

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: NYALALI, C. J., MAKAME, J. A. And KISANGA, J. A.

CRIMINAL APPEAL NO. 29 OF 1986

VIANA VENANT . . . . . APPELLANT

Versus

THE REPUBLIC . . . . . RESPONDENT  
(Appeal from the conviction of the High Court  
of Tanzania at Mwanza)(Korosso,J.) dated the  
20th day of December, 1985,

in

Criminal Sessions Case No. 71 of 1985

JUDGMENT OF THE COURT

NYALALI, C. J.

The Appellant and another were charged for the offence of murder c/s 196 of the Penal Code. Counsel indicated that they were willing to plead to the lesser offence of Manslaughter c/s 195 of the Penal Code. Although the trial judge did not ask the Appellant and his companion for their plea to the lesser offence, facts were adduced by the Prosecution which disclosed the offence of Manslaughter. The Appellant and his companion admitted those facts and the trial Court convicted him and his companion each on his own plea of guilty. The court then sentenced each to 15 years imprisonment. In passing this sentence the court stated:

"The circumstances in this case were bordering those which <sup>are</sup> relevant to intentional killing as defined under section 200 of the Penal Code"

Mr. Butambala has submitted that the trial judge misdirected himself in expressing those views. We agree.

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The facts adduced by the Prosecution show that at the time of the incident the Appellant and his companion appeared very drunk to the extent that they were refused service of more liquor. A case in which an accused acts or appears to act under the influence of alcohol cannot be said to be a borderline case. In thinking so, clearly the trial judge misdirected himself. We think that had he properly directed himself he might have imposed a lesser sentence. We shall therefore interfere with the sentence. Before doing so, we have to point out one procedural irregularity. The trial court omitted to take the plea of the Appellant and his companion on the lesser offence before the prosecution was called upon to adduce the facts in support of the offence. However, since the Appellant clearly knew the charge, we think that he was not prejudiced and the irregularity is curable under Rule 108 of Tanzania Court of Appeal Rules. We must also point out that the Appellant's companion who has not appealed to us against the sentence is at liberty to appeal if he so wishes. He must do so within 14 days from the date this decision is communicated to him.

As the Appellant had been in custody for 4 years at the time of his conviction, we allow the appeal and reduce the sentence to 5 years imprisonment from the time of his conviction.

DATED at MWANZA this 26th day of June, 1986.


F. L. NYALALI  
CHIEF JUSTICE

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L. M. MAKAME  
JUSTICE OF APPEAL

R. H. KISANGA  
JUSTICE OF APPEAL

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

  
(J. H. MSOFFE)  
DEPUTY REGISTRAR.