THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: RAMADHANI, J. A.; NSEKELA, J. A.; And KAJI, J. A.)
CRIMINAL APPEAL NO. 67 OF 2002
BETWEEN
RAPHAELI KINASHI ... APPELANT
AND
THE REPUBLIC ... RESPONDENT
(Appeal from the Conviction by the High Court of Tanzania at Moshi)
(Mushi, J.)
dated the 3rd day of September , 1993
in
Criminal Session Case No. 29 of 1992
.....
JUDGMENT OF THE COURT

RAMADHANI, J.A.:

Two brothers, Raphaeli Kinashi and Nicolaus Kinashi, were convicted of the murder of their cousin, Joseph Babu, on 24th August, 1990. When we came to hear the appeal we were informed that Nicolaus Kinashi died in prison. So, we strike out his appeal under Rule 71 (1) of the Tanzania Court of Appeal Rules, 1979. However, in this judgment we shall refer to him, whenever necessary, by his first name of Nicolaus.

About midnight of that fateful day the front door of the deceased's house was forced open by the use of a big stone commonly called *fatuma*. Two people got in. There was a wick lamp, known in *Kiswahili* as *koroboi* inside the room of the deceased and his wife, Benedicta Joseph (PW 1). In another room there were the children of the couple one of whom, Apronia Joseph, was PW 2. Both PW 1 and PW 2 recognized the two intruders as the appellant and Nicolaus.

PW 1 and PW 2 said that inside the house Nicolaus kicked the lamp and extinguished it and then started to attack the deceased with a stick. The appellant was beaming the torch at Nicolaus and the deceased, while throwing stones at the deceased. The deceased and his family raised an alarm and the two vanished.

Two persons arrived at the same time at the scene in response to the alarm. Michael John Mtei (PW 3), left his house for that of the deceased's and on the way he met Festo Juma (PW 4) heading towards the same destination. When they arrived they asked the deceased as to what was the matter and they were told "Ndugu

zangu wananiua", that is, "My kinsfolk are killing me". The deceased named the appellant and Nicolaus as his assailants. PW 3 and PW 4 advised the deceased not to mention those names to other people for fear that the appellant and Nicolaus could be attacked. A few minutes later the appellant and Nicolaus appeared at the scene and Nicolaus, together with other persons, accompanied the deceased to the hospital. The deceased died some 19 days later because of tetanus.

The appellant said that since after supper he was sleeping in his house when his wife, Lucia Raphael, DW 1, woke him saying that someone was knocking at the door. He got up and went to open the door where he found one Nico Babu who told him of the incident at the deceased's place and so he left in the company of Nico. At the deceased's place the appellant found a number of people including PW 3 and PW 4. The appellant said further that he and Nicolaus heard the gossip that they were mentioned as the assailants and so, they presented themselves to the Police Station. They gave two reasons for doing so: One, they wanted to look into the possibility of

suing the deceased for spreading false information. Two, they wanted to clear their names.

The learned trial judge did not buy those explanations and made the following observations:

> The reasons given by both accused for going to the Police are absurd and completely untenable. It is unthinkable that someone can decide to go to the Police to open a charge against someone who has made a complaint to the Police against him. Or for that matter that someone should voluntarily go to the Police to clear himself from a complaint made against him to the Police. The accused persons must have been labouring with guilty conscious and were under fear of being attacked and decided to clear it out by submitting themselves to the Police.

May be we digress a bit. We asked Mr. Mwampoma, learned Senior State Attorney, for the respondent/Republic, about that comment and he said that the learned judge went too far. We think that that statement is unfortunate and tends to incriminate the appellant and Nicolaus. We ask: what could they have done? If they had left the locality and had gone elsewhere, that would have been taken to be running away from the arm of the law.

Anyway, to be fair to the learned judge he made those comments after he was satisfied with the evidence before him. He said:

> Having heard and carefully observed PW 1 and PW 2 give evidence in this case, I have no reason at all to doubt their credibility. I believe the testimonies of these witnesses and find as a fact that the conditions as described by them were favourable for identification and that they identified the two accused persons in this case as the people who broke the door of their house that night and attacked the deceased.

The issue is the reliability of PW 1 and PW 2. For the appellant was Mr. J. M. Itemba, learned advocate, who canvassed before us a lone ground of appeal that the learned judge erred when he found that the appellant was properly identified. The learned advocate asked us to review the evidence. He submitted that the law is that where a case depends on the identification of an accused person then the evidence must be watertight. He questioned whether there was enough light to enable proper identification. The learned advocate pointed out that the wick lamp was extinguished and the torch was beaming away from the one holding it. However, Mr. Itemba conceded that the torch shone upon Nicolaus and so, he was properly identified.

Mr. Mwampoma, on the other hand, contended that there was enough light even to enable the identification of the appellant who was holding the torch. However, the learned Senior State Attorney conceded that there are a number of loose ends in the evidence produced but he did not agree that they raise reasonable doubts.

We are of a different view. As for light, PW 2 said that she was woken up by the decease to go and tie up a goat which became loose. She took the lamp from her parents' room and went to attend to the assignment and that after she had finished she returned the lamp to the parents' room. This shows that there was only that lamp and no other source of light in the house. Admittedly, PW 2 also said that there was a lamp in her room. But if that was so, why did she have to take the lamp in the parents' room to attend to the goats?

PW 2 told the court that the house had three rooms. She said further that after the big bang the deceased stood near the door leading to his room in which was the lamp. We are not told where exactly the lamp was stationed inside the parents' room. Could the lamp inside

the parents' room effectively illuminate the corridor leading from the front door which was broken into? Then both PW 1 and PW 2 told the court that Nicolaus kicked that lamp and extinguished it. It is not easy to envisage the acrobatic moves which were involved. How did he manage, from the corridor, to kick the lamp inside the parents' room? Did Nicolaus get into the parents' room first, kick the lamp and then get out? If so why was there no immediate confrontation between the deceased, who was standing near his door, and Nicolaus as he was entering that door to put off the lamp? The prosecution had to clear these taxing questions.

The court was told that the deceased told PWs 3 and 4 that the appellant and Nicolaus attacked him and that he also told the Police. We wonder why the appellant was not arrested immediately. Mr. Mwampoma said that this was due to the laxity of the Police.

These matters raise doubts in our minds on whether the appellant was really identified. We realize that there was a lot of suspicion against the appellant. The appellant had a border dispute with the

deceased way back in 1989. Then the appellant accidentally burnt the deceased's sugar cane and he was ordered to pay a compensation which he has not yet done so. But suspicion, however grave, cannot be a substitute for proof beyond reasonable doubt.

We, therefore, give the appellant the benefit of doubt and allow his appeal. The appellant should be released immediately unless his incarceration is otherwise authorized by law. We so order.

DATED at ARUSHA this 27th day of October, 2004.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR