REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 37 OF 1997

REPUBLIC…………….................……. PROSECUTOR

VERSUS

CHARLES GACHANJA …………………..….. ACCUSED

JUDGMENT

Charles Gachanja is the accused. He is charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of this offence are that: on the 19th October, 1996 at Dandora Estate, Nairobi, murdered Mercy Njeri Macharia (to be referred to as "the deceased" in this judgment).

Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits and is guilty of murder. This is the statutory provision of section 203 of the Penal Code.

It is a cardinal principle of law that the burden to prove the guilt of an accused lies on the prosecution. This is so because under section 107 of the Evidence Act cap 80 Laws of Kenya it is statutorily provided that: "s 107 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is found to prove the existence of any fact it is said that the burden of proof lies on that person"

An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probabilities.

The standard of proof placed on the prosecution to prove the guilt of an accused person is proof beyond reasonable doubt.

I have applied these well-established principles of law in this case as required. I have reviewed the prosecution's case, given by the eleven (11) prosecution witnesses, and the sworn testimony of the accused and of his witness, as a whole.

There are three essential ingredients of murder, which the prosecution must prove beyond reasonable doubt: (a) death of a person, (b) that the accused caused that death through unlawful act and (c) that the accused had malice aforethought.

The first ingredient of murder to be proved by the prosecution in this case is that the deceased is dead.

The prosecution called CPL George Mureithi (PW 10) whose testimony was that he rushed the deceased from a dispensary in Dandora Phase II to Kenyatta National Hospital on 19th October, 1996 for treatment as she had sustained serious cuts on her body and was in a coma. Upon arrival at Kenyatta National Hospital, the deceased was pronounced dead. He removed the deceased's body to the City Mortuary. On the 31st October, 1996 Dr Samuel Odero Ywaya (PW 6) performed a postmortem examination on the deceased's body which was identified to him by the deceased father John Maina Irungu (PW 8).

It is the evidence of Dr Ywaya that the deceased had sustained a deep cut on the back of the head, two more cuts on the left side of the same head, another cut on the right hand with the right palm chopped off, and deep cut on the left side of her leg. Internally there were multiple cut fractures on the skull, lacerated brain and intracranial haemorrhage (bleeding into the brain). The cause of the deceased's death was bleeding into the brain due to multiple cut fractures of the skull, inflicted by a sharp object. He produced the postmortem form as exhibit 1.

Further proof of the identity of the body of the deceased, showing her to be dead, is found in the photographs of the deceased's body taken by and produced as exhibits 5A by Police Constable John Munyi. His report is exhibit 5B.

This evidence proved beyond reasonable doubt that the deceased died on 19th October, 1996 from multiple cut fractures to her skull inflicted by a sharp object.

The second ingredient of murder to be proved in this case is that the accused caused the death of the deceased through an unlawful act. The prosecution set out to prove, first that the accused is the person who inflicted the fatal multiple cuts to the deceased skull which led to the bleeding into the brain and to eventual death, secondly that the accused did so through an unlawful act.

The accused in his sworn testimony has admitted to have inflicted these fatal cuts to the deceased's skull, thereby admitting that he killed the deceased. His defence or explanation is that he cut the deceased through provocation and in self defence.

The legal point to be determined on the outlet is whether provocation and self defence can be simultaneously raised by an accused person ie can provocation and self defence merge and be jointly raised by an accused person?

I will first deal with self defence. In law self defence is an absolute defence to a criminal charge. It absolves an accused from criminal liability for, where self defence is available to an accused, he is deemed to have acted within the permitted legal limits to repel any attack against him; he is deemed to have acted reasonably and to have used necessary and permitted force.

In *Palmer vs Reginam* (1971) 1 1 All ER 1077 at page 1088 the Privy Council (judgment of Lord Morris of Borth-Y-Gest) had this to say about the defence of self defence:

"In their Lordship's view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straight forward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. 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 on the particular facts and circumstances. Of these a jury can decide. 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 an attack is so serious so that it puts some one in immediate peril, then immediate defensive action may be necessary. If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger, by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of

defence….If there has been no attack then clearly there will be no need for 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 whether there was provocation so that the verdict might be one of manslaughter.”

