REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 24 OF 2017

(From original conviction and sentence in Mavoko Senior Principal Magistrate's Court Criminal Case No. 463 of 2015, P O OOKO, Ag. PM on 14th March, 2017)

LUCY WAMBUI KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant, **Lucy Wambui Kariuki**, was charged in the Senior Principal Magistrate's Court at Mavoko in Criminal Case No 463 of 2015 with the offence of manslaughter contrary to section 202 as read with section 205 of the ***Penal Code***. The particulars were that the appellant on the night of 3rd and 4th September 2013 at around 1.30 am at Wambo pub in Syokimau Athi River within Machakos County, he unlawfully killed Bernard Malemo Ngalo.

2. After hearing the Learned Trial Magistrate found that the prosecution had proved the charge of manslaughter against the appellant to the required standard, convicted her and sentenced her to seven years imprisonment.

3. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

1. The learned magistrate erred in law and in fact in relying on contradictory evidence, thus unsafe.

2. There is a reasonable doubt as to the circumstances leading to the death.

3. Impaired minds of PW1, PW2 and PW3.

4. The learned magistrate ignored the defence of provocation.

5. The sentence was excessive.

6. Weapon not recovered

4. The prosecution called five witnesses in support of its case. On 3rd September, 2013, PW1 was drinking with the deceased at a Pub called Wamboz Pub within Syokimau with one Bernard till about 12. 30 pm when he left the two other persons and went home. The following day he was informed that the deceased had been hit. He then proceeded to the deceased's house where he found his body lying in the toilet and saw many injuries on the deceased's body. According to him, he did not know who was responsible for his death.

5. PW2, **Peter Githaiga**, a friend of the deceased was called on 4th September, 2013 at 1.00 am by a friend called **Mwangi** who informed him that the deceased had hit by a bottle. He then rushed to the said pub where he found the deceased lying on the floor together with the appellant. He woke him up and accompanied him home. According to him the deceased was bleeding on his head and he informed him that it was the appellant who hit him in the head with a bottle. According to him, they used to share a house with the deceased. After giving the deceased first aid, he tried to get help to transport the deceased to the hospital but apparently failing to do so, they decided to spend the night. In the course of the night the deceased went to the toilet but failed to return. When PW2 went to check, he found him dead. It was his evidence that the deceased never disclosed to him the reason why the appellant had hit him. PW2 stated that the said night he had been with the deceased at the same bar where they took drinks before he left him there and proceeded home to prepare supper. According to him by that time there was no problem. In cross-examination, he however admitted that he never recorded that the deceased told him that he had been hit by the appellant and stated that after he woke up the deceased from the floor of the bar where he was sleeping.

6. PW3, **Denis Wachige Masina**, was on the material night drinking with the deceased amongst other people in the said pub after which PW2 left at around 9pm. PW3 stayed at the pub till 1.30 am. It was his evidence that the appellant who owned the bar was the one who was attending to them while she was also drinking Smirnoff Ice Whisky. He then heard the deceased and the appellant arguing about some abuses which the deceased had hurled at her the previous day. In his evidence this was not the first time the two were quarrelling. In the process the appellant threatened to hit the deceased with a bottle and the deceased dared her to go ahead. In the melee the appellant threw a bottle of bear which hit the deceased who started bleeding and lost consciousness. When the witness told the appellant to take the deceased to the hospital she refused as they had quarrelled before. It was at this stage the PW2 was called and the deceased was removed from the bar after he regained consciousness and even talked telling the appellant that he would never forgive her but the appellant retorted in just that he should go and die in his house though this was not recorded in his statement. PW3 then went home and it was not until the following day that he learnt of the deceased's death. In cross examination he admitted having attempted to seduce the appellant prior to the incident but denied that he testified against the appellant due to the rejection of his advances.

