Privy Council Appeal No. 48 *of* 1954

Matalo s/o Kilonzo - - - - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - *Respondent*

FROM

THE EAST AFRICA COURT OF APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH 1955

Present at the Hearing :

LORD OAKSEY
LORD TUCKER
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD TUCKER]

In this case the appellant Matalo appealed by special leave from an order of the Court of Appeal for Eastern Africa dated 31st May, 1954, dismissing his appeal against his conviction of murder by the Supreme Court of Kenya (Mr. Justice Connell sitting with three Assessors) on 10th May, 1954.

The appellant was charged and tried jointly with two of his brothers (hereinafter referred to as accused 2 and accused 3) for the murder of one Kibelenge on 27th September, 1953.

The evidence showed that Kibelenge had arrived on a bicycle at the hut of a woman called Mutindi (the wife of a brother of the appellant) after sunset on 27th September. He was a stranger to her. He expressed his intention of staying there for the night and refused her offer that he should sleep in the granary. She was afraid and consequently left her hut with her children and went to her mother-in-law's hut. Later that night the appellant and accused 2 and 3 arrived at the mother-in-law's hut and were told of the presence of the stranger. They had been drinking. They and Mutindi's son, a young boy named Grikoli, accordingly proceeded to Mutindi's hut to find the stranger. According to the evidence of Grikoli on reaching the hut the appellant said " the stranger is asleep." He touched the stranger and took a notebook from his pocket containing thirty shillings in notes. They thereupon left the hut and accused 2 took the stranger's bicycle which was outside the hut. They returned to the hut where Mutindi was. Grikoli entered the hut but the appellant and the other two accused went into the hut of accused 3. Later that night Grikoli heard the cycle being pushed and heard the appellant say " We are returning the cycle to the owner ".

On 8th October the body of Kibelenge was found in a trench 3-4 feet deep with a covering of soil some 18 inches deep about half a mile distant from the huts. Kibelenge's bicycle was found hidden in thick bush some 200 yards from the appellant's hut. Some ropes with blood stains were also found behind a hedge three-quarters of a mile away. The police inspector stated in evidence that the position of the cycle and ropes were pointed out to him by the appellant's wife.

The medical evidence was that the primary cause of death was fracture of the skull due to a blow from a blunt instrument or by the deceased

having been thrown down forcibly and striking his head on the ground. There was superficial and deep evidence of pressure round the neck caused probably by rope or cloth. There was burning on the arms and legs and odour of paraffin on the body. Neither pressure round neck or burning caused death either singly or in combination.

On 8th October the appellant made a statement in the presence of a magistrate. After describing his arrival at the huts with accused 2 and 3 and then being informed of the presence of the stranger, the statement continued, " We 3 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."

At the preliminary enquiry the appellant gave evidence on oath. This evidence was put in evidence by the prosecution at the trial. It contains the following account of the events of the night in question:—" I went with a light and stick to see the man. I found him in the house and 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 first blow. I picked up the body and put it near a terrace in the shamba. I tied a rope round his neck so I could carry him easily."

At his trial the appellant did not give evidence on oath but elected to make a statement from the dock. The material portion is as follows:—

> " 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, we were in the house. As he was about to hit me a second time I held his stick, I pulled stick and hit him with same stick."

These three statements are, of course, English translations of his native language.

There was accordingly abundant evidence that Kibelenge died as the result of a blow struck by the appellant either alone or in conjunction with others which was calculated to cause and did in fact cause grievous bodily harm.

There is no record of the Trial Judge's direction to the assessors but it is clear from his judgment that in the case of the appellant he left manslaughter to them as a possible verdict if they believed there had been a fight between him and the stranger. All 3 assessors returned a verdict of guilty of murder against the appellant and accused 2 and not guilty in the case of accused 3. The final decision rested, of course, with the Judge and he found the appellant guilty of murder, accused 2 guilty of being an accessory after the fact and accused 3 not guilty.

The appellant appealed to the Court of Appeal for Eastern Africa pursuant to a certificate granted by the Trial Judge giving leave to appeal on fact. The sole ground of appeal was that manslaughter would have been the proper verdict. The appeal was dismissed without any reasons being given.

On the present appeal it was contended that there was no evidence to support the verdict of murder and alternatively that the Trial Judge did not properly direct himself or the assessors with regard to manslaughter or the possibility of a verdict of not guilty on the grounds of accident or self defence.

The Judge referred to the conflicting accounts which had been given by the appellant. He stated that he had " glossed over " his theft of money from the deceased, had referred on one occasion to the deceased seizing a panga and on another to having taken the deceased's stick from him and hit him with that, and stated that the inference which he drew from the evidence as a whole was that the appellant having robbed the deceased had returned later and killed him to cover up the traces of his crime. He took the view that the deliberate theft of money on the first

occasion was inconsistent with the idea of a struggle and fight resulting from his being incensed at finding the stranger in the hut. These conclusions were evidently largely based on the Judge's acceptance of the evidence of the boy Grikoli coupled with the appellant's last two statements which in his view pointed to a second visit by the appellant to the tent after Grikoli had gone back to his mother.

It is not the function of the Board to review the facts in criminal cases nor do their Lordships sit as a Court of Criminal Appeal. It is sufficient to state that their Lordships find it impossible to say that the conclusion arrived at by the Trial Judge is one which no reasonable tribunal of fact could have reached. This would appear also to have been the view of the Court of Appeal.

The Trial Judge left the question of manslaughter to the assessors as a possible verdict if they believed there had been a struggle. On the material available and in the absence of evidence by the appellant at the trial in amplification of his previous statements or in explanation of the inconsistencies therein this was a direction by no means unfavourable to him and certainly affords no basis for invoking the jurisdiction of the Board.

Nor do their Lordships consider that any criticism can be directed to the judgment because the Judge did not deal with the possibility of a verdict of not guilty on the ground of accident or self defence. The conclusion which he drew shows that he must have entirely rejected a view of the facts based upon portions of the appellant's different statements which alone could have afforded any ground for such a verdict. In this connection it must be remembered that this is an appeal from the judgment of a Judge who was alone responsible for the final verdict and that although he is required to give his reasons he cannot be expected to direct his observations to aspects of the case which are irrelevant to his findings of fact but which might have been necessary in a charge to a jury.

Their Lordships do not find it necessary to deal in detail with the numerous other criticisms of the conduct of this case or the reasoning of the Judge which have been advanced before the Board since, save in so far as they were relied upon in support of the main submissions already dealt with, they do not come within the scope of the matters with which it is the practice of the Board to deal in the exercise of its criminal jurisdiction. This case raises no important question of law and discloses no fundamental departure from the requirements of the proper administration of the criminal law and their Lordships have accordingly, for the reasons indicated above, humbly advised Her Majesty that this appeal should be dismissed.

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In the Privy Council

MATALO S/O KILONZO

v.

THE QUEEN

DELIVERED BY LORD TUCKER

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