On this authority (*Palmer v Reginam*) the law has been settled that the element of self defence will frequently merge into provocation.

In *Robert Kinuthia Mungai v R* (1982-1988) I KAR 611 the appellant visited his woman friend, Christine, by whom she had a child of 13 years, for the purposes of spending the night with her. At 4.30 am they were awakened by the deceased who was Christine’s boyfriend as well. The deceased uttered threats to kill both Christine and the appellant and attempted to strangle Christine. He also threw a hurricane lamp at the appellant and a piece of the glass cut him above the eye. The appellant took out his gun, which was properly licensed, and fired a short in the air.

He then went outside intending to leave, and the door was locked behind him. Shortly after, the deceased and Christine emerged, with the deceased still attempting to strangle her and uttering threats. The appellant, with the intention of stopping the attack by demobilising the deceased, shot him in the thigh. Believing that the deceased was reaching out for a gun, the appellant short him again in the same thigh. The deceased collapsed, was rushed to hospital but died from bleeding. The appellant was charged with murder, convicted of manslaughter on the basis of provocation and sentenced to 21 months imprisonment. He appealed against conviction.

The Court of Appeal held that the appellant had acted reasonably in defence of Christine and also for the purpose of preventing a felony. On self defence and provocation the Court of Appeal held that (a) Criminal responsibility for the use of force in the defence of the person and of property are, under section 17 of the Penal code, to be determined according to the principles of English Common Law (b) The result of the East African cases is that the use of excessive force in defence of the person will frequently result in a conviction of manslaughter rather than murder, and that the element of self defence will frequently merge into provocation. Hancox JA (as he then was) had this to say at page 620:-

“However, notwithstanding the fact that s 17 of the Penal Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English

Common Law, it does appear that the doctrine is recognised in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter; See *R v Ngoilale s/o Lenjaro*

(1951) 18 EACA 164, and *R v Shaushi* K (1951) 18

EACA 198, the latter of which was cited with approval in *Hau s/o Akonaay v R* (1954) 2 EACA 276”

Dealing now with provocation, this is defined in section 208 (1) of the Penal Code to mean and include any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

In a House of Lords decision *Mancini v Director of Public Prosecutions* (1942) AC it was held that every kind of provocation, however, will not reduce the crime to manslaughter. To have that effect the provocation must be such as temporarily to deprive the person provoked of the power of self control, as the result of which he commits the act which causes death. The test to be applied is that of the effect of the provocation 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 person to act as he did. It is important to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable person time to cool, and account must also be taken of the instrument with which the homicide has been effected. The mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced

to manslaughter.

Then section 207 of the Penal Code statutorily provides as follows:

"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does an 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, he is guilty of manslaughter only."

On these legal principles, it is Mr Njanja's submissions, for the accused, that the defence of provocation is available to the accused, that the accused used excessive and unreasonable force in his self defence and the offence which the accused has committed is manslaughter.

On the other hand, the State Counsel Miss Wanyama has submitted, on behalf of the Republic, that the defences of self defence and provocation are not available to the accused and he should be convicted of murder.

The accused has admitted to have inflicted upon the deceased the fatal injuries. According to the prosecution, the following are the facts which support its contention that the accused was not acting in self defence and under provocation.

The accused and the deceased were lovers for two and a half years before the 19th October, 1996. The deceased's father, John Maina Irungu (PW 8) was however said to have been against it, a fact which PW 8 denied while under cross-examination when he said that he could not have been against a relationship between his daughter and the accused which he knew nothing about.

On the 3rd October, 1996 the deceased informed her father that the accused had assaulted her. Following that report both the deceased and her father (PW 8) made an assault report at Dandora Police Station. The accused was arrested by the police for that assault on 11th October, 1996 and locked up at Dandora Police station over night. On the 12th October, 1996 the accused was released on a police bond to attend court on 18th October, 1996. On that date the accused failed to go to court. His explanation was that the deceased had already withdrawn her complaint against him, another fact which was denied by her father (PW 8)

On the 19th October, 1996, the deceased was entertaining a visitor in his parents house when the accused called her to see him. The accused sent Mercy Wanjiru (PW 1), one of the deceased's friends, twice to go and call the deceased. On the first occasion, only upon insistence from Mercy Wanjiru, the deceased agreed to go to see the accused, who was by then in a rented house within Dandora Phase II Estate. That house had been rented by Chrisantus Odhiambo (not called) Mercy Wanjiru's boy friend.

There is evidence that this particular house was not far from the deceased's parents home. It is into this house that the accused first called, found Mercy Wanjiru (PW 1) resting and sent her to call the deceased. This is the same house that the deceased, the accused and Mercy Wanjiru all returned to after the deceased had accepted to see the accused. It is in this same house where the deceased sustained the fatal injuries.

It is the evidence of Mercy Wanjiru (PW 1) that the accused told her to go and call the deceased because he wanted to discuss the assault case with her, so that she could have it withdrawn. PW 1 had been told by the deceased that the accused had beaten her when he found her standing with another man.

Upon arrival in this house the accused, the deceased and PW 1 all sat on the bed and started to look at photographs in a photo album. Then PW 1 decided to leave them and she walked out of the house. The door was shut and she sat just outside the door. PW 1 said she could hear the accused and the deceased talking but not arguing. She however was not asked, both neither by the state counsel nor by the defence counsel, to state what the accused and the deceased were talking about. For the record, the prosecution has not placed before me any evidence as to what the deceased and the accused were talking about in that

room, save what PW1 had earlier been told by the accused that he wanted to talk to the deceased about the possibility of withdrawing the assault case against him. The only evidence of what the accused and the deceased talked about comes from the sworn testimony of the accused.

PW 1 testified that she left the deceased and the accused in the house at 3.30 pm. She sat outside the door for some time. Then she decided to walk away towards the gate. While at the gate she met the deceased's brother David Macharia (PW 5) who was looking for the deceased. She told PW 5 that the deceased and the accused were together in the house. PW 5 sent her to go and call the deceased out. She said she went back to house, knocked on the door and told them that the deceased was wanted by her brother. Accused is the one who answered the knock on the door and he told PW 1 that the deceased would be coming out in ten minutes time. PW 1 went back to the gate and informed PW 5. They waited for the deceased to come out of the house but she did not do so at the end of about eight minutes. PW 5 then sent PW 1 back to the house to call out the deceased. PW 1 went back to the house but before she could knock on the door she heard a commotion inside the house. Somebody was saying:

"Let me go" and the other one was saying "No. You will not go". Then she heard a bang against the door. PW 1 then called out the deceased.

There was no response. She went to the window and pulled aside the curtains. She looked inside the house and saw the accused pinning the deceased to the bed by her neck and holding a dagger. He had wrapped a handkerchief at the dagger's handle. From that position in which the deceased was, the deceased being pushed backwards against the wall, the accused holding her by the neck and pinning her to the bed, PW 1 saw that the deceased could neither yell/scream or stand up. Seeing that, PW 1 screamed.

There was a neighbour next to that house who was known as Irene Ambaiya Ongari (PW 7) who was by then dressing her baby whom she had washed. When she heard PW 1 screaming, she also rushed to the house. She found when the door of the house had been smashed open. There is evidence that David Macharia (PW 5) had done so, using a big stone. PW 7 said she looked into that room through the door. In her own words PW 7 described to the Court what she saw and did. She said:

"PW 7: When I entered into the house I saw the accused holding a knife, a small sharp knife and Cynthia (deceased) was pleading with the accused to forgive Cynthia but he did not."

