DISCILE NG'ONJA, OLIPA NG'ONJA, EPIMARK MWEGOMA, GLORIA NG'ONJA & RAHEL NG'ONJA *v.* REPUBLIC

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(Kisanga, Omar and Lubuva, JJ.A.)

CRIMINAL APPEAL No. 139 OF 1993

(From the decision of the High Court of Tanzania at Morogoro (Kyando, J.), dated 10th April 1992, in Criminal Sessions Case No. 21 of 1991)

Evidence – Corroboration – Evidence needing corroboration – In a trial for murder: evidence for the prosecution given by a brother of the deceased – Whether needing corroboration

Criminal Practice and Procedure – Final submissions in criminal trials – Right of reply by the prosecution – Sections 296 and 201 of the Criminal Procedure Act 1985

Criminal Law – Murder – Malice aforethought – Death from injuries inflicted in the course of a squabble at the end of a drinking session and in which no lethal weapon is used – Whether malice aforethought is established

The five appellants, members of the same family, assaulted the deceased, inflicting on him injuries that led to his death shortly after. The assault occurred at the appellants' home towards the end of a pombe drinking session where the deceased also participated. The appellants were then charged with and convicted of murder. The case for the prosecution had rested solely on the evidence of PW.1, a brother of the deceased who was an eye witness to the incident. On appeal:

Held:

(i) PW.1 was not a suspect in the homicide and the fact that he was a brother of

the deceased did not, by itself, make him a person with an interest of his own to serve in the matter and his evidence required no corroboration; it only required to be approached with caution, which the trial judge did;

(ii) As the defence in this case adduced no evidence other than that of the accused persons, and neither the Attorney General nor the Deputy Attorney General nor the Director of Public Prosecutions appeared in person, the prosecution had no right of reply in making the parties' respective final submissions; therefore, the prosecution wrongly exercised the right of reply and this contravened ss.296 and 201 of the Criminal Procedure Act 1985;

(iii) Malice aforethought and common intention were issues that the defence ought to have dealt with whether or not the prosecution raised them in its reply; failure by the defence to deal with those issues had nothing to do with the prosecution being wrongly allowed to exercise the right of reply;

(iv) As the injuries leading to the death of the deceased were inflicted in the course of a squabble at the end of a day's drinking session with no lethal weapon used, malice aforethought cannot be said to have been established beyond reasonable doubt.

Appeal partly allowed

Case referred to:

(1) *Mbushuu @ Dominic Mnyaroje and Another v. Republic*, [1995] T.L.R. 97

Mr. *Malolo*, for the Appellants

Mr. *Naali*, for the Republic

JUDGMENT OF THE COURT

(Dated 3 July 1995)

Kisanga, J.A.: The five appellants were jointly charged with and convicted of murder contrary to section 196 of the Penal Code. The appellants

Discile Ng'onja, Olipa Ng'onja and Epimark Mwegoma were each sentenced to death, while Gloria Ng'onja and Rahel Ng'onja aged 15 and 13 years respectively were each sentenced to be detained during the President's pleasure. They have now appealed. A

Essentially the case for the prosecution was that the appellants, who are members of the same family, jointly and together assaulted the deceased, inflicting on him injuries which led to his death only shortly afterwards. The assault was by way of revenge on the deceased for tearing or damaging a dress belonging to the appellant Rahel about one week before the day of the incident. The case for the prosecution rested solely on the evidence of Harold (P.W. 1), a brother of the deceased who eyewitnessed the incident. He testified that on the material day he and the deceased were at the home of the appellants drinking pombe. Towards the end of the drinking session the appellant Discile, who is the head of the family, for no apparent reason assaulted the deceased and threw him to the ground. As he continued to assault him on the ground each of the other appellants participated in the assault. P.W. 1 intervened and managed to separate the deceased from the assailants. The deceased walked away after that but died only shortly afterwards before reaching home. According to the post mortem report death was due to internal haemorrhage following a rupture of the spleen and the liver. B C D E F

All the appellants denied any involvement in the assault occasioning the death of the deceased. The trial judge rejected the defence and, accepting the evidence of P.W. 1, convicted the appellants as charged. G

In this appeal the appellants were represented by Mr. Malolo, learned advocate, while Mr. Naali, learned State Attorney, appeared for the respondent Republic. The joint memorandum of appeal raised four grounds of appeal. The first ground criticises the trial judge for rejecting the appellants' defences and accepting the uncorroborated evidence of the prosecution witnesses who, being relatives, had an interest of their own to serve. As stated earlier the prosecution case rested solely on the evidence of P.W. 1, a brother of the deceased, who eyewitnessed the incident. P.W.2 was also a brother of the deceased but his evidence was H I

A only peripheral because he was not at the scene or even in the neighbourhood of the scene of the incident; indeed he only came across the deceased as he was returning home when the deceased had collapsed on the way and was in a critical condition. P.W.2 did not claim to have
B witnessed the assault or to have any knowledge of what had happened rendering the deceased in the critical condition he found him.

