

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. 24 OF 1981

B E T W E E N

MAHELO MGUMBE APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Mwanza) (Munyera, J.)
dated the 14th day of March, 1981,

in

Criminal Sessions Case No. 26 of 1981

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The appellant was charged with and convicted of murder. He was alleged to have stabbed the deceased on a Christmas night in 1978. There was evidence that at about midnight he was trying to enter the hut of P.W.5 in order to sleep. The appellant had before that night been sleeping in the hut of P.W.5 for whom he had worked as an employee. When P.W.5 heard the knock and understood that the appellant had wanted to come in to sleep, P.W.5 told the appellant that there was no place for him that night as P.W.5 had another guest. The appellant then pushed and broke down the door which fell on the guest of P.W.5, and he was the deceased who was sleeping on the floor. The deceased got up and pushed the appellant out. The appellant re-entered the hut and the deceased again pushed him out. Immediately thereafter the deceased exclaimed that the appellant had stabbed him with a knife. The deceased fell down and died almost instantaneously.

The cause of death was a stab wound on the left neck, causing severe haemorrhage. The appellant ran off and was arrested the following morning.

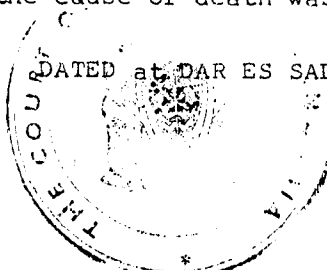
Both P.W.5 and his wife P.W.7 stated that they recognised the appellant as the man who attacked the deceased. They had known him a long time and according to P.W.7, after the first entry by the appellant into the hut, she lit a koroboi, and after that the appellant made his second entry. P.W.5 and P.W.7 also recognised the voice of the appellant and P.W.7 certainly saw him clearly when the appellant entered the hut that night.

Mr. Lakha for the appellant has submitted that the circumstances for identification were not favourable, and there could be doubt who the attacker of the deceased that night was. He submitted that the prosecution witnesses and the appellant himself had partaken of intoxicating liquor that day and night and they could not see or hear and identify properly. We have given due consideration to this aspect, and we agree with the trial judge that the appellant was properly identified by both P.W.5 and P.W.7 to whom the appellant was well-known. However, we are also satisfied that the appellant stabbed the deceased in the course of a struggle. The appellant, quite obviously not very sober, was ejected by force by the deceased and in the course of such ejection pulled out a knife which he obviously was carrying and made a stab at the deceased in the dark outside the hut. We are aware that the weapon used was a knife, but we also take into consideration that the stabbing took place in the midst of some sort of a struggle, and that both the parties were certainly under the influence of drink. The appellant could have struck as he was provoked by being forcibly ejected.

We think that the offence for which he should have been convicted was manslaughter, as there was insufficient evidence of malice aforethought.

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 manslaughter. We sentence the appellant to five years' imprisonment.

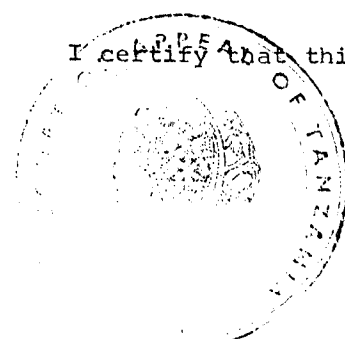
Before we conclude we must point out that in the record, there was no medical evidence as to the cause of death. No doctor testified, nor was the post mortem report, which is on the Preliminary Inquiry proceedings, exhibited or produced at the trial hearing. In some cases such an omission can have serious consequences. In this case, however, the deceased died almost immediately from the stab wound, and the evidence of the cause of death was sufficient in the circumstances.

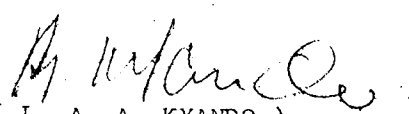
DATED at DAR ES SALAAM this 4th day of June, 1982.

A. MUSTAFA
JUSTICE OF APPEAL

Y.M.M. MWAKASENDO
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