

8, 1955

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UNIVERSITY OF LONDON
W.C.1.

No. 48 of 1954.

-3 JUL 1956

In the Privy Council.

INSTITUTE OF ADVANCED
LEGAL STUDIES

13583

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI.

BETWEEN

MATALO S/O KILONZO *Appellant*

AND

THE QUEEN *Respondent.*

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Case for the Respondent.

RECORD.

1. This is an appeal *in forma pauperis* by Special Leave from an Order dated the 31st day of May 1954 by the Court of Appeal for Eastern Africa (Sir Newnham Worley, Sir Frank Jenkins and Mr. Justice Briggs, a Justice of Appeal) dismissing the Appellant's appeal against his conviction on the 10th day of May 1954 in the Supreme Court of Kenya (Mr. Justice Connell sitting with three Assessors) whereby the Appellant was found guilty of murder and sentenced to death.

2. The case for the prosecution was that the Appellant had on or about the 27th day of September murdered one Kibelenge son of Mutua. The Appellant did not deny that he had killed the said Kibelenge. The only issue therefore was whether the killing was murder as defined by Section 199 of the Penal Code of Kenya (Cap. 24 of the Laws of Kenya, 1948). See appendix hereto.

3. The Appellant was charged and tried jointly with two of his brothers. The evidence called by the Prosecution against the Appellant was as follows :—

(1) P.W.1. Joel Mutua the father of the deceased Kibelenge said that on the 27th September 1953 his son went to visit a friend and that he took with him a bicycle which he (P.W.1.) had lent to him. P.W.1. identified the bicycle as the one exhibited in Court and further said that he had identified his son's body on the 8th October when he saw it buried in a certain ditch. p. 28, ll. 4-11.

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(2) P.W.4. Mutindi wife of Nyambu a brother of the Appellant said in evidence :—

p. 30, l. 4.

“ On 27.9.53 a stranger with a cycle came to my hut ; it was after sunset. I was with son Musambi and Waiyuwa my daughter. Stranger asked whether owners of hut were there ; I replied I and my children were inside. I asked him who he was ; I cannot remember his reply. I asked where he had come from, he pointed towards Kalama. I cannot say if he was drunk or sober, it was dark. I asked where he was going, he pointed towards Marala. Stranger then went off, he had a cycle with him. 10 He did not bring it in. The stranger returned soon afterwards with his cycle, we had some talk. I asked him why he had come back and where he was going to stay, he replied ‘ here.’ I asked him to sleep in granary, he refused. I became worried and I went with my children to Mother-in-law’s hut. I told her we had left on account of the stranger. We stayed at Mother’s hut and later the three Accused arrived. It was very dark. They asked us whence we’d come. I said from our huts, we were afraid of stranger. They and my boy Grikoli Muselbi said they’d like to see the stranger. They went off ; they returned immediately, 20 they had a cycle with them. Later they again went away. I slept night at Wanini’s hut. I only took my young baby with me. I did not see Grikoli again that night. I see this jembe, it is familiar to me—I have not seen it before. Accused 2 came to my hut next day. I asked him where strange man had gone, he replied they had returned his things and escorted him as he was a Mau Mau, then he said the stranger had a pistol. I just thought they ‘ took him a long way.’ The three Accused, the previous night left my Mother-in-law’s hut with a hurricane lamp.”

Cross-examined : “ The strange man was a Makamba. He 30 never said he wanted to sleep with me. I did not tell the Accused he wanted to sleep with me or rape me. I did not say I thought he was a Mau Mau. I was afraid of him. He took nothing from my hut. I am quite sure all the Accused came to my Mother-in-law’s hut.”

Depositions put to Witness : I did not say “ Accused 2 did not come to my Mother-in-law’s house.” Each Accused was a bit drunk that night, not very drunk.

Questioned by Assessors : There was no fight or quarrel ; my hut is only visited by female visitors I’ve never been visited 40 by a man.