7. **Dr Joseph Ndungu**, who testified as PW4 carried an autopsy on the body of the deceased on 9th September, 2013. Upon examination he found that the deceased who was approximately 34 years old had a skull bruise on the parietal region and had internal bleeding in the same area. There was also subdural haematoma on the right side of the brain. In his opinion the cause of the deceased's death was head injury due to blunt force trauma to the head. These findings were reduced into a post mortem form which he exhibited.

8. PW5, **Sgt Ahmed Abdilahi**, the investigating officer visited the scene of the incident at the said pub and not finding him there proceeded to the village nearby where they found him dead inside a toilet where he had gone to relieve himself. According to him the body was full of blood particularly in the head. They then moved the body to the mortuary and after recording statements from the witnesses caused the arrest of the appellant. It was his evidence that he saw some blood ate the entrance of the bar inside.

9. At the close of the prosecution's case, the appellant was placed on her defence and she gave sworn evidence. According to her the deceased was her employee at the said bar and she had known him for three years and their relationship was cordial. It was her evidence that on the material day the deceased showed up at the pub drank and staggering and ordered for a spirit called Vikings which she gave her. He also ordered for Keg alcohol which he was given while the appellant was drinking Smirnoff ice together with the deceased while serving other customers. According to her she was sitting next to her ex-boyfriend one, Bosco. However, the deceased picked a quarrel with her alleging that she was sitting next to a person who did not have money and insisted that she sits close to PW3 who had money but the appellant declined. At this point the deceased abused her that's she was a cheap prostitute. Her demand that the deceased leaves the pub was however not heeded by the deceased who shot up from where he was seated and approached the appellant who told him that she had sacked him. The deceased then attempted to assault him and she pushed him and he fell down. When the appellant got up he ordered for another drink which the appellant gave him. At the close of the business the appellant closed the bar by 1.00 am by which time only three customers were left. According to her the deceased left the bar while walking though he was drunk accompanied by PW2.

10. According to her she initially declined to sell drinks to the deceased since it was past working hours and she was drunk. She testified that she was accompanied by her said ex-boyfriend back to her house. At around 2.30 am a friend woke her up telling her that a crowd of people were looking for her to kill her for having hit the decease with a bottle at which point she proceeded to her mother's place in South C Estate. Due to fear for her life following the vandalising and stealing of her hotel properties she decided to stay at her mother's till 31st March, 2014 when she was arrested and later charged with the offence.

11. It was her evidence that PW3 was one pf her customers who wanted to have an affair with her but she turned him down. She declined that she hit the deceased with a bottle.

12. In his judgement, the learned trial magistrate found that there was proof that the deceased died as a result of head injuries caused by a blunt object. It was his finding that the evidence of the witnesses corroborated each other in material respects pointing to the appellant's unlawful act of hitting the deceased's head with a bottle. According to him there was overwhelming evidence that tendered by the prosecution that the appellant hit the deceased with a bottle. According to the learned trial magistrate the appellant's defence was a bare denial. It was therefore his finding that the defence of provocation and/or self defence does not hold any water since no foundation was laid for the same. The court also took issue with the fact that the appellant did not call the other people who were present during the incident including her ex-boyfriend.

13. On behalf of the appellant it was submitted that it is clear from the evidence on record that the appellant and the deceased had no differences or issues as between themselves. They had a cordial relationship. The accused had indeed employed the deceased. Both parties were drinking when the deceased insulted the accused, leading to an unfortunate altercation. It was unfortunate that this incident happened especially when the deceased was only trying to avoid a serious fight with the deceased. The deceased was not blameless. The appellant did not use any excessive force. The evidence of PW1 was clear that the deceased was already drunk by the time he went to the accused's pub. He then insulted and lunged at the accused. She was only trying to repel him when he fell over backwards.

14. It was submitted that the learned magistrate relied heavily on the evidence of PW3 that there was a bottle that was flung at the deceased. However, the court was urged to find, that it is against the prosecution case that this bottle was not produced in evidence. None of the other prosecution witnesses testified about the alleged bottle. PW3 who allegedly saw the bottle does agree though that the deceased and accused had argued about some "previous abuses". PW3 also agreed with the accused's evidence that the deceased fell backwards. This falling was of course made worse by his state of intoxication. While the court found, against the evidence of all the witnesses, that the deceased had not provoked the accused, this is not true at all since even the star witness, PW3, alluded to a argument about some "previous abuses".

