REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 35 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

S K M.....ACCUSED

CRIMINAL LAW

Manslaughter – Sentence for –

Consideration for life or other sentence

JUDGMENT

The accused, S K M was charged with the murder of one C G K, his wife on the night of 29th Aril 2008. He pleaded not guilty and a plea of not guilty was entered, and the matter proceeding to hearing on 15th December 2008 when his son, 10 year old boy K M was affirmed and gave his statement, after being subjected to a ***voire dire*** and found to be in possession of sufficient understanding to give a statement in Court.

After the boy's statement, the accused held consultations with his Advocate, Mr. Mwanzia, and accepted his little son's version of the events leading to his beating of his deceased wife, and her death. He offered to change his plea of not guilty to murder, but one of guilty to manslaughter. The Information dated 17th December 2008 was read and explained to the accused on 12th May 2009, and the accused readily pleaded guilty to the lesser charge of manslaughter – "**It is true I did not want to kill"**, and the matter was fixed for reading of the facts on 14th May 2009. After the facts were narrated by Mr. Oluoch learned Deputy Chief Litigation Counsel, the accused after being asked by the Court to respond thereto said –

"The facts narrated by State Counsel are correct, I had no intention of killing her."

And a plea of guilty to manslaughter was confirmed by the Court .

The facts as stated by PW1 (Kenneth Murithi), the accused's 10 year old son, and later narrated by Mr. Oluch, are not in dispute. The accused used to work away from home and used to visit only at the weekends. While the husband was away, the deceased got into the habit of inviting her lover to the couple's matrimonial bed, and would sent her litter sons away.

On the material day the lover came at about 7.00 p.m. and the deceased sent away 10 year old K M with his younger brother, J G to go and stay with the grandmother so that she and her lover could enjoy the pleasures of flesh without little kids wondering what was going on between their mother and the man who was not their father.

As fate would ordain it, the accused came that evening and arrived home at about 8.00 p.m. He knocked at his door only to be met by a stranger who answered the door, knocked him down and took to his heels as fast as he could and disappeared into the night. After gaining entry into his house, the accused found his spouse naked under the bed and holding a stick, either to defend herself against an angry husband, or to hit and disable him, and herself run away into the darkness of the night following her lover. This however was not to be. The husband, (that is, the accused) wrested the stick from her, and in turn used it to hit her, not once but severally until the stick broke into half, in the middle. The beating of the wife extended from the house to outside, and back to the house until either the accused was satisfied that he had inflicted sufficient punishment on her, or the deceased having suffered so much beating could offer no further resistance, and just went back and lay in bed until the next morning.

As it is won't in our rural communities, the grandmother retired to her shamba in the morning, the deceased came out and lay under a banana

plantation nursing her wounds and injuries, while her little sons wondered why their mama lay for a whole day under the banana plantation, not knowing that she had slept her last, and was in fact dead from her beatings. A report was made to the Police who moved to the scene, and removed the body to the Meru General Hospital where a post mortem was carried out on 6th May 2008.

The accused disappeared, was arrested by members of the public and handed over to the Police on 30th April 2008 and was found fit to stand trial for the offence of murder. The charge was withdrawn and substituted with manslaughter, the subject of this judgment.

As already stated above, the accused accepted the facts as narrated by the Deputy Chief Litigation Counsel. The said Counsel also told the Court that the accused be treated as a first offender. He is a stone dresser.

Mr. Mwanzia, learned Counsel for the accused, mitigated for him. Counsel told the Court to have regard to the circumstances of the commission of the offence, that the accused was extremely provoked, he regrets that his wife died, and pleads for leniency and the Court's mercy, and that he is deeply remorseful, he has been in custody for one year (13months), that he is the sole parent to the children, that they need him.

The accused readily pleaded guilty to the charge of manslaughter contrary to Section 202 of the Penal Code (Cap 63, Laws of Kenya). The punishment for manslaughter is prescribed by Section 205 of the Penal Code. It is life imprisonment. The issue is, what considerations should the Court have in imposing a sentence for the offence of manslaughter.

One of the considerations that readily comes to mind, is what is the purpose of punishment? Classic texts on this subject such as **Hyman Gross –** a **Theory of Criminal Justice,** New York Oxford Press (1979), Chapter 9, (Theories of Punishment) – pp. 385-400-prescribes some of these considerations -

(1) removal of socially dangerous persons from society;

(2) rehabilitation of socially dangerous persons;

(3) paying one's debt to society;

(4) intimidation or deterrence of would be offenders.

A sociologist and no less a criminologist would write whole essays on all or any of theories on purposes of punishment.

Is a husband who finds his wife in bed with another man and kills him a socially dangerous person? Does he require rehabilitation a socially dangerous man? Does he owe any debt to society? Would his incaceration in prison intimidate and deter other men who find their wives or for that matter their husbands in bed with other women?

What I am saying is that none of these of purposes fit the case of an irate wife finding her husband with another woman, or husband with another woman in the act of adultery. The justification for the punishment of such a man or woman would lie in other theories. It is that punishment is not purely for the socially dangerous. An irate wife or husband is dangerous at the spot of discovery of his spouse in the act of adultery. The cause of ire is the act of another deliberately socially dangerous man or woman who excites extreme loathing in the mind of the other socially injured man and woman, and who is provoked to act in a certain and dangerous manner against that act. Should such man or woman be punished, and if so, on what theory of punishment?

In determining that question a crucial factor from ancient times has been the relationship between the gravity of provocation and the manner in which the accused (the offended party) has retaliated, (and both the gravity of the provocation and corresponding relation) being judged by the social standards of the day.

In primordial African society the gravity of the provocation was answered by the ultimate punishment, death. It was not any different in other societies, England for instance. In a violent age when every man bore weapons for their own protection when going about their business in a chance medley or sudden falling out at which both parties had recourse to their weapons and fought on equal terms. Chance medley was a spontaneous fight during which one participant kills another in self-defence. Writing in 4 - Commentaries on the Laws of England 184 (1769)– William Backstone said –

"But the self-defence which we are now speaking of, is that whereby a man may protect himself from assault, or the like in the cause of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word <u>chance medley</u>; or as some rather choose to write it <u>chaud medley</u> the former which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion; both of them of pretty much import, but the former is in common speech too often erroneously applied to any manner of homicide by misadventure where or it appears …..it is properly applied to such killing, as happens in self-defence upon a sudden encounter."

There were to exceptions, actual violence offered by the deceased to the accused. The two exceptions were the discovery by a husband of his wife in the act of committing adultery and the discovery by a a father of someone committing sodomy on his son; but these apart, insulting words or gesture unaccompanied by physical attack did not in law account to provocation.

Lord Diplock delivering his speech in the case of **DPP Vs. CAMPLAIN [1978] ALL 168 at 17 (f) said:-**

"<u>The reasonable man</u>" was comparatively late arrival in the law of provocation. As the law of negligence emerged in the field in

the 19th Century he becaume the anthropological embodiment of the standard of care required by the law. Keating J in the Case of R. Vs. Welsh (1969) 11 Cocc 336 was the first to make use of the reasonable man as the embodiment of the standard of self-control required by the criminal law of persons exposed to provocation, and not merely as a criteria by which to check the credibility of a claim to have been provoked to lose self-control made by an accused who at the time was not permitted to defend himself.

Since **R. V. LESPIN [1914] 3 K.B. 1116** the test of whether the defence of provocation is entitled to succeed has been a dual one: the conduct of the deceased to the accused must be such as (1) might cause in any reasonable or ordinary person and (2) actually caused in the accused a sudden and temporary loss of self-control as the result of which he commits the unlawful act that kills the deceased. However for purposes of the law of provocation, the "reasonable man", has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or purgnacious, but possessed of such powers of self control as every one is entitled to expect that his fellow citizens will exercise in society as it is today. A crucial factor in the defence of provocation being the relationship between the gravity of provocation and the way in which the accused retaliated both being judged by the social standards of the day.

In the matter at hand, the Meru society and the Kenya society today, as in the past, and despite modern day promiscuity as evidenced by the large number of single parents, and currently street children, does not approve of adultery. Any self-respecting married man or woman will experience a sudden and extreme temporary loss of self-control as a result of which he or she will commit the unlawful act that kills the deceased – whether the other spouse, or the interloper.

The accused, upon returning from a hard week's job away form home, knocks at his door, and instead of his wife opening, a stranger comes out, knocks him down, and bolts into the night. What does he find when he eventually gains entry into his house? He finds him under his bed his wife in Adam's skin, her birth suit that is, – stark naked, and holding a plunk of timber ready to do battle with him. So what does he do? He wrestles the plunk of timber from the wife, and proceeds to use it against the offending or unfaithful spouse. Was he provoked? In Africa as I believe in every human society, it is said you can share everything with your brother, but cannot share "**your sleeping skin** –", "your sheets". or bluntly, your wife, unless you first die, in which event a young woman/wife will be liberated to enter into a levirate marriage with a brother or other relative of the deceased, and of her choice.

In the circumstances of this case, the accused was so provoked to the extreme as his small son was perplexed with his mother's activities of sending them away to their grand mother and welcoming a stranger into their father's house. The Swahili proverb says that a "**thief has fourty-days",** and the fourty days may just be one or two occasions, but the second time may the fourtieth day. For the deceased wife, C G K, the fortieth day was the 29th April 2008. She was found out and by caught her husband, by the accused. Did the accused act like the "reasonable man", the "reasonable" person, "the ordinary", average or normal person – the other sobriquets by which the "reasonable man" has been referred to on this subject?

I think he did. It would I think be abnormal, unusual, unmanly, (unwomanly), to expect a (young man, a father of two who no doubt was still very much in love with his wife) to say, "**darling, since you prefer the other guy to me and for whatever reason, follow him."** This would require unusual courage and supreme sobriety and self-control of heavenly hosts and not mortal man.

The sense of betrayal was so intense that the accused rained blows and kicks upon the deceased that proved fatal to her. The intention was no to kill, but to punish for the betrayal, the unfaithfulness. Any reasonable man in today's Kenyan society will most probably act as the accused did. He was so provoked that he lost his self-control, and beat the deceased so intensely that she succumbed to her injuries arising from the beatings. The accused would probably have done the same to the interloper if he had caught him. He did not. The killing of his wife was still unlawful, and he pleaded guilty to the lesser charge of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

The penalty for the offence of manslaughter is life imprisonment. In other circumstances, the accused would be liable to such a sentence. However in the circumstances of this case, as discussed in the foregoing passages of this judgment, the accused was so provoked by the act of the deceased he lost his self-control and inflicted life sapping blows on the deceased. He has been in custody for over one year since his arrest and detention He has lost his wife, unintentionally killed her. His two children are feeling the loss of one parent, and the absence of the one still alive. He was a first offender, according to the submissions of Mr. Oluoch learned Deputy Chief Litigation Counsel. Mr. Mwanzia, Counsel for the accused submitted that the accused was remorseful. The accused looked, and I believe he is remorseful.

In those circumstance, a custodial sentence would not serve any of the purposes of the theory of punishment discussed above.

I would therefore sentence the accused to one year's imprisonment from the date of his arrest and detention and since he has already served that period and perhaps more, I would direct that he be set free forthwith, unless otherwise lawfully held.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 12th day of June 2009

M. J. ANYARA EMUKULE

(JUDGE)