# NATHANIEL ALPHONCE MAPUNDA AND BENJAMINI ALPHONCE MAPUNDA v. REPUBLIC

## COURT OF APPEAL OF TANZANIA AT MBEYA

(Mroso, Nsekela and Msoffe, JJA)

## CRIMINAL APPEAL No. 251 OF 2005

(From the judgment of the High Court of Tanzania at Songea, Manento, J., dated 28 October 2003, in Criminal Sessions Case number 40 of 2001)

*Criminal Practice and Procedure – Burden of Proof – Appellants convicted of murder and manslaughter – No prosecution witness testified to have seen the appellants kill the deceased – Witnesses only saw appellants with the deceased body – Whether prosecution case was proved beyond reasonable doubt.*

*Criminal Practice and Procedure – Circumstantial evidence – Appellants seen with the dead body – Whether this was enough evidence to ground a conviction.*

*Criminal Practice and Procedure – Appellants present at the scene of the killing – Appellants were the last persons to be seen with the deceased – Whether sustainable grounds to link appellants with the killing of the deceased.*

*Criminal Practice and Procedure – Sentensing –Appellants had a common intention of assaulting the deceased but sentenced differently – Whether sentencing was proper.*

A The appellants, who were brothers, were charged with murder contrary to section 196 of the Penal Code. After a full trial the judge convicted the first appellant of murder and the second appellant of manslaughter. At the trial no prosecution witness testified to have seen the appellants kill the deceased. They only stated that on arrival B at the scene they saw the appellants with the deceased's body. On appeal to this Court;

**Held:** (i) As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of *Mohamed Said Matula v. R* (2) this Court C reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt;

(ii) Where circumstantial evidence is relied on the principle has always been that facts from which an inference of guilt is drawn must be proved beyond reasonable D doubt;

(iii) Much as we are aware that this is a sound and cherished principle of law (that the appellants were the last persons to be seen with the deceased) our view is that the principle presupposes that an accused person was last seen with a deceased E person while still alive.

(iv) In a criminal charge suspicion alone, however grave it may be, is not enough to sustain a conviction, all the more so, in a serious charge of murder;

F (v) The principle has always been that where a person is killed in the course of prosecuting a common unlawful purpose each party to the killing is guilty of murder.

***Appeal allowed***

G Cases referred to:

(1) *Efraim Lutambi v. Republic* (CAT) Criminal Appeal number 30 of 1996 (unreported)

H (2) *Mohamed Sadi Matula v. R* [1995] T.L.R. 3

(3) *Ally Bakari and another v. R* [1992] T.L.R. 10

(4) *Jackson Mwakatoka and twoothers v. R* [1990] T.L.R. 17

I (5) *Juma Zuberi v. R* [1984] T.L.R. 249

(6) *Katabe Kachochoba v. R* [1986] T.L.R. 170

(7) *Haruna Mohamed and Mathew Lwali v. R* (CAT) Criminal Appeal number 30 of 2001 (unreported)

(8) *Tabulayenka s/o Kirya and others v. Republic* (1943) 10 E.A.C.A. 51

Statutory provisions referred to:

(1) Penal Code, Chapter 16 sections 196 and 195

(2) Criminal Procedure Act 1985, section 192(3)

*Mr. Mbise* for the appellants

*Messrs. Manyanda and Boniface* for the Republic

## JUDGMENT OF THE COURT

(Dated 31 August 2006)

**Msoffe, JA:** The appellants, who are brothers, were charged with murder contrary to section 196 of the Penal Code. It was alleged that on 16 October 2000, at about 00:30 hours at Liwili village within Mbinga District they murdered one Egreta Ndimbo. After a full trial the High Court (Manento, J.) sitting at Mbinga convicted the first appellant of murder and the second appellant was convicted of manslaughter contrary to section 195 of the Penal Code. Consequently, the first appellant was sentenced to death and the second appellant was sentenced to a term of imprisonment for twenty one years. In grounding the convictions the learned trial judge observed and reasoned partly as follows:

> On my observation to the demeanour of the second accused person, the way he was giving his evidence, answering questions put to him, I am of the opinion that he was persuing (*sic*) a just and lawful cause, that of arresting a suspect. But he was negligent in not rescuing the deceased. I have a feeling that he was telling the truth when he said that he urgued his brother, the first accused not to assault the deceased after her arrest

A but the firstaccused, persisted in the assaulting of the deceased, causing the rapture of the forehead of the deceased. The whole proceedings showed how the first accused, was in command of the situation. Sending other people to go and report to the authority first the order given to PW2
B Geofrey Kayombo who refused and later on to the second accused. All those circumstances leads me to conclude that there was *no mens rea* by the second accused. That was only by the first accused, who had alleged that the deceased was stealing his maize. What the second accused did
C was to assault the deceased. But his being in action leads to a commission of lesser offence. As to malice aforethought, I would say that it has been proved against the first accused person perforating the deceased's forehead, causing it to rapture and damaging the brain, was an act intended to cause
D the death of the deceased. That the deceased, was a weakly health woman was fatally beaten on her head which at the end, caused her death. The first accused's malice aforethought could also be inferred from his belief that the deceased was a reputed thief, a habit born, on her mother's family.