15. It was submitted that according to the evidence of PW2 Peter Githaiga, he escorted the deceased from the pub to his house but the deceased did not mention to him that he had been hit by the accused. When they reached his house, they stayed together for a while before the deceased went to the toilet and stayed for too long, prompting the said PW2 to check, upon which he found him dead at the bath tub. It was surmised that an injury to the head caused by a fall at the bath would of course be similar to one sustained through a blunt injury. It must also be called into question what the deceased did from the time he left the pub until he went to his home. Is it possible that in his drunk and aggressive state, he engaged in a further altercation or fight with other people at night or even at his home?

16. The Court was urged to note the major contradiction in paragraph 1 on page 42 of the record and paragraph 2 on page 45 of the judgement as to what the deceased said to the witness PW2. It is clear that the magistrate rendered the evidence in a way that the witness had not rendered it, with a view to merely securing a conviction; and not as an agent of the law and truth.

17. According to the submissions, PW1, PW2 and PW3 all testified that they had been drinking until midnight. They were clearly of an impaired state of mind, having imbibed one too many. The same actually applies to the deceased who was also drunk and aggressive. However, the learned magistrate took their evidence hook, line and sinker without making any comments as to their impaired state of mind arising from drunkenness yet it is well known that excessive intoxication impairs functioning of the mind hence the creditworthiness of the evidence of these three witnesses was questionable.

18. It was submitted that the learned magistrate disregarded the evidence presented by PW1, PW2 and PW3 that there had been a heated argument between the deceased and the accused. At line 24, the learned magistrate found that "at no time did the deceased actually provoke the deceased'. This is not the case, as all the witnesses that the magistrate relied on in all other regards testified to the existence of this argument. He has not explained why she did not believe this part of the evidence.

19. It was submitted that the accused was sentenced to serve seven years imprisonment which sentence is excessive and unfair and not even legal. According to the appellant, under section 205 of the ***Penal Code***, the maximum sentence for manslaughter is life imprisonment. It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender. The manner in which the deceased died is in doubt. it is equally true that the appellant was provoked when he assaulted the deceased. It is within the mandate of this Honourable Court to correct the failure by the court below to take into account the normal circumstances to be considered in deciding the appropriate sentence. These are, in this case, that the appellant was a first offender, circumstances leading to the alleged killing, and whether or not the appellant was remorseful. These were not considered by the court below. This is a matter where in our view a non custodial sentence would have been appropriate.

20. The appellant further submitted that the alleged weapon used to injure the deceased was not produced in court and no sufficient explanation was made by the prosecution. To the appellant, there was no such weapon.

21. In support of the submissions the appellant relied on the case of **Republic vs. Silas Magongo Onzere alias Fredrick Namema [2017] eKLR** where the court stated that:

> **"I have reviewed the evidence of the seven witnesses PW1 – PW7 at the close of the prosecution case. It is clear under the circumstances of this case: first the alleged murder weapon was not recovered for the court to make conclusive findings on its nature and any physical harm inflicted. Secondly, parts of the body allegedly targeted as per the testimony of PW6 no probative evidence from the medical examination established the deceased suffered harm. Thirdly, the manner in which PW6 stated the weapon was used did not seem to inflict either a single or multiple wound upon the deceased. As pointed out elsewhere in this ruling there is no nexus between PW6 testimony with the discharge summary and the autopsy report by PW7. This loose ends rendered the testimony of a single witness PW6 casting a doubt on its credibility."**

22. In conclusion, it was submitted that the burden is upon the prosecution to prove its case against the accused person beyond any reasonable doubt. The accused has no burden to prove that his defence is true. All her defence needed to do is to create a doubt as to the veracity of the prosecution case. This, the accused did successfully. The court was therefore urged to allow the appeal as prayed

23. It was submitted by **Ms Mogoi**, learned prosecution counsel, that from the evidence, the only person that the deceased had an issue with on the material night and who was likely to cause any harm to him was the appellant and there is evidence that it is the appellant who hit the deceased with a bottle. Therefore, the appellant's defence that she did not throw the bottle was a mere denial. In support of the submissions reliance was placed on section 202 of the ***Penal Code*** and it was submitted based on **Republic vs. Andrew Mueche Omwenga [2009] eKLR** and **John Njoroge vs. Respublic Cr. App. No. 186 of 1987**.

