Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO 7 OF 2004- COURT OF APPEAL OF TANZANIA AT MWANZA. Coram: MUNUO, J.A, MSOFFE, J.A AND KAJI, J.A	**ELIAS PAUL VS THE REPUBLIC** (Appeal from the conviction of the High Court of Tanzania at Bukoba)- **Criminal Sessions case No 1 of 1998** Mrema,J	Establishment of case beyond reasonable doubt. S.200 of the Penal code in relation to this case. "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances"

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO,J.A., MSOFFE,J.A., And KAJI,J.A.)

CRIMINAL APPEAL NO. 7 OF 2004

ELIAS PAUL.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Bukoba)

(Mrema J.)

Dated the 4th day of April, 2004
in
Criminal Sessions Case No. 1 of 1998

JUDGMENT OF THE COURT

14 February, 2006 &

MSOFFE,J.A:

The appellant Elias Paul was convicted of murder contrary to section 196 of the Penal code by the High Court (Mrema,J.) sitting at Bukoba. He was sentenced to suffer death by hanging. Even so, he believed he was wrongly convicted of the offence and through the services of Mr. Galati, learned advocate, he has preferred this appeal. Mr. Galati, prosecuted the appeal before us and the respondent Republic was represented by Mr. Mdemu, learned State Attorney.

A summary of the case that led to the appellant being convicted of murder is as follows. The 25th day of December, 1991 was Christmas Day. The villagers of Rwakihaya – Rugasha in Karagwe District were busy commemorating and celebrating the day with the usual church services and other festivities accompanying the day. The deceased and his wife Pw4 Ntabajana Rwabitenga attended church services. On their way home they passed through the home of one Paulo Kalisa where a local brew commonly known in the area as "rubisi" had been brewed to colour the day. There were a number of people drinking the brew, including one Fidestina Bugingo a daughter in law of the deceased. The appellant was also present.

The deceased instructed his sister in law to accompany PW4 and thereby return home to draw local brew into drinking containers. The act or practice of putting brew in containers is known in the area as "kuchota pombe". Immediately after giving the instructions, the appellant assaulted the deceased. The people who were present separated the appellant from the deceased. In the meantime, the deceased and his wife left and returned home. At about 4.00 p.m the deceased visited the home of PW1 Anthony, his son. PW1 was not there. He met PW2 Maria Antony, PW1's wife. He narrated to PW2 how the appellant had assaulted him on that day. Thereafter, he returned home. At about 5.00 p.m PW1 also returned to his home. As he (PW1) was drinking some local brew with his friends the appellant came in, in a visit which was without notice or invitation. Nonetheless, PW1 offered the brew to the appellant to drink. Shortly thereafter, the deceased came in as well. On seeing the appellant the deceased made the following remark to the said appellant:-

> "Elias umenipiga kwenu nyumbani na bado mpaka sasa umenifuata na hapa nilipo ni kwetu nyumbani".

Upon that statement, the appellant seized the deceased by the shoulders, pulled him out of PW1's house and beheaded him, and the blow sent the deceased to the ground. PW1 and those present attempted to stop the appellant. In the process, PW1 was also beheaded by the appellant. PW3 Pascal saw the deceased bleeding from the mouth. The deceased left for home, still bleeding. At home, the deceased told his wife PW4 that the appellant had assaulted him. PW4 started to nurse the deceased. As she was doing so, the appellant hurriedly came in. Without uttering a word the appellant grabbed the deceased and pounded him with a stone on various parts of the body including the chest, abdomen and head. Out of fear PW4 went out and raised an alarm. Among the first people to respond to the alarm were PW1 and PW3. They found that the appellant had already left the scene but meanwhile PW4 was crying and shouting "Yulee, Yulee anakimbia". She also told PW3 thus: - "Elias amemuua mume wangu". In the meantime, the deceased had

lost consciousness and was groaning. He died immediately thereafter. A village drum was sounded and the "sungusungu" sealed the common village outlets to ensure that the appellant did not escape. The appellant was sought and found the following day hiding under a bed in his house. He was accordingly arrested and taken to the deceased's house. Later the police were informed. Consequently, the appellant was charged in court, hence the eventual conviction and sentence.

At the trial the appellant was the sole witness for the defence. In his fairly long oral defence statement he canvassed a number of points. It will not be necessary for us to touch on each and every point that was raised by him. It will suffice to say briefly that the central point in the defence was that the appellant denied touching, let alone, beating the deceased on the three occasions. He admitted visiting the home of PW1 at 3.00 p.m on the fateful day where, at sunset and just before 7.00 p.m, the deceased joined them. According to him, the deceased then uttered the following words:-

> "Zamani walipokuwa wanalipiza kisasi walikuwa hawafuati yule aliyefanya kitendo bali walikuwa wanachagua hata kwenye ukoo ule ule".

Thereafter, the deceased wanted to close the door but his son Antony intervened and took him outside. While outside he (the deceased) quarreled with the appellant. According to the appellant, the deceased was a quarrelsome person.

