



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law and Miller, JJ.A.)

CRIMINAL APPEAL NO.125 OF 1981

BETWEEN

SOLOMON KACHERA ALUTA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Kneller, J. dated 26th August, 1981 in Criminal Case No. 50 of 1980)

JUDGMENT OF THE COURT

At his trial for the murder of Issa Jeremiah the appellant was convicted of manslaughter, contrary to section 205 of the Penal Code.

The cause of death was shock and haemorrhage from a stab wound 6' deep in the left chest cavity which penetrated the left lung and its covering and also the left ventricle of the heart and its covering. The wound was consistent with having been caused with a sharp instrument such as a knife.

A woman named Haida Nakesa, also known as Mama Taabu, worked as barmaid in Achiru Club at Magongo in Mombasa District. At one time she had been the appellant's mistress until he became amorously attached to Mary Akeyo to whom he referred as his wife. While he was associating with Haida the appellant left his shirt and a pair of trousers at her place. On April 4, 1980 Haida was at the club with two of her sisters serving drinks to customers among whom were present Japhet Joseph, Swayi, Sauli Kwajo, Anthony Shuiji Wanga, Moses Luo Aloo and the appellant. During the course of the evening the appellant asked Haida for the return of his shirt and trousers which he wanted for his brother. Haida being reluctant to return them a row developed between them. The appellant tried to pull off her *leso*. A scuffle ensued during the course of which Haida and her sisters who had joined her pushed the appellant. He fell over outside the club. A sister struck him with a bottle and there was a bleeding injury under his left eye. Haida tore his T-shirt.

The appellant's brother-in-law took him away from the club. He returned to the club with his wife and again demanded his shirt and trousers. He pulled up a leg of his trousers and indicating something metallic in a sock said if he did not get back his shirt and trousers that night he would burn down a house

or kill someone.

Haida agreed to return the appellant's shirt and trousers to him. She asked Moses to accompany her as she did not want to go to her house which was about three minutes walk from the club alone with the appellant and his wife. Moses went with Haida. Swayi Wanga and Sauli also joined them. Issa Jeremiah followed about 5 paces behind. At the house the appellant and his wife remained outside and Haida went in and came out with the appellant's shirt and trousers which she handed to him. His wife then told him that they ought to go home. He agreed and they left. Within seconds of the appellant and his wife leaving Issa Jeremiah ran up to the others near Haida's front door. He had a stab wound in his chest and told those who were there 'Solomon ameniweza' 'Solomon has done me in' or 'Solomon has clobbered me'.

The learned judge said in his judgment that Sauli asked Issa Jeremiah how Solomon had done it and Issa Jeremiah replied "He has stabbed me up here with a knife" and he indicated the wound of his chest.

Moses and Wanga rushed to the appellant's house. They found the door locked. They heard the appellant say to his wife "I told you I would return and fight hard and I will go back and do so again". Moses and Wanga left and returned to find Issa was dying. He died. The police arrived. They were taken to the appellant's house which they searched and recovered a knife (Ex 3) which the appellant's wife handed to them. It had no blood stain on it.

The appellant was arrested for the murder of Issa Jeremiah. The sworn evidence of the appellant and his wife was that they took a shorter route back and were soon home. The appellant had a bath, food and they went to bed. The appellant never left the house until the police arrived when his wife woke him up at 1.15 a.m. They said they never saw Issa Jeremiah that night, that the appellant did not stab him, he had no grudge against him. He knew Issa Jeremiah was Haida's relative. She had returned his clothes willingly and they were on peaceful terms.

The three assessors were unanimously of the opinion that the appellant was not guilty; one of the reasons for their opinion being that there were no blood stains on the knife. Secondly, the assessors referred to the absence of any yell from Issa Jeremiah when he was stabbed, but, said the judge, there was this evidence that he called out 'Solomon ameniweza'.

The learned judge held that Issa Jeremiah made the declaration that he was dying, hence his injunction not to pursue the appellant; that it rang with truth. The learned judge said in fairness to the appellant he would exclude the additional words 'he stabbed me with a knife' which were given in evidence by only Sauli in answer to a question put by him (it was Aloo, not Sauli). The stab was inflicted at night in a well-lit road or near it and not in the darkness, and this, together with the other events of the evening and the previous acquittance of the appellant and Issa Jeremiah, satisfied the judge that Issa Jeremiah could not have been mistaken about his assailant.

