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MAULID HASSAN KONDO v REPUBLIC

COURT OF APPEAL OF TANZANIA

(Nyalali, Mnzavas and Lubuva JJA)

CRIMINAL APPEAL NO 164 OF 1993

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May 30, 1994 – DAR ES SALAAM

(From the decision of the High Court of Tanzania at Dar es Salaam, Mapigano, J)

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Criminal Law – Murder contrary to s 196 of the Penal Code Cap 16 Criminal Practice and Procedure – Appeal – Memorandum of Appeal filed out of time – Consequences thereof – Rule 65(1) of the Court of Appeal Rules 1979.

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The appellant was convicted of murder contrary to s 196 of the Penal Code, and sentenced to death. He appealed to the Court of Appeal.

A When the appeal came up for hearing it was discovered that the memorandum of appeal had been filed out of time.

Held:

(i) The appeal was not properly before the Court as the mandatory provisions of Rule 65(1) of the Court of Appeal Rules 1979 were not complied with;

B (ii) Malice aforethought was clearly established by the evidence that the applicant used a pestle in attacking the deceased, and there were no reasons to interfere with the finding of the High Court which was based on clear and loud evidence.

C *Appeal dismissed.*

No case referred to.

Lamwai, for the appellant.
Miss *Kiwanga*, for the respondent.

D **Mnzavas, JA**, delivered the following considered judgment of the Courts:

Maulidi Hassani Kondo was charged with and convicted of murder contrary to s 196 of the Penal Code and sentended to death. Dis-
E satisfied with the decision of the High Court, (Mapigano, J) he has appealed to this Court.

When the appeal came up for hearing on 17 February 1994 we discovered that it was not properly before us as the memorandum of appeal was filed out of time contrary to the provisions of Rule 65(1)
F of the Court of Appeal Rules. Dr *Lamwai*, learned defence counsel applied for an adjournment to enable him to file an application for leave by this Court for enlargement of time to file memorandum of appeal. The application was granted but when the matter came up again for hearing this morning – 26 May 1994, Dr *Lamwai* informed
G the Court that after he had scrutinised the evidence tendered in the High Court he was of the view that the conviction was based on the evidence of identification of the appellant by PW1, Fatuma Thabiti, who told the trial court that she saw and identified the appellant as he was attacking the deceased Thabiti Ali on 18 November 1990.

H The learned defence counsel finally told the Court that he had nothing to say about the conviction and left the matter to the Court to decide. In her short submission to the Court Miss *Kiwanga*, learned State Attorney, said that in view of what the learned defence counsel had stated she also left it to the court to decide.

I First we would like to point out that the appeal was not properly before us as the mandatory provisions of Rule 65(1) were not com-

plied with. That being the position the Court would be entitled to strike it out as incompetent. A

Even if for the sake of argument the appeal had been properly before us we would have no reason to interfere with the finding of the High Court taking into account that the conviction was based on the clear and loud evidence of Fatuma, PW1. B

The witness, (PW1), testified that she knew the appellant before the incident and that she clearly saw him attacking the deceased on the head with a pestle. According to her testimony the attack took place in the morning at a 'ngoma' party to celebrate the initiation of three girls and that it was in the morning at 6 am. That PW1 could C not have mistakenly identified the appellant is evident from her husband's testimony. Her husband, (PW2), told the court that he saw the appellant holding a pestle and attacking his wife (PW1) in the flank. Apparently the appellant is uncle of PW2. There was no suggestion, leave alone evidence, that PW1 and PW2 had reason to D tell lies against the appellant.

We see no reason to differ with the learned judge's finding of fact that it was the appellant who fatally attacked the deceased on the material day. Malice aforethought was clearly established taking into account the evidence that the appellant used a pestle in attack- E ing the deceased; he held the pestle with both hands when inflicting the blow and directed the blow to such vulnerable part of the body, the head.

We are satisfied in our own minds that there was ample evidence in support of the learned judge's finding that the appellant was F guilty of the offence of murder as charged. In the event we dismiss the appeal in its entirety.