24. It was submitted that the trial court did analyse and evaluate the evidence tendered by the prosecution and the defence and thereafter formed the opinion that the prosecution had proved its case hence the conviction and the sentence should be confirmed.

Determination

25. This is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

26. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

27. This Court appreciates the old hat principle of law to the effect that the burden of proof in criminal matters lies with the prosecution. In this case the main issue for determination is whether the prosecution proved to the required standards that the appellant was guilty of the offences with which he was charged. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''

28. According to ***Halsbury's Laws of England***, 4th Edition, Volume 17, paras 13 and 14:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

29. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated that:-

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction… Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

30. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty…the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

31. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."

32. **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the

guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

33. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

34. As regards the issue of self-defence, in **Roba Galma Wario vs. Republic [2015] eKLR**, the Court of Appeal cited the case of **Mohammed Omar & 5 Others [2014] eKLR** and the case of **DPP vs. Morgan [1975] 2 All ER 347** where it was held that:-

"The essential element of self defence is that the accused believed that he was being attacked or in imminent danger of being attacked but this belief should be based on reasonable grounds."

35. In the case of **Ahmed Mohammed Omar & 5 Others vs. Republic [2014] eKLR** the court held as follows:

"What are the common law principles relating to self defence? The classic pronouncement on this has been severally cited by this Court is that of the Privy Council in PALMER VS R [1971] AC 818. The decision was approved and followed by the Court of Appeal in R VS McINNES, 55 Lord Morris, delivering the judgment of the Board, said:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. .....Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. ..... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then the matter would be left to the jury."

36. The Court of Appeal further held that:

"The common law position regarding the defence of self-defence has changed over time. Prior to the decision of the House of Lords in DPP V MORGAN [1975] 2 ALL ER 347, the view was that it was an essential element of self-defence not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds."

37. Though the danger the accused apprehends, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means, in **Beckford vs. R [1988] AC 130, Lord Griffiths** stated (at p.144) that:

"a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."

38. In **Peter King'ori Mwangi & 2 Others vs. Republic CR. APP. No. 66 of 2014,** the Court identified two conditions as prerequisites for the application of provocation as a defence, namely:

(a) The "subjective" condition that the accused was actually provoked so as to lose his self control; and

(b) The "objective" condition that a reasonable man would have been so provoked"

39. Turning to the doctrine of self-defence, it is provided for under section 17 of the ***Penal Code*** thus:-

Subject to any express provision of this code or any other law in operation in Kenya, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.

40. The section has been ably construed in the cases of **Republic vs. Andrew Mueche Omwenga** (supra); **Roba Galma Wario vs.**

Republic (supra) and **Ahmed Mohamed Omar & 5 Others vs. Republic [2014] eKLR** from which the following principles have emerged:

(i) Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

(ii) The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

(iii) It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

(iv) The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

(v) What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case.

41. **Maraga, J** (as he then was) in **Republic vs. Andrew Mueche Omwenga [2009] eKLR** expressed himself as follows:

"In Mokwa Vs Republic, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force. In Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 243 the English House of Lords held:-

"The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter."

What is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. In the words of Lord Morris of Borth-y-Gest in the said English case of Palmer Vs R., [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in John Njoroge Vs Republic, Cr. App. No. 186 of 1987:-

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances… It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation….If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction."