Another witness Christopher Githure Maina (PW 9), who in fact the deceased had been entertaining at her parents home, also rushed to the window and looked in. He saw the deceased lying down and a man standing over her, holding a sword. He identified that man as the accused. The sword which he was holding he identified as exhibit 6. At that time PW 9 said he noticed the accused had a wound in the abdomen and was bleeding profusely.

Members of the public then all started arriving at the scene. David Macharia (PW 5) went to call other members of his family and reported the incident to the police. CPL Kennedy Barasa Wekesa (PW 4) rushed to the scene. He was in the company of CPL George Mureithi (PW10). They did not however find the accused and the deceased in that house. They had been removed for treatment to the nearby dispensary. Both of them were unconscious: the accused had bled profusely from the stomach wound while the deceased too had bled profusely from the injuries on her head and limbs. CPL Mureithi (PW 10) is the one who escorted the deceased to Kenyatta National Hospital where she was pronounced dead upon arrival. The accused was admitted in the same hospital.

Both CPL Wekesa (PW 4) and CPL Mureithi (PW 10) went to the house where the deceased and accused had received their injuries. They recovered a Somali sword (exhibit 7) from there; things in the house were thrown about and blood was virtually everywhere. They found a tin with a substance inside the room. That substance was not analysed to determine what it was. There was evidence to the effect that there was some froth coming out from the accused's mouth suggesting a possibility that he might have drunk a poisonous substance. However there is no evidence to prove that the liquid substance in the tin found in that house was toxic.

There was also no evidence to show that the accused drunk any poison. The accused has given evidence of what happened in that house between the deceased and him. He has testified that the deceased had gone to that house to discuss with him about her pregnancy. He said the deceased was two months pregnant with his child and that he was delighted about it. The only problem was that the deceased's father was seriously opposed to his relationship with the deceased. So that on that 19th October, 1996 the deceased told him that if her father found out she was pregnant he was going to cause her a lot of problems. She had therefore decided to abort that baby. He said he told the deceased that he was ready to marry her.

Therefore he was opposed to her proposed abortion. He said he also told the deceased that if she insisted and went ahead to abort then he would end their relationship and he would abandon her for his former girl friend called Sheilla, who was the deceased's serious rival. He said that in the past, whenever he mentioned Sheilla's name to the deceased, she would get very annoyed. So when he mentioned Sheilla's name that afternoon to the deceased, she reacted by locking the door, telling him that she would not allow him to abandon her for another girl when she was pregnant. At that time he was bent down to put a music compact into his radio cassette.

As he did so he saw the deceased holding a knife with which she stabbed him on his abdomen, below the diaphragm. He said he screamed loudly.

He then grabbed the knife which was still stuck in his stomach and both of them struggled, and the knife dropped down. He said by that time the deceased was crying. She then picked up a panga from under the bed and approached him, intending to cut him with it. He said he picked up a pillow and blocked the blow. She lost grip of the panga which fell on the bed. He again saw her picking up a knife. It was then when he realized that the deceased was serious. He proceeded to pick-up the panga and threatened her with it but when she continued coming towards him, he then attacked her but not intending to kill her. He said he was in pain and shock as to why the deceased was doing that to him. He then cut her with that panga. He said he could not remember how many times he cut her.

He found himself feeling dizzy and fainting. When he regained consciousness, he was in the hospital.

I have given that explanation serious consideration in view of the evidence of Mercy Wanjiru (PW 1) David Macharia (PW 5), Irene Ambiga (PW 9) who had testified that they had seen the accused having pinned the deceased to the bed by the neck with one hand and a knife with the other. I have particularly considered the evidence of Irene Ambiya (PW 7) who said she had pleaded with the accused to forgive the deceased and that the deceased was also pleading with the accused to forgive her but he did not do so. Even if the deceased had attacked him in the initial stages of their struggle, the accused had absolutely overpowered the deceased and had pinned her to the bed, holding her down by her neck so that she could neither yell, scream or stand up. In that position the deceased did not pose any danger to the accused. She was not attacking him. And as there was no attack, there was nothing the accused was defending himself from the deceased. I therefore hold that the defence "of self defence" is not available to the accused.

