

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MAKAME, J.A., KISANGA, J.A., And LUGAINGIRA, J.A.)

CRIMINAL APPEAL NO. 58 OF 1995

BETWEEN

1. SAMWEL SAMSON MASATU }
2. LIMBU SUNGWA } APPELLANTS
3. KUBE SHIWA }
}

AND

THE REPUBLIC RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Tabora)

(Mackanja, J.)

dated the 14th day of August, 1999

in

Criminal Sessions Case No. 125 of 1990

J U D G E M E N T

KISANGA, J.A.:

The three appellants were convicted of murder and sentenced to death by the High Court (Mackanja, J.) sitting at Tabora. They now appeal against both conviction and sentence. They were represented in this court by Mr. Matata, learned advocate, while Mr. Ndunguru, learned Senior State Attorney, was for the respondent Republic. Mr. Ndunguru did not seek to support the convictions.

Very briefly the background to the case was as follows:- The deceased had made allegations of adultery, with his wife, against the second appellant, Limbu Sungwa, a fellow villager. The second appellant felt defamed by the allegations and lodged a complaint in the Primary Court for defamation. The complaint was received and acted upon by the first appellant Samwel Samson Masatu, a court clerk, in the absence of the Primary Court Magistrate who was working at another station that day.

The deceased was duly arrested by the third appellant, Kube ~~Shija~~^{SHUWA}, a member of the traditional security force - Sungusungu, upon a warrant of arrest issued by the first appellant. Following the arrest the first and third appellants put the deceased in lock up at the Primary Court. However, the first appellant said that when later he came and inspected the lock up he noticed the deceased's leg sticking out of a broken window indicative of the deceased intending to escape. Whereupon he removed the deceased from the lock up and transferred him to the court office and locked him there. On the following day he came and opened the office only to find that, according to him, the deceased had hanged himself using a piece of cloth (kitenge) which the first appellant had taken from him as part of prisoner's property and put in an adjacent store room that had no door.

The trial judge found that the three appellants acted together to execute a plan initiated by the second appellant to harm the deceased. With due respect, however, this was mere conjecture. There was not a shred of evidence to support such a view. For, after the second appellant had lodged his complaint of being defamed, which act was lawful, he is not shown to have done anything either alone or signifying participation with the co-appellants, to harm the deceased. Similarly, the third appellant after lawfully arresting the deceased and assisting the first appellant to put him in the lock up at the Primary Court, did nothing either alone or signifying participation with his co-appellants to harm the deceased. The trial judge in his judgement found that the third appellant assisted the first appellant to transfer the deceased from the lock up to the office. This finding was erroneous. The evidence on record shows that the third appellant did not participate in such transfer, his role in the matter ended with putting the deceased in the lock up. Therefore there was no evidence at all to connect the second and third appellants with the death of the deceased.

The case of the first appellant too is not free from difficulty. The first difficulty arises because, as the trial judge rightly found, cause of death of the deceased was not established. Yet having made that finding the learned judge proceeded to convict the appellant(s) for murder. That sounds plainly a contradiction in terms. The learned judge said that although cause of death was unknown he found, nevertheless, that deceased died an unnatural death. This however, does not answer the question "What was the cause of death, unnatural, though it may be. In the absence of any answer to that question, we increasingly think that conviction for murder could not be sustained in the circumstances of this case.

The first appellant may have acted wrongly in law in locking up the deceased upon a complaint of defamation which was purely of a civil nature. That alone, however cannot connect the appellant with the death of the deceased. Likewise his act of transferring the deceased from the lock up to the office cannot be taken as implicating him with the death. For one thing, the appellant would not allow the deceased to be killed in his office because that would openly betray him. His locking him up in the office may have been quite innocent. Indeed the appellant's explanation could possibly be true that he transferred the deceased into that office for security reasons to prevent his escape, and the deceased might have met his death there by means unconnected with the appellant, such as, suicide.

Thus we are satisfied that while there was suspicion against the appellant the evidence adduced, however, could not found his conviction for the murder of the deceased.

The learned Senior State Attorney rightly did not seek to support the appellants' convictions. In the result, and for the reasons set out above, the appeal is allowed. The convictions are quashed and sentences

set aside. The appellants are to be released forthwith unless they are otherwise lawfully held in custody.

DATED at DAR-ES-SALAAM this 4th day of September, 2000.



L.M. MAKANGI
JUSTICE OF APPEAL

R.H. KISANGA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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


(A.G. MARIJA)
DEPUTY REGISTRAR