Q. Have you run away from any visitors as you did that night.

A. When I am visited I am never alone.

Q. Did you ask Accused 2 next day where cycle had gone.

A. Yes, they said they had returned everything and escorted the stranger.

Re-Examination : Nil.

(3) P.W.6. Grikoli Muselbi the son of P.W.4. a young boy of about 10 years old deposed as follows :—

“ During last September I lived with parents in Masii p. 32, l. 7.
 Location. I remember night when a stranger came to my hut. It was a Sunday. I was with my mother and small babies. Stranger had a cycle. He greeted me outside the hut, then he asked ‘ Where are the other people ? ’ ; I replied in the hut. He asked if it was a man or woman in the hut. I replied a woman. My mother then came out of hut and stood at the door. Stranger greeted her. The stranger asked for the way ;
 10 he went and returned shortly afterwards with the cycle. That is the cycle Ex. 1, he stood outside and mother told him to sleep in store. He refused and said he would sleep ‘ there ’ on his bicycle. We became afraid. We thought he was a *bad man* ; he was not talking properly, etc., we were worried, we went to my grandfather’s hut. Later we heard people talking, then the three Accused asked us why we had left. Mother replied we were afraid of the stranger ; they asked us to show where stranger was and I accompanied them. We had a hurricane lamp and we (I and three Accused) went to our hut and entered
 20 there ; we saw a cycle outside the door. Matolo (Accused 1) said, ‘ The stranger is asleep.’ He touched the stranger, found a notebook in his pocket, opened it and produced Shs. 30/- (10/- and 20/- notes), these and the note book he put in pocket. We went out of hut and Munyao (Accused 2) took cycle with him. We returned to grandfather’s hut. I entered, the 3 Accused did not enter grandfather’s hut but left to go to their own huts ; actually they had told me to go back to grandfather’s hut and I saw them enter into Mutua, Accused 3’s hut. Accused 2 still
 30 had the cycle. I slept in grandfather’s hut. The 3 Accused came later and woke us up. I heard noise of cycle being pushed. They said, Accused 1 said, ‘ We are returning the cycle to the owner.’ I recognised his voice, they never entered hut. They said nothing about the stranger. Mother did not sleep in Grandfather’s hut, she went to Mareta’s hut, she told me that next morning. About dawn the three Accused returned and told us they’d returned the cycle and escorted stranger away from the village ; it was Accused 2’s voice, they did not enter hut.”

40 *Cross-examined* : “ The stranger appeared somewhat drunk, he did not beat mother or I ; he did not make mischief at hut. The three Accused appeared to be drunk, not very drunk. They could talk properly. We took lamp to my hut, at door I only heard Accused 2’s voice, not the others. From Grandfather’s house Accused 3’s house is 20 yards. All three Accused went to Accused 3’s hut. They took cycle to Accused 3’s hut. Accused 2 wheeled it. My father is brother of the Accused.”

No Re-examination.

50 *By Assessors* : When Mother and I went to Grandfather’s we left stranger sleeping across the bed. Cycle was outside hut

on ground, I was not asleep when stranger came ; it was twilight. I had not had food ; she was cooking. The stranger ate nothing. The Accused did not wake stranger up. Coat from which they took money was on his body.

(4) P.W.2. William Aron Morkel, Inspector of Police, deposed :—

p. 28, l. 19.

On 8.10.53 I proceeded to Masii Location and found S.P.O. Albrechtson on scene. He and other Africans were uncovering a body, it was removed from a hole and taken by me to Native Civil Hospital, Machakos. Body was in a trench 3-4 ft. deep and top of body was 18" from top of soil. Next day I again visited scene ; met by local Chief and some women. The woman took me to her house, she was Accused 1's wife, her name is Zelani, she then took me to a spot $\frac{1}{2}$ -mile from where body was found and 200 yards from her house. In thick bush she showed me a cycle, I identified it as Ex. 1. I concluded the cycle had been hidden there deliberately—it was not on a foot-path. I took the cycle . . . Next day, on 10.10.53 I returned to Masii Location accompanied by wife of Accused 1 ; she showed me a place about $\frac{3}{4}$ -mile from her house, it was behind a hedge ; there she pointed out 2 new ropes, they were partly concealed under hedge. I took possession of the ropes, they are Ex. 3. I examined them and found what appeared to be blood stains on them. Some was ordinary rope, some was "sisal strapping" rope. I sent Ex. 1 to Government Laboratory in Nairobi for analysis. They were returned to me and I kept them in my Exhibit box. I did not arrest the other 2 Accused.

l. 33 ; l. 35.

p. 29, l. 16.

