

A quite well. Four; the witnesses were also not contradicted that the night was moonlit. Through the moonlight they identified the appellants. Five; it may also be significant to mention here that all the above three prosecution witnesses were consistent in their respective pieces of evidence that Malota was the one carrying the gun on that fateful night.

C Surely in the light of the above aspects of the evidence, like the trial judge, we are satisfied that the identification of the appellants was watertight. In this regard, there will be nothing to fault the trial judge in her findings and conclusions on the evidence of identification. In the same vein, she was justified in rejecting the appellants' defences of *alibi*.

D Before we conclude the judgment we wish to make the following point. A look at the evidence in its entirety will show that the murder in question was committed in the course of committing a felony. The evidence shows that the appellants, and their colleagues who were not arrested and brought to justice, were involved in a robbery. Indeed, in the evidence of PW2 a sum of money was actually stolen in the process, although she did not state or specify the exact or specific sum. In this regard, the law is clear that a person who uses violent measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violent measures result in the death of the victim. In other words, if death is caused by an unlawful act in the furtherance of an intention to commit an offence malice aforethought is deemed to be established in terms of section 200(c) of the Penal Code, Chapter 16. (Also see *Olenja v. R.* (3), *Sentali Lemandwa v. R.* (4), and *Manazo Mandundu and Another v. R.* (5). In the instant case malice aforethought was established in that the death occurred in the course of committing the robbery in question.

I In the event, we are satisfied that the appeal has no merit. It is dismissed accordingly.

ABDALLA ABASS NAJIM v. AMINI AHMED ALI

HIGH COURT OF ZANZIBAR
AT VUGA
(Kihyo, J.)

CIVIL APPEAL No. 13 OF 2005

(From Original Civil Case number 32 of 2003, Regional magistrate's Court at Vuga)

Evidence – Documentary Evidence – Annexes to the Plaintiff – Whether documents attached as annexes to the plaintiff may be taken as documentary evidence tendered in Court.

Evidence – Documentary Evidence – Annexes attached to the Plaintiff but not tendered in evidence in Court as exhibits – Whether the Court may decide a case on the basis of such annexes.

The respondent filed a suit against the appellant in the regional magistrate's Court of Zanzibar at Vuga, claiming vacant possession of a house situated at Jang'ombe. The respondent claimed to have purchased the said house from the appellant at 2 000 000. In support of his claim the respondent had annexed some documents to the plaintiff but he did not tender them in evidence in Court as exhibits. The respondent was successful in the suit, hence this appeal to the High Court.

Held: (i) Annexures to the Plaintiff are not exhibits in evidence; they cannot be relied upon as evidence and cannot be the basis of a decision;

(ii) As the Annexures to the respondent's Plaintiff were not tendered in Court as exhibits and were not tested in evidence, it was improper for the learned Regional magistrate to base his judgment on those annexures.

Appeal allowed

Statutory Provisions referred to:

(1) Civil Procedure Decree Chapter 8, Order XV rule 7(2)

JUDGEMENT

(Delivered 8 September 2005)

B Kihio, J: The appellant, Abdalla Abass Najim, was the defendant in the Regional Court of Zanzibar at Vuga Civil Case number 32 of 2003 where by the respondent had filed a suit against him claiming that he (appellant) be ordered to hand over vacant possession of the house situated at Jangombe within Mjini district, Mjini Magharibi Region Unguja he (respondent) had purchased from him (appellant) at a price of TZS. 2 000 000 and won the case.

D Dissatisfied with the decision of the learned Regional magistrate the appellant filed this appeal. The appellant filed four grounds of appeal in his Memorandum of Appeal. The four grounds of appeal are:

- E** 1. That the learned regional magistrate erred in law in deciding that there was a sale agreement in respect of the house situated at Jang'ombe between the appellant and the respondent when there was no proof to that effect.
- F** 2. That the learned regional magistrate erred in law in failing to decide that he (appellant) owed the respondent TZS. 2 000 000.
- G** 3. That the learned regional magistrate erred in law in basing his judgment on respondent's documents which were not tendered and admitted in evidence in Court and according to the provisions of a order XV, rule 7(2) of the Civil Procedure Decree, Chapter 8 of the Laws of Zanzibar the documents were not supposed to be part of evidence.
- H** 4. That the learned Regional magistrate erred in law by failing to take in to consideration the discrepancies between the evidence of the respondent and that of PW2 and PW3 and as a result he gave judgment in the respondent's favour.

The parties are unrepresented.

