

UGANDA / JUDGMENT

Rex v Kwenyema (Cr.A. 111/1934.) [1937] EACA 169 (1 January 1937)

[1937] EACA 169**COURT**

East African Court of Appeal

BEFORE

Horne J, Lucie-Smith Ag CJ (Kenya), Webb, J

CASE / FILE NUMBER

Cr.A. 111/1934.

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COURT OF APPEAL FOR EASTERN AFRICA. $\mathcal{S}_{\text{out}} \subset \mathcal{S}_{\text{in}}$

Before LUCIE-SMITH, Ag. C. J. HORNE, J., and WEBB, J. (all of Kenya).

> REX (Respondent) (Original Prosecutor) $\overline{\mathbf{r}}$ **MGAMBO BIN KWENYEMA (Appellant) (Original Accused). Cr. A. 111/1934.**

Murder—Manslaughter—Provocation—Whether circumstances are such as to reduce the crime to manslaughter—Case of where the accused intends to injure the person who has provoked him but by accident happens to kill another person whom he never intended to hit at all.

Held (4-8-34).—That if a person feloniously fires at another in such circumstances as would make the killing of that other person manslaughter, but by accident he hits and kills a third person whom he never intended to hit at all, he is guilty of manslaughter. Cases of Rex v. Gross (1913), 23 Cox 455 and Rex v. Harrington, 10 Cox 370 followed. Conviction altered to manslaughter.

Appael from High Court of Tanganyika Territory.

Appellant absent, unrepresented.

Bruce (Solicitor-General, Kenya) for Crown.

JUDGMENT.—In this case we are of opinion that the learned trial Judge has not given full consideration to the question of manslaughter. In Rex v. Gross (1913) 23 Cox 455, it is stated that "If a person feloniously fires at another in such circumstances as would make the killing of that other person manslaughter, but by accident he hits and kills a third person whom he never intended to hit at all, he is guilty of manslaughter." What the learned trial Judge had to consider was whether if Sabaharo had been killed would the circumstances have enabled him to reduce

the offence to manslaughter. He deals with the question in these words: "The accused had seen blood on his sister's head and entered the house and seized the gun. The accused was undoubtedly upset by what he had seen. But there was nothing to justify him in firing at his brother-in-law merely because the latter was engaged in boxing the ears of his other wife who was no relation of the accused ... In my opinion the accused had not received such provocation as would entitle him. to be found guilty of manslaughter." This passage shows that the learned Judge did not envisage what the effect of the circumstances would have been if Sabaharo had been killed. Sabaharostated that he was boxing the ears of his wife Mkondo at the moment he was shot. The appellant stated that Sabaharo had.

the axe raised as he came out of the house with the gun and Sabaharo admitted that he had beaten Mkondo with the axe and had wounded his other wife, Nakasanya, on the head with the axe, but a few minutes beforehand when she interfered and came to the assistance of Mkondo. In both his statement at the preliminary inquiry and his evidence at the trial the appellant stated that he saw this blow struck and in consequence thereof went into the house and seized the gun. In *Re x v. Harrington* 10 Cox, 370, where a father, seeing his daughter violently assaulted by her husband, struck the latter a fatal blow in strong resentment, it was held to be manslaughter.

If Sabaharo had been killed there would clearly appear to have been some provocation sufficient to cause a loss of self control and to reduce the offence in that case to manslaughter. It is equally manslaughter whether the person who gave the provocation or some other person was killed.

We therefore quash the conviction for murder and substitute a conviction for manslaughter and sentence the appellant to five years' imprisonment with hard labour.

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