Cross-examined : Wife of Accused 1 did not give me explanation, except that she had been told by her husband to go and hide the cycle. She did not say her husband told her to hide ropes, but that she had found the ropes in her house and was going to use them to collect firewood. She said she was looking for firewood on another's property and dropped ropes when someone saw her.

p. 29, ll. 23-32.

Zelani the wife of the Appellant was called as P.W.3. but gave no material evidence against her husband.

(5) P.W.1. Ian Easton Dawson, a Doctor attached to Machakos Hospital who had conducted the post-mortem examination of the deceased on the 9th October 1953 said in evidence :—

p. 27, l. 4.

Decomposition set in some 10 days previously. Superficial and deep evidence of pressure round neck caused probably by rope or cloth on which pressure was applied ; burning on arms and legs ; odour of paraffin on body, fracture of left parietal region of skull with underlying brain damage. Last injury caused by direct force by blunt weapon on skull or else by the deceased being thrown forcibly on ground, falling on left of head. Primary cause of death was fracture of skull and damage to brain ; neither pressure round neck nor burning in my opinion caused death, nor could they jointly cause death.

Cross-examined: I could not estimate how long paraffin if sprinkled on dead body would retain odour. Skull injury could be caused also by being thrown forcibly to ground. p. 27, l. 21.

(6) P.W.5. Finlay McNaughton, Assistant Government Chemist gave evidence that he had found human blood on strap which was part of Ex. 3 found by P.W.2. p. 31, ll. 20-32.

(7) P.W.8. Allen Farrar Sagar, 1st Class Magistrate gave evidence of the circumstances in which the Appellant had made a statement in his presence on the 8th day of October 1953. The learned Trial Judge ruled that this was a voluntary statement. Ex. 5 which was a translation of the Appellant's statement by P.W.11. Julius Mbubi was as follows:— p. 39, l. 13.
p. 38, l. 33.

On the last Sunday in September, 27th September, 1953, I mean on the Saturday 26th September, I left Machakos by taxi at 2.00 p.m. to my home in Masii. I slept there. About 3.00 p.m. next day I left home with two other men, Munyao s/o Kilonzo and Mutua s/o Kilonzo, my brothers. We went to see Nduta s/o Nzuba where we drank beer until about 6.00 p.m. We then returned home. We went to my house. My father's home was near the market, my eldest brother's near the girl's school. We went to my father's and found my eldest brother's wife and her three children there. She said she had been driven from her house. She did not know by whom. He had a bicycle. a panga and a stick. She thought he might be Mau Mau. We three brothers went there, and took pangas and sticks. We found the man asleep. We did not know him. We woke him up. He seized a panga. I seized him and threw him down. I and my brothers hit him. We did not know him and thought he was Mau Mau as a gang had passed recently. We hit him until he died. We then threw him outside. I told my brothers as I had to go off to work next morning to report to the Chief and to take the bicycle. Next morning I left at 5.00 a.m. to work in Machakos. Since then I heard nothing. I have been in Machakos. p. 63, ll. 10-35.

