciful the suggestion by the learned advocate for the appellant that police sergeant

Charles Hamisi (P.W.5) cannot be the same police Sergeant Charles mentioned by the doctor (P.W.1). The authorities cited by the learned advocate appear to support the view that circumstantial evidence, where available, can be used to establish the identity of the dead body in the absence of direct evidence on the issue.

In the case of Enoclea Ewul v. R. (1931 - 34) T.T.L.R. 65 the brief judgment of the Court of Appeal for Eastern Africa states:-

> "The appellant has been found guilty of murder and sentenced to death. The evidence in our opinion amply supports the conviction. In his examination in the Lower Court which was read as evidence in the High Court he said: 'What I have said to the police officer is what I saw with my own eyes and that is all I want to say.' What he said to the police officer reads as follows: 'I then held the woman by the chest while Yoweri took the spear and thrust it into the woman's vagina. He drew it out and dug it in the ground. He then told me to take the spear and hide it. I told him to do it himself. He said he had not a good house to hide it in and said 'Take the spear and hide it in the roof at the back of your house.' Yoweri then again got on to the woman's stomach and I went away quickly and hid the spear in my house.''. That the appellant was beside the woman Akechi shortly before her death is borne out by the evidence which further shows that he was carrying a spear which according to the medical evidence had blood on the shaft. The evidence of Sgt. Zekeri Makuda is that he found this spear hidden in the thatch of the appellant's roof and that the appellant voluntarily said to him: 'This is the spear with which accused one and I killed deceased' adding 'Accused one and I killed deceased because she was bewitching us'. Daudi Makuda, Chief of Lubonge, also gave evidence of the appellant having said: 'That is the spear accused one and I killed the deceased with'. All this evidence is clearly sufficient to convict the appellant provided that the evidence of identification is satisfactory. Not only at this Session of the Court of Appeal but at many sessions it has been necessary to point out the care that should be exercised in recording satisfactory evidence identifying the body of a deceased person as that of a particular person who was seen to have received the injuries resulting in death. If for instance A gives evidence of B having been mortally injured and the latter's body is brought to hospital where Dr. C conducts a postmortem examination on it A should be called as a witness to identify the body and the doctor who conducted the post-mortem examination; and the doctor should be asked to identify A as a person who was present when the examination was conducted. In the present case Dr. McDaniel, who conducted the post-mortem examination, said: 'I performed post-mortem on body of adult native (female) brought to Tororo Hospital and identified to me by Yowana as being that of one

> "Akechi of Apeipei'. The lacuna here is that Yowana was not called as a witness. The learned Acting Solicitor General while drawing attention to this defect addressed to us a convincing argument, viz., that Akechi had been injured in a peculiar and brutal manner according to the eye-witnesses and that the woman examined by the doctor bore signs of having been injured in a similarly peculiar and brutal manner. This fact taken together with evidence of death of persons who had seen the woman in an injured condition prior to her death and were present at her death is in our opinion sufficient evidence of identification but the cases where such evidence would not be available can well be imagined. The appeal is dismissed.".

It is clear in that case that the identity of the dead body was established not by direct evidence but by circumstantial evidence of the peculiar injuries.

In the next case of R. v. Sirasi Bachumbira (1936) 3 E.A.C.A. 40 the brief facts of the case are contained in the headnote of the report which state:-

> "The appellant was convicted of the murder of one Mutundi. Witnesses who were present when he stabbed Mutundi gave evidence and there was evidence that seven days later a person called Mutundi was admitted to hospital suffering from a wound caused by a sharp instrument, but there was no evidence identifying this person with the person stabbed by the appellant.".

On page 41 of the judgment of the Court of Appeal for Eastern Africa the Court stated:-

> "No person was called to say that the Mutundi who died in hospital was the same as the Mutundi who was stabbed by the appellant, and the question for us to decide is whether the death of a man alleged to have been murdered has been properly proved. It is hardly necessary to say that the onus of proving this is upon the Crown.
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> Counsel for the Crown submits that there is a strong inference from the circumstances that the Mutundi who died in the hospital is the same as the Mutundi who was stabbed by the appellant. We are of the opinion that to establish such a fact from circumstances an irresistible inference must be shown. Is there such an irresistible inference. The facts are that on the 19th October one Mutundi in the district of Masindi was admitted to the hospital suffering from a wound in the left side. All the witnesses who saw the stabbing on the 19th October refer to the victim of the assault as the deceased and in all probability think him dead. We do not think that we can say that there is an irresistible inference of the identification.".

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This judgment is a clear authority for saying that circumstantial evidence which is sufficient in identification of a dead body must be such as to give rise to an irresistible inference of identity.

In the third case cited by the learned advocate for the appellant, that is the case of R. v. Mpande s/o Ndele (1938) E.A.C.A. 44 the Court of Appeal for Eastern Africa adopted and applied the principles stated in the first two cases.

In the fourth case cited by the learned advocate for the appellant, that is the case of Tumbo s/o Ngalishi v. R. (1953) 20 E.A.C.A. 173, the brief facts of the case are contained in the headnote of the judgment where it is stated:-

> "The appellant was convicted of the murder of his mother. A witness identified the deceased at the mortuary, giving only her name without adding anything more by which she could be identified.".