I The appellant submitted in Court that there was no sale agreement produced in the Trial Court and decided to adopt the other grounds

of appeal in his Memorandum of Appeal. The respondent who strongly resisted the appeal submitted that the sale agreement document was tendered in Court as an exhibit to establish that there was a sale agreement between him and the appellant. **A**

In regard to the second ground of appeal he submitted that there was no claim of money and so the learned Regional magistrate could not decide that he claimed TZS. 2 000 000 from the appellant. **B**

In resisting the third ground of appeal he submitted that he tendered the documents in Court as exhibits in accordance with the law and the same were admitted in accordance with the law. **C**

In resisting the fourth ground of appeal he submitted that there was no discrepancies in his evidence and that of PW2 and PW3 and so the learned Regional magistrate gave judgment in his favour on the strength of the evidence adduced. **D**

In reply, the appellant submitted that the respondent did not tender the sale agreement document in Court as an exhibit in trial. He further submitted that the respondent did not tender documents in Court as exhibits in accordance with law and so there were no documents admitted in Court in accordance with law. **E**

Three issues were framed for determination by the Trial Court, namely, (1) Is there any sale agreement between the plaintiff and the defendant (2) Did the plaintiff give the defendant TZS. 2 000 000 (3) If yes then for what purpose. **F**

In his decision the learned Regional magistrate said as follows: **G**
Well now let us go back to our framed issues.

- (1) Is there any sale agreement between the plaintiff and the defendant. **H**
To my view there is an agreement made before the police station and written agreement, which was made before the sheha. Together with that in the testimony of PW1, PW3 police officer and the testimony of the defendant bruses all these witnesses told about a handover of the house folier to recover the said TZS. 1 900 000. And that at **I**

A that point it is crystal clear that the defendant freely agreed on the whole matter. Perhaps that is why PW1 refused to take the sum of TZS. 350 000 from DW2 and DW4. Because by then the agreement was made already annexure D1 in the plaint. Connecting thereto if you look at annexure B from the plaint it shows clearly that DW1 had agreed that he sold his house for the recovery of the debt and these agreement made at the police station as it was supported by the witnesses from the plaintiff's side.

C Most of the witnesses from defence side they were not aware of how the whole issue had happened. DW1 got to know when the whole issue had reached very deep and the whole debt was now TZS. 1 900 000. And from her testimony it is seen that she is not aware of the agreement made at the police station or of what happened there.

D At the final stage I see that the claim has been proved by the plaintiff and I hereby order the defendant to evacuate the said house located at Jang'ombe with Deed 1179/Vo1ume V /book A-3/1993 and hand it over to the plaintiff immediately.

F I find it necessary to start with the third ground of appeal as I feel that the determination of this ground will dispose of the whole appeal. In the third ground of appeal the learned regional magistrate is faulted by the appellant for basing his judgment on the respondent's documents which were not produced and admitted in evidence in the trial.

G From the record, it is plain that the learned regional magistrate based his judgment on documents which are annexures on the respondents' plaint and which were not produced in Court in the trial as exhibits and tested in evidence and admitted as part of the evidence. The two annexures on which the learned regional magistrate based his judgment are annexure "D1" and "B2". However, it is not irrelevant to point out here that a peep at the Trial Court's record shows that the annexure annexed at the respondent's plaint is annexure "B" and not "D" as indicated in the learned regional magistrate's judgment. I assume that the indication of annexure "D1" in the learned regional magistrate's judgment is a typing error.

A In that said, I now revert to the point in issue. The point for determination here is whether it was proper for the learned regional magistrate to base his judgment on the respondent's documents annexed at the plaint as annexures and which were not produced and admitted in evidence in the trial or otherwise.

B It should be pointed out here that annexures to the plaint are not exhibits in evidence, cannot be relied upon as evidence and cannot be the basis of a decision.

C As I have already indicated above the respondent's submission is to the effect that he tendered the document in Court as exhibits in accordance with the law and the same were admitted as exhibits in accordance with the law. With due respect, I am unable to accede with the respondent's submission in this regard.

D The appellant submitted, rightly in my view, that the respondent did not tender documents in Court as exhibit in accordance with law and so there were no documents admitted as exhibits in accordance with law.

F I hold the view that as the annexures B1 and B2 annexed to the respondent's plaint were not tendered in Court as exhibits and tested in evidence it was improper for the learned regional magistrate to base his judgment on those annexures. Therefore, I unhesitatingly hold that the learned regional magistrate erred in law in basing his judgment on respondent's documents which were not tendered and admitted in evidence in Court.

G In my opinion, all this caused injustice on the appellant and so vitiated the decision with the result that the judgment cannot stand and must be set aside. This finding is sufficient to dispose of the whole appeal and I find no necessity of determining the other grounds of appeal. For the foregoing reasons, I set aside the judgment of the Trial Court and order that the case be re-tried before another magistrate of competent jurisdiction.