The learned judge said that while he did not forget the testimony of the appellant and his wife that the appellant was not seen with Issa Jeremiah at any time or said to have sparred verbally or physically with him there was other cogent evidence connecting the appellant with this crime in the fact that the appellant was greatly upset by Mama Taabu's behaviour over his shirt and trousers and the humiliating way she and her sisters worsted and injured him before everyone else in the club not much earlier that evening. So the appellant armed himself with something metallic in his sock and threatened to burn down a house or kill someone that night if he did not have his clothes returned to him at once. He had them returned but Mama Taabu still had these four men with her who had seen these earlier episodes. He and his wife went down back along the road up which they had followed Mama Taabu and there the appellant met Issa Jeremiah whom he knew to be related to her.

And when added to all this the strengthening facts that the court found the appellant's alibi untrue and that he lied about the events of the evening because he could not tell the truth about them without convicting himself.

The evidence was circumstantial but its quantity and quality were enough and sound and so the

inculpatory facts were incompatible with the innocence of the appellant and incapable of any other explanation upon any other reasonable hypothesis than that of his guilt. The Republic proved beyond any other reasonable doubt that the appellant delivered the fatal injury to Issa Jeremiah. There was only one stab. The appellant had been provoked by Mama Taabu and her sisters so much so that he lost control of his passions and that in the circumstance, was reasonably to be expected of a man of his age and background. The effect of this provocation had not ebbed by the time he came across her relative Issa Jeremiah. The use of a knife on Issa Jeremiah in the circumstances was, however, (not) reasonable and represented excessive use of force. The appellant had been proved guilty of manslaughter beyond reasonable doubt.

In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches. A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is, generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person, made in the absence of the accused and not subject to cross-examination, unless there is satisfactory corroboration. *Okale and Others v Republic* [1965] EA 555.

The fact that the deceased said the appellant was the assailant is evidence of his belief that such was the case; it is no guarantee of accuracy. While the learned judge appreciated that the dying declaration in this case certainly must not be acted upon without corroboration, with respect, he erred in his appraisal of the situation after Haida handed over the clothes to the appellant. In whatever state of mind, even if bent upon a further fight, the appellant returned to the club with his wife, he must have cooled off when Haida offered to return his clothes. The procession proceeded peacefully to Haida's house. The shirt and trousers were returned to the appellant there without any further incident. There was no longer any *causus belli*. The appellant never uttered a word. Having got what he wanted he agreed with docility to return home with his wife. He did not argue with her or anyone else. There was no evidence that he was still bubbling or seething with rage. All the indications were to the contrary, also that the incident was finally over.

Although the appellant knew Issa Jeremiah was in some unstated manner related to Haida he had no grudge against him. Swayi's evidence, accepted by the judge also, was the appellant and Issah Jeremiah had not quarrelled before. Issa Jeremiah had taken no part in the night's proceedings, he was a mere hanger-on, a complete non-entity so much so, according to Aloo, he was not even present when the clothes were returned to the appellant.

It was an assumption made by the judge, albeit wrong, that when the appellant met Issa Jeremiah, whom he was not expecting to meet, he was smarting under the indignity inflicted upon him earlier by Haida and her sisters, so he suddenly decided to revenge himself against Haida by stabbing Issa Jeremiah, i.e. revenge by proxy. This revenge theory was the judge's own, he put it forward. It was not canvassed by anyone at the trial. Thus there was no basis left for the other so-called cogent evidence taken into account by the judge.

With respect the learned judge did not give sufficient weight that Issa Jeremiah did not immediately scream or yell "Solomon has killed me" or words to that effect. He called out '*Solomon ameniweza*' much later.

This was an important aspect of the trial requiring verification or otherwise by cross-examination. The learned judge also did not give sufficient weight that Moses and Wanga who immediately rushed to the appellant's house found him and his wife at home, instead of making themselves scarce and unavailable.

Further, the learned judge did not give sufficient weight to the absence of blood stains on the knife, also, we would say, on any of the clothes of the appellant and his wife.

We consider it reasonable to say that an unsophisticated villager of the station in life of the appellant was unlikely to have erased completely all traces of blood in the very short time available to him. We do not consider the appellant's guilt was proved beyond reasonable doubt. We allow his appeal, quash the

conviction and set aside the sentence. He must be set at liberty forthwith.

Dated and delivered at Mombasa this 28th July , 1982.

C.B MADAN

JUDGE OF APPEAL

E.J.E LAW

JUDGE OF APPEAL

H.E MILLER

JUDGE OF APPEAL

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

DEPUTY REGISTRAR