

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 3 OF 1981

B E T W E E N

SHIJA KIDETE. APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Nzega) (Mushi, J.)
dated the 14th day of October, 1980,

in

Criminal Sessions Case No. 14 of 1980

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The appellant was charged with and convicted of murder. There was evidence that the appellant had assaulted the deceased. At about midnight one night the appellant took the deceased to the house of the appellant's brother, one Sipilingi, alleging that he had found the deceased committing adultery with Sipilingi's wife. The deceased was found bleeding from the mouth, and seen with some bruises on the back. The appellant slept that night at Sipilingi, and the deceased walked off to his own home. The matter of the adultery was to be dealt with the following day.

On the following morning the deceased was found lying on the ground in his hut in a critical condition, his body and head swollen. He was taken to hospital and he died the same day.

The doctor who performed the post-mortem examination on the deceased gave evidence. He stated that the cause of death was suffocation, and that it was possible that the instrument used to suffocate the deceased was a piece of cloth or a rope.

The trial judge in summing up to the assessors told them that they could ignore the doctor's opinion as to the cause of death, if there was clear evidence contradicting such opinion. The judge in his judgment found as a fact that the deceased died as a result of the injuries he sustained at the hands of the appellant, most probably from kicks or attacks with a blunt object. The judge also ruled out the possibility of an intermediate intervention between the time the deceased walked back to his hut and the following morning when he was found in a critical condition.

We do not think that the judge was justified in his rejection of the doctor's opinion of the cause of death, that is, suffocation, nor do we think that the judge was justified in his findings of fact which are not based on any evidence. We do not think that the prosecution has established any link between the injuries inflicted on the deceased by the appellant and the suffocation which caused the death of the deceased.

In the result we are satisfied that the charge of murder has not been established against the appellant.

We, however, are satisfied that the appellant was guilty of causing actual bodily harm - contrary to section 241 of the Penal Code.

We allow the appeal, quash the conviction for murder, set aside the sentence of death passed on the appellant, and substitute therefor a conviction for ^{causing} actual bodily harm.

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We sentence him to two years' imprisonment. This will result in his immediate release from prison as he has been in custody from 3rd June, 1978.

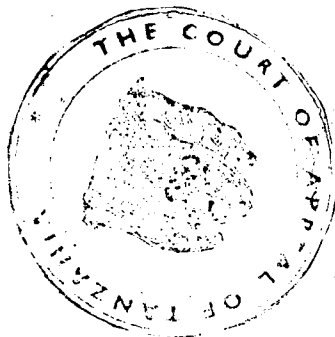
DATED at DARE ES SALAM this 1th day of June, 1982.

A. KULEFA
JUSTICE OF APPEAL

Y.H.M. MAKISENDO
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

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



(L. A. A. KYANDO)

DEPUTY REGISTRAR