E The appellants are dissatisfied, hence this appeal against the respective convictions and sentences.

At the hearing of the appeal Mr. Mbise learned counsel advocated for the appellants. Mr. Manyanda learned state attorney assisted by
F Mr. Boniface learned senior state attorney appeared on behalf of the respondent Republic. We wish to state from the outset that the learned state attorneys did not support the convictions and sentences.

Mr. Mbise filed a Memorandum of Appeal with four grounds of
G complaint. The grounds read as follows:

1. The learned honourable trial judge erred on concluding that the deceased did not meet her death at the hands of members of a Mob.

H 2. The learned honourable trial judge erred in not taking into account the Cautioned and Extra Judicial Statements admitted and marked Exhibits P.2 (a) and (b) and P.3 (a) and (b) in his Judgment.

3. The learned honourable trial judge took a wrong approach to the
I testimony of the second appellant as against the first appellant.

4. The sentence of twenty one (21) years imprisonment imposed on the second appellant is manifestly excessive in the circumstances of this case.

In arguing the appeal Mr. Mbise submitted generally on he above grounds. In the process, he contended that it was wrong for the trial High Court not to believe the defence evidence that the death of the deceased was caused by a mob of people. No prosecution witness testified and stated that he/she saw the appellants assaulting the deceased to death. In this regard, the prosecution case either succeeded or failed on the basis of the defence case. The appellants' version of the circumstances surrounding the deceased's death was not contradicted by the prosecution side. If the judge had appreciated the above facts he would not have convicted the appellants, Mr. Mbise concluded on the point.

As for the different convictions and sentences, Mr. Mbise faulted the judge for treating the appellants differently. Once the judge had found that the appellants had a common intention of assaulting the deceased he ought not to have convicted and sentenced them differently. At any rate, Mr. Mbise went on to say, the sentence of 21 years imprisonment meted out to the second appellant was too severe for an offence of manslaughter.

In supporting the appeal Mr. Manyanda essentially repeated the submission made above by Mr. Mbise. He too was convinced that the judge was in error for the reasons stated by Mr. Mbise. He emphasized that anything that was material to the case came from the appellants themselves. It was therefore wrong to ground the conviction on the basis of the defence case, he urged. In conclusion on the above point, Mr. Manyanda was of the view that the appellants' convictions were based on suspicion only. Like Mr. Mbise, Mr. Manyanda also felt that once the judge had found that the appellants had a common intention of assaulting the deceased it was wrong to convict and sentence them differently.

In his brief submission Mr. Boniface was of the view that there were a lot of doubts in the prosecution case. The doubts ought to have been resolved in favour of the appellants, he submitted. Like Messrs. Mbise and Manyanda, Mr. Bonifance was also of the view that the judge ought not to have treated the appellants differently in handing down the convictions and sentences.

Mr. Boniface added another point which was not canvassed by Messrs. Mbise and Manyanda in their respective submissions. The point relates to the cautioned and extra judicial statements which were produced and admitted in evidence at the preliminary hearing. The complaint here is that the statements were not read over to the appellants. With respect, we agree with Mr. Boniface in the following sense. A look at the record of the preliminary hearing conducted on 26 August 2002 will show that cautioned statements as well as extra judicial statements were produced and admitted in evidence as Exhibits P2 and P3 respectively. Thereafter, a Memorandum of Matters that were not in dispute was drawn up and signed by the parties. However, the record of the case does not show that the contents of the Memorandum were read over and explained to the appellants as required by sub-section (3) of section 192 of the Criminal Procedure Act, 1985. The sub-section reads:

> (3) At the conclusion of a preliminary hearing held under this section, the Court shall prepare a memorandum of the matters agreed *and the memorandum shall be read over and explained to the accused in a language that he understands,* signed by the accused and his advocate and by the public prosecutor and then filed [emphasis supplied].

In the case of *Efraim Lutambi v. Republic* (1) this Court stated:

> .... Any exhibits, including cautioned and extra judicial statements, which are not in dispute should have them referred to and given exhibit numbers in the memorandum of undisputed matters. The contents of the memorandum including the exhibited statements, if any, should be read over and explained to the accused (in a language he understands), and the fact that that has been done should be reflected on the record.

For purposes of our decision in this matter we note that the judge did not attach any weight to the above statements in his judgment. He decided the case on the basis of other evidence. In the light of this fact, we do not have to go further and discuss the evidential value of the statements in relation to the case and what orders could be made in the circumstances. It will suffice to say briefly that we hope in future the provisions of section 192(3) of the above Act, as emphasized in *Lutambi,* will be complied with fully by judges and Magistrates when conducting preliminary hearings. After all, the provision is couched in mandatory terms. At this juncture we think it is pertinent and instructive to state the case that was before the trial High Court.