Mr. Galati raised in the memorandum of appeal two grounds but at the hearing he abandoned the second ground and argued only the first ground. The sole ground then reads as follows:-

> That the learned trial Judge erred in law by convicting the accused for the offence of murder while the cause of deceased's death was not proved beyond reasonable doubts.

In arguing the appeal Mr. Galati said that the cause of death was not established beyond reasonable doubt. In the course of his

submission, he carried us through the findings of the judge on the point. He sought to fault the judge in grounding the conviction when the post mortem examination report was not produced and admitted in evidence. In the absence of the report it was quite possible that the deceased met his death on account of other causes, Mr. Galati concluded on the point.

On his part Mr. Mdemu was of the general view that the absence in evidence of the post mortem examination report was inconsequential because of the following reasons. There was no evidence that the deceased was sick before he died. The evidence is clear that the deceased was not beaten by any other person other than the appellant. The deceased died instantly after the third assault. Even if the post mortem examination report had been admitted in evidence at the trial the only dispute would have been on who signed it and not on the cause of death. Thus, the cause of death as narrated in the facts at the preliminary hearing would have remained the same i.e. that the cause of death was internal

haemorrhage. Therefore, in his view the case against the appellant was proved beyond reasonable doubt.

We heard the appeal on 14. 2. 2006 and reserved our decision. In the meantime, and in the interests of justice, on 17. 2. 2006 in exercise of our powers under Rule 34(1) (b) of the Court Rules, 1979, we directed the High Court to take additional evidence on the post mortem examination report and certify the same for our decision. Our order has since then been complied with by the High Court. CW1 Longino Alois Tibenda testified in compliance with our order. He stated that he conducted the post mortem examination on the deceased's body. Having done so, he opined that the cause of death was due to internal abdominal haemorrhage. This evidence tallies with the post mortem examination report which he later prepared, signed and produced in evidence when he testified.

In the light of the additional evidence it will follow that the sole ground of appeal has no leg to stand on. It is now clear that the cause of death is established by the evidence on record. At any rate,

the ground was based solely on the fact that the post mortem examination report was not produced and admitted at the trial so that the cause of death could be ascertained. Now that the post mortem examination report is part of the evidence on record the ground of appeal has no basis, as already stated above. We may observe further that at the trial the report was objected to because it was not signed by a qualified doctor. The objection had nothing to do with the cause of death reflected on the said report. Therefore, strictly speaking, there was no objection at the trial regarding the cause of death.

Having said so, the crucial issue before us is whether or not there was sufficient evidence to ground the conviction in question. With respect, we are in agreement with Mr. Mdemu that the case against the appellant was established beyond reasonable doubt. In this regard, we wish to associate ourselves with his submission on the circumstances showing that the cause of death of the deceased was caused by the appellant.

Having made the above general statement, we wish to address ourselves to other salient features of the case. In both at the preliminary hearing and at the main trial there was no serious dispute that the appellant assaulted the deceased on that day in the three separate incidents. And as fate would have it the third assault led to the death of the deceased. In this regard, like the trial High Court, we have no basis in not believing PW1, PW2, PW3 and PW4 in their respective testimonies on the three incidents.

At this juncture we wish to address ourselves to the provisions of section 200 of the Penal Code in relation to this case. The section reads as follows:-

> 200 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-
>
> (a) an intention to cause the death of or to do grievous 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 harm to some person, whether that person is the person actually killed or not, although that 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 an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

(Emphasis supplied)

Under sub-paragraph (b) above, it is evident that the knowledge that an act or omission may cause death or grievous harm constitutes constructive malice. In the instant case the appellant must have known that the act of assaulting the deceased on the three separate occasions was likely to cause the death of the deceased or cause

grievous harm to him. And, as already observed, the third assault actually led to the death of the deceased.

Malice may also be inferred from the nature of the weapon used and the part or parts of the body where the harm is inflicted. In this case a stone was used and was hit on the head, chest and abdomen which are vulnerable parts of a human body.

The conduct of an accused person before or after killing may also infer malice. The appellant in this case did not respond to the alarm raised by PW4. Under normal circumstances one would have expected him to respond to the alarm. After all, the deceased was his neighbour! So, responding to the alarm would have been a prudent thing for him to do in the circumstances. It is also in evidence, and undisputed for that matter, that the appellant left the scene immediately after the killing. If he was all that of an innocent person he would not have left the said scene. It is also undisputed that he was seen and arrested hiding under a bed in his house. If he was innocent there was no need for him to hide.

In our view, the totality of his conduct after the killing was not consistent with innocence.

In the event, for the above reasons, we are satisfied that the case against the appellant was established beyond reasonable doubt. We have nothing to fault the judge in grounding the conviction in question. We accordingly dismiss the appeal in its entirety.

DATED at DAR ES SALAAM this 3rd day of October, 2006.

E.N. MUNUO

JUSTICE OF APPEAL

J.H. MSOFFE

JUSTICE OF APPEAL

S.N KAJI

JUSTICE OF APPEAL

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

S.M. RUMANYIKA

DEPURY REGISTRAR