

IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA

CORAM: MUSTAFA, J.A.; MAKAME, J.A. And OMAR, J.A.

CRIMINAL APPEAL NO. 12 OF 1986

NICHOLAUSI SENGEU. . . . . APPELLANT

VERSUS

THE REPUBLIC. . . . . RESPONDENT  
(Appeal from the conviction of the High  
Court of Tanzania at Arusha) (Mwakibete, J.)  
dated the 8th day of May, 1985

in

Criminal Sessions Case No. 34 of 1981

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The appellant was charged with murder but was convicted of manslaughter and sentenced to 12 years imprisonment. He was alleged to have killed the deceased in the act of raping her. He is appealing mainly on the ground that it was a question of mistaken identity.

P.W.1 was the main and crucial witness for the prosecution. P.W.1 had seen the appellant several times before the alleged incident, although they were not on speaking or friendly terms. P.W.1 stated that on the material evening while he was returning from a walk to his house he heard someone shouting about a rape taking place. He went to where the alarm emanated and there he saw a man lying on top of a woman. An old man was standing by protesting at the incident. P.W.1 saw the man on top holding the woman below by the neck while sexually assaulting her. P.W.1 pulled the man off the woman. The man got up and assaulted P.W.1. The man in the fight fell down, and P.W.1 saw that the woman was in a very bad way. The man was then buttoning up his trousers.

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On P.W.1's instructions the man helped in carrying the exhausted woman into a nearby house, and immediately thereafter the person ran off into a maize shamba, chased by P.W.1. P.W.1 caught the man and took him to a house where the man was tied up with a rope. Later P.W.1 got hold of a medical aid who examined the woman. The woman was pronounced dead.

P.W.1 was positive that the appellant was the man who was the rapist and whom he had caught in the chase.

The appellant had denied the whole incident stating that it never took place so far as he was concerned. Mr. Umbula for the appellant contended that P.W.1 was either concocting the whole incident, or that P.W.1 could have chased and caught the wrong person because the field was full of maize and visibility could have been therefore poor. On a consideration of the evidence we are satisfied that P.W.1 was a truthful witness as found by the judge and the assessors. The appellant in an unsworn statement stated that he was arrested while he was in a pombe shop. That account would render impossible the possibility that P.W.1 had chased and arrested the wrong party. P.W.1 took the person he had chased and arrested and tied him up, and that was the appellant.

We are satisfied that the appellant was properly identified as the person who was caught raping the woman victim.

Then there is the question of the cause of death. P.W.3, the medical aid examined the body of the deceased. He found that the body had bruises on the neck, and there was a fresh wound on the right side of the nose. The left thumb and index finger had wounds. The tongue and eyes were protruding. He noticed what he thought were dead spermatozoa, on the thighs of the woman. He was of the view that the deceased had died from asphyxia

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resulting from strangulation.

P.W.6, a medical doctor, prepared a postmortem report. However P.W.6 did not examine the dead body at all, but wrote down the symptoms noticed by P.W.3 and gave the cause of death as asphyxia and strangulation. That post mortem report is based on hearsay and is inadmissible. Indeed in our view that was improper on the part of P.W.6, and we think that his action amounted perhaps to unprofessional conduct.

However P.W.6 testified and stated that assuming the symptoms observed by P.W.3 to be true, then the cause of death was asphyxia due to strangulation. He stated that the neck bruises together with the protruding tongue and eye could only have been the result of throttling causing asphyxia. The symptoms noticed by P.W.3 would be consistent with what P.W.1 had observed.

In the result we are satisfied that the deceased was throttled to death by the appellant while he was attempting to rape or raping her.

The trial judge found that the appellant was guilty not of murder but of manslaughter on the ground "there was no evidence to show that the accused was sober at the time". We fail to understand the reason for reducing the offence from murder to manslaughter in the circumstances. The appellant was fortunate to have escaped a conviction for murder. As there is no cross appeal we will not concern ourselves with the verdict.

In the result we dismiss the appeal against conviction. We also dismiss the appeal against sentence.

DATED at ARUSHA this 24th day of July, 1986.


A. MUSTAFA  
JUSTICE OF APPEAL

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L. M. MAKAME  
JUSTICE OF APPEAL

A. M. A. OMAR  
JUSTICE OF APPEAL

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

  
(J. H. MSOFFE)  
DEPUTY REGISTRAR.