(8) P.W.9. Noel Guy Hardy, 1st Class Magistrate who conducted the Preliminary Enquiry leading to the committal of the Appellant produced the record of the evidence of the Appellant at the said Enquiry. In his said evidence the Appellant said:—

On the 27th September, at 3.00 p.m. I went to Nduta d/o Nzuba to drink pombe. I met both my brothers the other 2 Accused there. We drank till 6.00 p.m. The owner of the house told us to go away. I bought Shs. 5/- worth of tembo and we took it to my house where we arrived at 7.00 p.m. We took the rest of the drink and a lamp and went to my father's house which is about $\frac{1}{2}$ -mile away. We went into Accused 3's house (Mutua) and carried on drinking. My brothers were drunk and slept on the ground. I sat on a chair. At 11.00 p.m. Mutindi Nyambu p. 16, l. 26.

came and told me that a man had come to her house and beaten her and raped her and said he was Mau Mau. A Mau Mau gang had passed that way on the 24th and we thought he was Mau Mau. She went to her mother's house and I went with a light and a stick to see the man. I found him in the house and I asked him who he was—he did not reply but hit me. I hit him with my stick and he fell to the ground. I do not know where I struck him as I was drunk. I did not hit him again. He died from the 1st blow. I picked up the body and put it near a terrace in the shamba. I tied a rope around his neck so I could carry 10 him easily. I put him in the terrace and then I went to my own house. I did not return to my brothers. That night at 4.00 p.m. I went to my brother Munyao and told him to go to report the death to Chief Mutinda. I returned to my work in Machakos. I was arrested in Machakos.

Cross-examined: I went on my own to Nyambu's house. I killed the man. I did not go back to tell Mutindi Nyambu. I told my brother Munyao to report to the Chief. I was drunk when I carried the body. I did not try to burn the body or put paraffin on it. The man was dead when I put the rope around 20 his neck.

4. The Appellant elected to make an unsworn statement at his Trial and stated :—

p. 39, l. 27 to
p. 40, l. 15.

When I fought with that man I was drunk. He was in my elder brother's home. It was about 11 p.m. My elder brother's wife found me drinking in my father's house. She told me she had been chased away by someone she did not know. As it was night I took a lamp and went ; because I was drunk I fell down. Lamp got broken. I entered house and asked who was in, the man hit me with a stick on my left shoulder. I could not see him, it was dark, 30 we were in the house. As he was about to hit me 2nd time I held his stick, I pulled stick and hit him with same stick. I went out. Because I was drunk I ran for 5 yards and fell down. I slept there till next morning up till 6 a.m. When I got up I remembered going to elder brother Nyambu's house, so I went back and found stranger dead. I did not know the man and had no intention of hitting him. I realised I'd done something bad unintentionally. I went and called younger brother Munyao and told him to report to Chief, then I ran away and entered the forest. Later I was arrested at Machakos Township. I was alone when I fought that 40 man. The other 2 Accused were not there. I did that unintentionally. I was drunk. I drank from mid-day to night time. I was very drunk.

5. At the conclusion of Counsel's speeches the learned Trial Judge summed up the case to the Assessors. There is no record of the summing up. The Assessors then gave their opinions. As to the Appellant, who was the first Accused, their opinions were :—

p. 43, l. 17.

Assessor No. 1 : First Accused guilty of murder.

Assessor No. 2 : First Accused guilty of murder.

Assessor No. 3 : First Accused guilty of murder, otherwise he could have tied him up and taken him to the police. ^{1. 21.}

6. On the 10th day of May 1954 the learned Trial Judge delivered Judgment. In the course of his Judgment the learned Judge said :—

In my summing-up to the Assessors I directed them that they could find an opinion of manslaughter in the case of the first Accused if they believed that there had been a fight between the stranger and (Accused 1) Matolo. The Assessors, however, unanimously found the first Accused guilty of murder. Now, if one believes the small boy's sworn evidence, it is perfectly clear that Matolo's first action was to steal money from the dead man's pocket ; in answer to the Assessors Grikoli (P.W.6.) stated : " The Accused did not wake the stranger up. Coat from which they (i.e. Accused 1) took money was on his body." I believe that was what happened ; it is not inconsistent moreover with Grikoli's evidence and with Munyao's (Accused 2) statement to Mr. Knaggs that Matolo returned a second time to Mutindi's hut followed later by Munyao. ^{p. 48, l. 8.}

There is no doubt that the first Accused and his brothers had been drinking heavily and were in a state of semi-intoxication, but in my view they knew perfectly well what they were doing.

