

**When a father discovers a man raping his young daughter:
Case note on *S v Nyakabau* HH-330-19**

By Geoff Feltoe

In this case the court had to deal with a situation in which a father severely beat a man who had raped his fifteen year old daughter, which beating caused the death of rapist. The father was charged with murder and the main issue was whether he could successfully rely on the partial defence of provocation.

The accused was woken up late at night by the screams of his daughter who had been raped. Knowing that his daughter has been raped, the accused, who was in a violent rage, intercepted the rapist when he was coming out of his daughter's bedroom. He fought with the rapist outside the house. He later dragged him into the dining room where the accused had used a leather strip to assault him. The rapist had reached into his pocket where he had a knife, but before he could draw out the knife, the accused's son reached into his pocket and took away the knife. The rapist was then tied up to prevent him from escaping. As a result of the beating by the accused using his fists and the leather strip the rapist was now badly injured. The accused tried to contact the police to report the incident but was unable to get through to the police. However, a neighbourhood watch police officer was called to the scene and found the rapist tied up. The rapist was untied and the accused and the officer took the rapist to a place where they hoped to obtain transport to take him to hospital. However, before they could do so, the rapist succumbed to his injuries. The report of the pathologist was that the deceased had multiple blunt force injuries to his head, upper arms, chest wall, lower back and thighs. Moderate to severe force would have been used to inflict these injuries. The death had resulted from internal bleeding into the tissues.

The court had to decide whether in these circumstances the partial defence of provocation applied. It pointed out that under section 239 of the Criminal Law Code on a charge of murder a two stage approach is used. Under the first stage the accused is not guilty of murder but only culpable homicide if the provocation led the accused to lose his self-control and act without forming the intention to kill. On this point the court found that given the severe and sustained nature of the assault, he must have foreseen the risk of death, that is, that he had legal intention to kill. On this point the accused had denied that he had intended to kill. The defence might have argued that he only wanted to punish the rapist and in his fury he did not realise that there was a real risk death. This contention might have been fortified somewhat by the fact that the accused subsequently sought to take the injured man to hospital. However, the court decided that he must have realized that the sustained and severe nature of the beating would lead to the death of the rapist. But even if the court had found that he lacked intention to kill under the first rung, he would still have been found guilty of culpable homicide.

Having decided that the accused had legal intention to kill, the court then proceeded to the second stage. At this the stage the question to be determined is whether the accused killed intentionally in circumstances in which he had completely lost his self-control and in which even the reasonable person would have lost his self-control and would have behaved as the accused behaved. If these requirements are satisfied the accused would automatically be found guilty of the lesser crime of culpable homicide. However an essential ingredient of culpable

homicide is negligence and to convict the accused without first deciding that this element is satisfied would seem unfair.

It should be noted that this second rung test has been subjected to criticism. It has been argued that a reasonable person would not intentionally kill another person even when subjected to extreme provocation. Be that as it may be, this second stage test is still provided for in the Criminal Law Code.

On the facts before the court, the court decided that the second rung did apply and it found the accused guilty of culpable homicide. It said that the issue of whether a reasonable person would have acted in the same manner as the accused is to be decided contextually and not by using an armchair approach. In other words, the judge is required to evaluate whether the accused acted reasonably by examining how a reasonable person would have acted given the extent of the provocation to which the accused was subjected. The court pointed out that any father whose young daughter has been raped and who apprehends the rapist soon after the rape is likely to be furious and might well respond by assaulting the rapist. A father has a duty to protect his daughter against such a sexual attack upon her and when such an attack has occurred, a father who is horrified by the harm done to his daughter may be unable to restrain himself from punishing the rapist.

The court pointed out that in the present case the anger of the accused was engendered primarily by the fact that he felt that his own interests had been harmed in that the rape had compromised the marriage prospects for his daughter. The court observed that his attitude arose from the system of payment of bride price to the father of a girl to secure the daughter's hand in marriage. Here the father believed that his daughter was now "damaged goods" and this had adversely affected his own status and honour in the eyes of the wider community. The court said that what should have been uppermost in the mind of the accused was that his daughter's own rights had been gravely violated by the rape.

Nonetheless the court impliedly decided that the response of the accused was reasonable given the extent of the provocation to which he was subjected. Therefore the partial defence applied to reduce murder to culpable homicide.

But the court then went on to decide that the accused was negligent in taking the law into his own hands rather than allowing the law to take its course. The court did however accept in a rural community where the nearest police station is often a long distance away, as was the position in the present case, it is not possible for the aggrieved party quickly to bring in the police to arrest the rapist who had been apprehended.

The finding of negligence on this ground appears to contradict the earlier finding that the accused was entitled to the partial defence of provocation as he had acted reasonably in response extreme provocation. If he acted reasonably he was not negligent. Ideally, a father who apprehends a person who has raped his daughter should refrain from engaging in violence against the rapist and should instead hand over the rapist to the police. But in reality a furious father is likely to lose his self-control and be unable to restrain himself from meting out punishment to the rapist. This very situation is envisaged under the defence of provocation and this is the reason why a violent response to extreme provocation can be a partial defence.

In regard to sentence the Court took into account the fact that a person had died as a result of the sustained beating and the family expects justice for the taking of a life and the law should

discourage people from taking the law into their own hands. On the other hand, despite the court's misgivings about the fact that the accused had been primarily motivated by his concern that his daughter was now "damaged goods", the court also took into consideration that the accused had been extremely provoked. Balancing these factors the court decided that a wholly suspended sentence of three years imprisonment was appropriate for the crime of culpable homicide.