That is not, however, the end of the matter. I have a duty to consider whether the accused acted under provocation, as defined hereinabove. This brings me to the observation I had made earlier on in this judgment.

After Mercy Wanjiru (PW 1) left the deceased and the accused in the house, she sat outside the door and she could hear them talking. Mercy Wanjiru (PW 1) was not asked by the prosecutor to tell the Court what it was that the accused and the deceased were talking about. The accused, in sworn testimony, has told the Court that he was discussing with the deceased about her pregnancy and her proposal to abort, a proposal which he objected to. There is no other evidence before me to show that such a discussion as explained by the accused did not take place.

There is a submission from Miss Wanyama, State Counsel, that the deceased was not pregnant. She pointed out that Dr Ywaya who had performed postmortem examination did not indicate in the postmortem form that the deceased was pregnant. My record shows that Dr Ywaya was not asked whether

he examined the deceased's uterus and found no foetus inside. The party in these proceedings who was to ask Dr Ywaya that question was the prosecution. The record, as of now, shows that Dr Ywaya neither said the deceased was pregnant nor that the deceased was not pregnant.

The accused has further explained that it was the deceased who attacked him first, stabbing him in his stomach with a knife when he told her that, if she went on with her proposed abortion, he would leave her for Sheilla. Christopher Githure (PW 9) testified that, when he rushed to the window of the house and looked through, he saw the accused standing over the deceased who was by then lying down and that the accused was holding a sword and was bleeding profusely from his stomach. How did the accused sustain that stab wound? The prosecution put forward a proposition that the accused had stabbed himself. There is no reason at all as to why the accused would have wanted to kill himself. In the absence of how the accused sustained the stab wound, I find that the accused's explanation is possibly true and I accept it. This being the position I hold that, during the discussion between accused and deceased, they disagreed and thereupon the deceased stabbed the accused in the stomach. That was a wrongful act done against the person of the accused and provoked him into attacking the deceased, which he did viciously and brutally, inflicting the fatal injuries. The accused therefore acted under provocation when he killed the deceased. The offence which the prosecution has proved committed by the accused is manslaughter.

The first assessor Mr Reuben Matundura's opinion is that the defence of

self defence is not available to the accused. I have accepted that opinion.

He however said that the accused did not act under provocation. For that reason I have given in this judgment, I differ with his opinion. It is true that the injury on the accused was severe but Christopher Githure (PW 9) saw the accused standing over the deceased who was lying down and he saw that the accused was bleeding profusely. As for the sword which the accused used, there is evidence from the accussed's witness Benson Ochieng (DW 2) that it belonged to him (DW 2) and he had been keeping it under their bed. The accused had said the deceased had pulled out that sword from under the bed. There is no evidence to show that the killing of the deceased was planned by the accused.

The second assessor Joseph Wanjohi also found that self defence was not available to the accused. On the issue of provocation, he said that the accused stabbed himself and drunk poison when he realised that he had killed the deceased. Mr Wanjohi's reference to the accused drinking poison was outrageous. Not a single witness ever testified that there was any poison in that house, that the accused drunk it. I wonder then where he got this evidence from. Assessors must always base their opinions only on evidence which is adduced in court and canvassed by the parties. Neither the prosecution nor the accused had made any such suggestion.

The third assessor Mr James Githu found that the accused did not act in self defence. He rejected provocation because he thought that, with that serious injury in his stomach, the accused could not possibly have been on his feet. It was his opinion that the accused was not stabbed by the deceased. He did not, however, give me an opinion as to how the accused then sustained that injury.

For these reasons I do not agree with the opinion of these three assessors that the accused is guilty of murder.

I have already made a finding that the offence committed by the accused is manslaughter contrary to section 202(1) read with section 205 of the

Penal Code and I find him guilty and do hereby convict him accordingly.

It is so ordered.

Dated and Delivered at Nairobi this 5th June, 2001

A.G.A ETYANG

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JUDGE