As earlier stated, the appellants are brothers. At the material time they lived at Liwili village in Mbinga District, Ruvuma Region. The first appellant owned a *shamba* where he had planted maize. At the time of the incident the maize was ripe and ready for harvesting. On 16 October 2000 at about 1230 hours the fist appellant was going back home. As he passed through his *shamba* he saw a person harvesting his maize. He quietly went to the home of the second appellant which was nearby and informed him of the person he had seen at his *shamba*. The two went to the *shamba* where they saw the person who happened to be the deceased in this case. They raised an alarm, popularly known in the area as "*mlete.*" Those who answered the alarm were PW1 Charles Mwingira, PW2 Geofrey Kayombo and PW3 Odo Kayombo. These witnesses stated that on arrival at the scene they saw the appellants with the deceased's body. Upon inquirly the appellants told them that the deceased was assaulted to death by a mob of people who had already dispersed at the time. In their respective defences the appellants repeated the same story, that the deceased was killed by a mob of people.

There was no dispute at the trial that Egreta Ndimbo was dead and that she died on 16 October 2000 at about 0030 hours. According to the post mortem examination report the death was due to fracture of the frontal bone with brain damage. It was due to fracture of the frontal bone with brain damage. It was also undisputed that no prosecution witness testified to have seen the appellants kill the deceased. The crucial issue

was whether the appellants were responsible for the death of the deceased. The judge considered the issue and answered it in the affirmative. He held that the appellants assaulted the deceased to death. He also opined and held that the reasonable inference was that the appellants raised the "*mlete*" as a camouflage "so that it could be believed that they did not kill the deceased."

As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of *Mohamed Said Matula v. R.* (2) this Court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt. In the instant case, the appellants did not admit the killing. So, it was the duty of the prosecution to prove the case against them beyond reasonable doubt if a conviction was to lie in the matter. Without hesitation, we are in agreement with learned counsel from both sides that this burden was not discharged. As is evident from the evidence, apart from the dead body being seen or found in the first appellant's *shamba*, and the fact that the appellants were also seen there, there was no other evidence to implicate them with the killing. We agree with learned counsel that the above evidence was not enough to sustain a conviction. There ought to have been more credible evidence linking the appellants with the killing. Apparently no such positive evidence was forthcoming. In fact, in the absence of evidence to the contrary the appellants' version of the incident might as well have been true.

We also wish to add here that although the judge did not say so in so many words he appeared to have been working on the idea that there was circumstantial evidence linking the appellants with the killing on account of the undisputed fact that they were seen with the dead body. With respect, this fact alone was not enough to ground a conviction. The principle has always been that facts from which an inference of guilt is drawn must be proved beyond reasonable doubt – *Ally Bakari and Another v. R.* (3). In the instant case no such proof was forthcoming, as already stated above.

We are aware that it could perhaps be suggested that the appellants were responsible for the death because they were present at the scene

of the killing. As far as this point is concerned we wish to associate ourselves with this Court's decision in the case of *Jackson Meakatoka and 2 Others v. R.* (4) where at page 21 the Court quoted a statement from a decision of the Eastern Africa Court of Appeal in the case of *R. v. Komen* that:

Mere presence of the accused at a killing, he not having raised any objection thereto is not enough to justify his conviction for murder.

Again we are also aware that it could perhaps be argued that the appellants were responsible for the death because they were the last persons to be seen with the deceased. Much as we are aware that this is a sound and cherised principle of law our view is that the principle presupposes that an accused person was last seen with a deceased person while still alive. Indeed, in the cases of *Juma Zuberi v. R.* (5) and *Katabe Kachochoba v. R.* (6) the respective accused pesons were said to have been seen with the deceased pesons while still alive. In the instant case the situation is different. The prosecution witnesses saw the appellants with the deceased after she had died. So, the principle would not apply.

As observed by Mr. Manyanda, the case against the appellants may well be highly suspicious. However, in a criminal charge suspicion alone, however grave it may be, is not enough to sustain a conviction, all the more so, in a serious charge of murder – See *Haruna Mohamed and Mathew Lwali v. R.* (7).

As for the different convictions and sentences we also agree with learned counsel that the judge was in error in treating the appellants differently once he had found that they had a common intention of assaulting the deceased. While we are on this point we wish to point out that the principle has always been that where a person is killed in the course of prosecuting a common unlawful purpose each party to the killing is guilty of murder. In *Tabulayenka s/o Kirya and Others v. Republic* (8) the Court of Appeal for Eastern Africa stated at page 52 as follows:

....To constitute such common intention it is not necessary that there should have been any concerted agreement between the accused prior to the

attack on the so called thief. Their common intention may be inferred from *their presence, their actions* and the omission of any of them to dissociate himself from the attack... [emphasis supplied].

Furthermore, we also think that the sentence of 21 years imprisonment meted out to the second appellant was too severe particularly in the light of the mitigating factors that were presented to the Court.

In the event, we allow the appeal, quash the convictions and set aside the sentence. The appellants are to be relased from prison unless they are lawfully held therein.