Did Matolo then deliberately intend to kill the deceased, or cause grievous harm by striking him over the head which he admits he did with a stick ? It is consistent with the medical evidence that the deceased died of a fractured skull caused by a blow or blows delivered by the first Accused. From all accounts the stranger was lying on the bed and was in a disadvantageous position. The first Accused has given a conflicting account of what actually happened, he has glossed over the theft of money from the deceased, and whilst he stated to Mr. Knaggs that the deceased seized a panga, in the lower Court he states the deceased hit him (he does not say with what weapon). In his unsworn statement he says he took the deceased's stick and hit him with that. In my view the previous and subsequent conduct of the first Accused is relevant in deciding whether he is guilty of murder or manslaughter. One would expect that, if he was incensed at finding a stranger in his hut, and there had been a genuine struggle, that he would not have stolen money and concealed the cycle ; he would have reported all the events to the Police. The onus is on the Crown to prove murder and I think that all these facts prove that the first Accused had a motive for concealing all that occurred and I think that the only reasonable inference to draw is that after stealing the deceased's money, the first Accused struck the deceased a severe blow on the head with a stick intending to kill him and cover up traces of his crime. I find the first Accused guilty of murder.

7. The learned Trial Judge sentenced the Appellant to death. The second Accused was found guilty of being an accessory after the fact to the murder and sentenced to six years' imprisonment with hard labour. The third Accused was acquitted.

8. The learned Trial Judge granted to the Appellant a Certificate enabling him to appeal to the Court of Appeal for Eastern Africa on fact and the Appellant gave notice of Appeal dated the 13th day of May 1954. The grounds of the said Notice of Appeal were :—

p. 51, l. 27.

(1) That I am not guilty of the offence.

(2) That the evidence given against me was insufficiently strong to support a conviction.

p. 53, l. 21.

9. On the 31st day of May 1954 the said appeal was heard. It was argued on behalf of the Appellant that manslaughter would have been the proper conviction. On the said date the Court of Appeal dismissed the Appeal without giving any reasons. 10

p. 53.

10. By Order in Council dated the 19th day of October 1954 the Appellant was granted Special Leave to Appeal *in forma pauperis*.

The Respondent submits that the Appeal should be dismissed for the following (among other)

REASONS.

- (1) THAT the Appellant was guilty of murder as charged.
- (2) THAT the Assessors and the learned Trial Judge considered and rejected the Defence of manslaughter put forward by and on behalf of the Appellant. 20
- (3) THAT there was sufficient evidence that the Appellant was guilty of murder to justify the findings of the Trial Judge and the conviction of the Appellant of the crime of murder.
- (4) THAT the Court of Appeal for Eastern Africa considered the defence of manslaughter and rightly dismissed the Appellant's appeal on fact.
- (5) THAT there are concurrent findings of fact by both the Trial Judge and the Court of Appeal.
- (6) THAT there was no miscarriage of justice sufficient to 30 interfere with the conviction of the Appellant.

D. A. GRANT.

APPENDIX.

KENYA PENAL CODE.

Laws of Kenya 1948 Cap. 24.

- Section
- 10 198. Any person who by an unlawful act or omission causes the death of another is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether such omission is or is not accompanied by an intention to cause death or bodily harm.
199. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.
202. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances :—
- 20 (a) an intention to cause the death of, or to do grievous bodily harm to, any person whether such person is the person actually killed or not,
- (b) knowledge that the act or omission causing death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused,
- (c) an intent to commit a felony,
- (d) an intention by act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.
- 30 203. When a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter.
- 40 204. The term provocation means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master and servant, to deprive him of the power of self control and induce him to commit an assault of the kind which the person by whom the act or insult is done or offered. When such an act is done or insult offered by one person to another or in the presence of another, to a person who is under the

immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

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