The Court of Appeal for Eastern Africa stated at page 173:-

> "The learned Counsel for the Crown has pointed out that the evidence as to the identification of the deceased body after it had been taken to the mortuary was not satisfactory, in that the witness gave only her name and did not add anything more by which she could be identified. This court has on occasions before observed that the mere giving of the name is not sufficient. Actually in this case there are sufficient pointers in the other evidence to establish beyond doubt that the body of the dead woman, described by the identifying witness as Agnes d/o Sauka, was in fact the wife of the witness Mshenzi and the mother of the appellant.".

It is clear in this case that though the direct evidence was not found to be sufficient to establish the identity of the dead body, the deficiency was made good by circumstantial evidence. It is probable, though not quite certain from the judgment of the Court of Appeal for Eastern Africa, that the direct evidence was found to be insufficient on the basis that the name of the deceased was given by a witness who did not disclose how he came to know

the deceased, for otherwise we cannot see how the identification by name of the deceased by a close relative or a person who previously knew the deceased would be found to be insufficient identification.

The medical evidence accepted by the learned trial judge in the present case shows that the deceased died of cardiac and respiratory arrest which could have arisen from a broken spinal cord in the neck. On the eye-witness' testimony of P.W.3, who corroborates the confession of the appellant as well as the confession of the second accused - a confession which implicates the appellant - we are satisfied and find as a fact, like the learned trial judge, that the deceased sustained a broken spinal cord in the neck in the course of being beaten up by the appellant and the second accused.

The question which arises is who was the author of the fatal blow or blows which broke the spinal cord? Obviously, if the appellant was the author of the fatal blow or blows, she could be found to have caused the death of the deceased; but if, on the other hand, the fatal blow or blows were administered by the second accused, the appellant would not be found legally responsible for the death of the deceased unless the situation falls either under the provisions of section 22 or section 23 of the Penal Code, which deal with parties to a criminal offence and offences committed by joint offenders in the prosecution of a common purpose.

On the evidence adduced at the trial, and accepted by the learned trial judge, there is nothing to show that the appellant was the author of the fatal blow or blows in the neck. However, in the appellant's confession to the Justice of the Peace (P.W.6), there is the following statement in Kiswahili:-

"Mimi nakumbuka mnamo tarehe 20/10/76 kama saa 10.30 jioni marehemu alikuwa anapigana na dada yangu ndipo na mimi nikaenda kumsaidia dada yangu kumpiga marehemu.".

It is evident from this statement that the role of the appellant in the incident, which resulted in the death of the deceased, was that of giving help to the second accused in beating up the deceased. In common legal parlance, the appellant aided and abetted the second accused in beating up the deceased, and she is covered by the provisions of section 22(c) of the Penal Code, and she therefore caused the death of the deceased.

We have reached this conclusion after considering the medical evidence along with the confessions of the appellant and the second accused - confessions which are corroborated by the testimonies of P.W.2 and P.W.3. We do not, however, accept Mr. Kiritta's submission that the appellant could not have been convicted in this case without the medical evidence regarding the cause of death of the deceased. The medical evidence in this case is direct evidence of the cause of death; but direct evidence does not preclude the cause of death being proved by circumstantial evidence. There may well be cases where the medical evidence as to cause of death is essential for a conviction, but in our considered opinion this is not such a case. since, according to the confessions of the appellant and that of the second accused, the deceased died on the spot very soon after being beaten up with sticks by the appellant and the second accused. It is our considered opinion that the circumstances in this case are such as to point irresistibly to death being due to the beatings administered by the appellant and the second accused. It makes no difference that the beatings could have trigerred off some other factor such as a heart attack which killed the deceased, since the situation would fall within the provisions of section 203(d) of the Penal Code under which

"a person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death ... ... if by any act or omission he hastens the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;".

With regard to malice aforethought, the learned trial judge agreed with the lady and gentlemen assessors who sat with him to the effect that the appellant and the second accused did not intend to kill the deceased. The appellant and the second accused were therefore acquitted on the charge of murder but convicted for the lesser offence of manslaughter - contrary to section 195 of the Penal Code - as there was no justification for killing the deceased.

With regard to the sentence, the learned trial judge imposed a sentence of twelve years' imprisonment on the appellant and the second accused. He decided to impose such sentence because, in his view: "This is a very serious manslaughter case almost bordering murder.". With due respect to the learned trial judge, we do not think this was "a very serious manslaughter case almost bordering murder" since, as the learned trial judge noted, death occurred in the course of a minor squabble. Moreover, no vicious weapons were used. We are convinced that had the learned trial judge properly directed himself on the issue, he would not have passed what he considered to be an exemplary sentence. We will, therefore, reduce the sentence.

In the final analysis, therefore, the appeal against the conviction is dismissed, but the appeal against sentence partly succeeds, to the extent that we reduce the sentence to five years' imprisonment.

The appellant's sister, that is the second accused at the trial and who has not appealed, also falls in the same position

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as the appellant with regard to sentence. But since the jurisdiction of this Court is exclusively appellate, we are not in a position to grant any relief to the appellant's sister unless she appeals against the sentence.

We note that by now it would be very much late in making an appeal, but we will exercise our discretion in granting her leave to appeal out of time to this Court if she so wishes.

And we order accordingly.

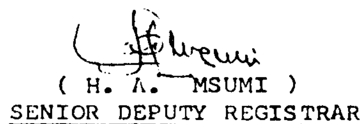
DATED at ARUSHA this 20th day of November, 1980.

F. L. NYALALI
CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

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



( H. A. MSUMI )
SENIOR DEPUTY REGISTRAR