The true position, therefore, is that P.W. 1 is the only brother of the deceased who gave damning evidence against the appellants. But the
C witness had no interest of his own to serve in the matter as claimed on behalf of the appellants in this appeal. For, it was not alleged and there is nothing to suggest that P.W. 1 was a suspect or that should the appellants be acquitted he would be the next suspect. The fact that he was a brother
D of the deceased by itself did not make him a person with an interest of his own to serve. As such, therefore, P.W. 1's evidence although being the evidence of a relative, required no corroboration either in law or as a matter of practice. It only required to be approached with caution because
E of the possibility that the witness might have been tempted to exaggerate his story in an attempt to ensure that someone is held responsible for the death of his relative. This the trial judge did when, after finding that P.W.
F 1 was a witness of truth, he went on to say,

> Of course the deceased was his brother and one has to always guard oneself against the possibility of his trying to pin the responsibility for his
G brother's death on anyone. In this case I am satisfied that he testified truthfully.

There was evidence that P.W. 1 knew all the accused persons well
H before the incident as they were his co-villagers. The incident took place in the evening when there was still day light, and the witness spent some time with the accused persons when he intervened and rescued the deceased from their joint attack. Like the trial judge, we are satisfied that
I in those circumstances P.W. I correctly identified the appellants as the assaillants of the deceased.

The complaint in the second ground is that the trial judge wrongly allowed the prosecution to exercise the right of reply in contravention of sections 296 and 201 of the Criminal Procedure Act. Those sections provide in effect that at the conclusion of the evidence for both sides, if the defence called no witnesses then in their final submissions the prosecution starts and the defence has the right of reply, the only exception being where the Attorney General, Deputy Attorney General or the Director of Public Prosecutions appears in person. In this case admittedly the defence adduced no evidence other than that of the accused persons and neither the Attorney General, Deputy Attorney General nor the Director of Public Prosecutions appeared in person. Therefore the prosecution should not have exercised the right of reply as it did.

It was alleged for the appellants that such irregularity was prejudicial to the defence because the defence was precluded from commenting on the issues of malice aforethought and common intention introduced by the prosecution in its reply. It must be pointed out at once that malice aforethought and common intention were issues which in this case the defence ought to have dealt with whether or not the prosecution raised them in its reply. Therefore the defence itself was to blame for not dealing with such obvious matters when it had the opportunity to do so in its submission. In other words the defence failed to deal with the issues of malice aforethought and common intention out of its own indiligence and not because the prosecution was allowed to exercise the right of reply.

This brings us to the third ground of appeal which urges that the evidence did not support conviction for murder. We think there is merit in this submission. The injuries leading to the death were inflicted in the course of a squabble at the end of a day's drinking session which might well be described as a drunken squabble in which no lethal weapon was used. It seems that the appellants jointly assaulted the deceased as an expression of their anger and displeasure arising from the decease tearing or damaging the dress of the appellant Rahel, and that in the

course of demonstrating such displeasure, and without using any lethal weapon, they inflicted the fatal injury or injuries. In the totality of all those circumstances we think that malice aforethought cannot be said to have been established beyond reasonable doubt. In our view therefore the evidence could only support conviction for the lesser charge of manslaughter.

The fourth ground alleges that the death penalty passed on the appellants Discile Ng'onja, Olipa Ng'onja and Epimark Mwegoma contravened the provisions of Article 13(6)(e) of the country's Constitution. On this point we wish to say no more than that in the recent case of *Mbushuu @ Dominic Mnyaroje and Another v. Republic (1)*, this Court held that in Tanzania the death penalty is not unconstitutional.

In the result, the appeal is partly allowed. The conviction for murder is quashed and for the reasons above stated we substitute therefore conviction for manslaughter contrary to section 195 of the Penal Code. We set aside the sentence of death passed on the appellants Discile Ng'onja, Olipa Ng'onja and Epimark Mwegoma and substitute therefore the sentence of 7 years' imprisonment for each of them. And lastly the sentence of detention during the President's pleasure passed on the appellants Gloria Ng'onja and Rahel Ng'onja is also set aside. We sentence each of these to such a prison term as will result in their immediate release from prison unless they be held on some other lawful ground.