

IN THE COURT OF APPEAL OF TANZANIA AT DODOMA CRIMINAL APPEAL NO. 271 OF 2007	EMMANUEL MREFU @ BILINJE VS THE REPUBLIC (Appeal from the judgment of the High Court of Tanzania at Dodoma by Masanche, J.)	1) Malice Aforethought 2) Dying declaration - Case of Goodluck Kyando VS Republic, Criminal Appeal No. 118 of 2003 (unreported).
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**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: MSOFFE, J.A. RUTAKANGWA, J. A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 271 OF 2006

EMMANUEL MREFU @ BILINJEAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the judgment of the High Court of Tanzania
 at Dodoma)**

(Masanche, J.)

dated the 10th day of July, 2007

in

Criminal Sessions Case No. 59 of 2003

JUDGMENT OF THE COURT

23 & 27 October, 2009

BWANA, J.A.

Marcelina Stephano (PW1) and John Madimo, the deceased, were lovers for about three months before the latter met his death which is the subject matter of this appeal. It was alleged before the trial court – the High Court of Tanzania at Dodoma – that on 13 April 2002 around 11.00 p.m., at Hombolo area of Dodoma, John Madimo was murdered. The present appellant was alleged to be the killer. He was said to have killed the deceased by stabbing him in the right side of the chest. The appellant denied to have committed the alleged offence. He was, however, found guilty of murder, convicted and sentenced to suffer death by hanging.

Aggrieved by that decision of the trial court, the appellant preferred this appeal. He was represented during his trial and before us, by Mr. Z. E. Njulumi, learned Advocate. The respondent Republic was represented by Mr. F. Nchimbi, learned State Attorney.

This being a first appeal, we have the duty to re-evaluate the evidence and if necessary, come to our own conclusions on relevant aspects of the case. To do so, we find it apposite to start by appraising ourselves on the issues involved in this case.

It is on record that on the material day, the deceased, in the company of PW1 and two other people were at a local "*pombe*" shop at an area called Ng'ambo. Later on the appellant came to the said pombe shop. Although it is on record that the appellant and the deceased were close friends, yet on this particular day, the appellant did not join PW1's group. He stayed at a distant table, enjoying his drink in the company of other people.

Around 11.00 p.m. PW1's group left the *pombe* shop. The other two people, however, did not go all the way with PW1 and the deceased. The two were left to go their way presumably as they were lovers. Before reaching a shop belonging to one John Kisani, suddenly they met the appellant. How he had managed to be there at that time was not the issue but it was alleged during trial that he may have waylaid the two.

At the scene, there was sufficient light, from electric bulbs – there was electric light from John Kisani's shop, so much that PW1 could identify the appellant.

Upon meeting PW1 and the deceased, the appellant is said to have greeted the two in Kigogo and then asked the deceased to come with him a distance away from PW1. The appellant and the deceased stepped about 10 paces away from where PW1 was and had a talk "**in low voice**" that she could not hear what they were conversing. She did however notice that after a while the appellant and the deceased kicked each other. Then John "**lucked**" Bilinje although no one fell down. It is PW1's evidence that in the course of that encounter, she heard John shouting that "*jamani nimekwishapigwa kisu*". At that moment, the appellant is said to have run away – to be arrested on the 15th of April 2002, as he himself stated in his defence.

Following that unexpected development, the deceased ran towards the house of one Stanley Masima @ Madege but fell on the way. PW1 woke up the said Madege who came out with a lamp/torch. It is then alleged that during that moment, the deceased told Madege that "*nimepigwa kisu na Bilinje*". Madege rushed to report the incidence to a nearby Ten Cell Leader. John was then taken to hospital but he died on the way.

What followed again in the subsequent few days was the usual procedures – investigation by the police and the arrest of the appellant. If it may be noted here, that during that period of investigation, PW1 was also detained by the police in order **'to assist them with the investigation'**. She was later released but only after her statement had been recorded.

In his summing up to the assessors and indeed in his judgment as well, the trial judge did address his mind to the credibility of PW1; the dying declaration and the fact that there was sufficient light at the scene of the murder, hence PW1 could identify the appellant without problems.

We have addressed our minds to the above issues as well. We have paid particular attention to the fact that during that time, there was electric light which provided watertight identification. Further, the three people – the deceased, the appellant and PW1 – knew one another. They lived in the same village and it was not disputed that the appellant and the deceased were very close friends.

Equally important is the "**dying declaration**". We do agree with the trial judge's analysis of the law governing dying declarations. His cited authorities which are relevant to this case. Our concern here however, is, whether PW1 and Madege (PW3) heard John Madimo make that declaration. We are of the considered view that they heard him make such a declaration before he died.

From the evidence on record, it is apparent that PW1 is the **only witness** who saw what transpired at that time of the night. In proving a case of murder, the prosecution must prove (beyond reasonable doubt) that the person mentioned is truly dead. That he died of an unnatural cause. And that the accused is the one who killed the deceased. He did so with malice aforethought.

It is not in dispute that John Madimo died on 13 April 2002. The cause of his death was stab wound apparently leading to excessive bleeding. If PW1's evidence is to be believed, it is the appellant who inflicted that fatal wound by stabbing the deceased with a knife, something that was seen by her (PW1) who was about 10 paces away from the scene of the stabbing. The trial judge

believed her evidence to be credible. We have no reason to fault that in the absence of any plausible evidence establishing that the deceased may have been stabbed by another person other than the appellant. Indeed it is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted **unless** there are good and cogent reasons for not believing (see **Goodluck Kyando vs Republic**, Criminal Appeal No. 118 of 2003 – unreported). In the instant case, we do not have such good and cogent reason to make us disbelieve what PW1 stated in respect of what transpired at the material time and place.

The above considered, there arises now a nagging question of law – was malice aforethought established for the appellant’s action against the deceased? Our considered view (after having carefully perused through the record), is **not** in the affirmative. All what the evidence of PW1 tends to establish is the following sequence of events –

That all the three – PW1, the appellant and the deceased had been taking alcohol – immediately prior to this incident.

That before the appellant stabbed the deceased, the two were seen by PW1 "**kicking each other, John 'lucking' Bilinje but no one fell down**". It is apparent then that there was a scuffle between the two. The fact that PW1 states that "**no one fell down**", we are of the considered view that it was not a minor/light scuffle. If this is so, then that leads us to the irresistible conclusion that although John Madimo met his death at the hands of the appellant, there is no evidence to establish malice aforethought.

In the absence of malice aforethought, a conviction for murder cannot stand. We therefore quash that conviction and substitute it with one of **manslaughter**. We set aside the sentence of death by hanging and impose one of **imprisonment**. The period the appellant has been in custody taken into consideration, we are of the view that a term of **imprisonment of five years** from the date hereof, will suffice. We so order.

DATED at DODOMA this 27th day of October 2009.

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA

JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(Z. A. MARUMA)
DEPUTY REGISTRAR