I should here point out that like in all other criminal cases, where accused raises the defences of self defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self defence. In other words the prosecution must disprove the defences of provocation and self defence and it must discharge this burden beyond reasonable doubt—Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR. In the said case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

"It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

Adequate provocation, especially when coupled with self defence, can reduce a murder charge to manslaughter- Mbugua Kariuki Vs Republic, [1976-80] 1KLR 1085 and Republic Vs Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."

In Mancini Vs Director of Public Prosecutions, [1941] All ER 272 the English House of Lords held that not every kind of provocation, however, will reduce murder to manslaughter. To have that effect the provocation must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the act which causes the death. The test to be applied therefore is that of the effect the provocation would have on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary and reasonable person to act as he did. And before provocation becomes an operative factor in a murder trial, however, the prosecution must have proved beyond reasonable doubt, that murder, provocation apart, had been committed by the accused—Stingel Vs R. [1991] LRC Crim) 639."

42. I associate myself with the view expressed in **Joseph Kimani Njau vs. Republic [2014] eKLR** where the Court of Appeal stated:-

> **"In all criminal trials, both the actus reus and the mens rea are required for the offence charged; they must be proved by the prosecution beyond reasonable doubt. The trial court is under a duty to ensure that before any conviction is entered, both the actus reus and mens rea have been proved to the required standard. In the instant case, the trial court erred in failing to evaluate the evidence on record and to determine if the specific mens rea required for murder had been proved by the prosecution…In the present case, the circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it is an error of law to invoke circumstantial evidence when malice aforethought for murder has not been established. We find that mens rea for murder was not proved. Failure to prove mens rea for murder means that an accused person may be convicted of manslaughter which is an unlawful act or omission that causes death of another."**

43. Similarly, in **Nzuki vs. Republic (1993) KLR 171**, the Court in substituting Nzuki's charge of murder with manslaughter observed:

> **"there was a complete absence of motive and there was absolutely nothing on the record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter."**

44. Adequate provocation, especially when coupled with self-defence, can reduce a murder charge to manslaughter – **Mbugua Kariuki vs. Republic, [1976-80] 1KLR 1085** and **Republic vs. Gachanja, [2001] KLR 428**. This is also legislated in Section 207 of the ***Penal Code*** in the following words:-

> **"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only."**

45. In this case, the only evidence apart from the statement allegedly given to PW2 by the deceased, as to how the incident occurred was the evidence of PW3 and that of the appellant. However, the evidence of PW3 coming from a person who had an axe to grind with the appellant, the appellant having rebuffed his overtures, his evidence must be treated with caution. One wonders why the prosecution which had at its disposal other witnesses whose evidence could have been free of suspicion chose to rely only on the evidence of PW3 whose evidence was open to question regarding his impartiality. As was stated in **Ndung'u Kimanyi vs. Republic [1979] KLR 282**:

> **"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence".**

See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

46. In the absence of any independent witness who could be relied upon to give unbiased testimony, it is my view that the court must lean towards the explanation given by the appellant as to the manner in which the incident took place. It is however clear that the act of pushing the deceased cannot amount to self-defence. The appellant could have avoided the confrontation with the deceased without necessarily pushing him. The act of pushing the deceased who, as the appellant said, was already drunk and staggering was reckless.

47. In the premises, I agree with the finding of the learned trial magistrate that the prosecution proved the offence of manslaughter.

48. As regards the sentence, the court seems not to have considered that the appellant was herself inebriated. Her state of mind ought to have been taken into account in meting the sentence against her. It would seem that this was a case where the deceased and the appellant were in the habit of quarrelling and on this day both of them seems to have taken one too many. In that state of mind one cannot say whether the appellant believed that she was using excessive force when she pushed the deceased.

49. In this case the appellant was sentenced on 14th March, 2017, the day that her surety was released. Accordingly, the appellant has served two years and four months. In my view, the sentence of 7 years was rather harsh. Taking into account the period she has been in custody, I set aside the 7 years sentence imposed on the appellant and substitute therefore an order that the appellant be placed on probation for a period of three years.

50. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 25th day of July 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for the Respondent

CA Geoffrey