



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ELIZABETH KEMUNTO OOGA..... ACCUSED

JUDGMENT

1. Following a domestic disagreement between the accused herein, **ELIZABETH KEMUNTO OOGA** and her husband one **JARED NANGOYA MIGIRO**, the said husband sustained some injury and later on succumbed to the same. The incident occurred within the couples' house at Pebo Village within Isebania Township in the early evening of 07/06/2015.

2. The accused was then arrested and accordingly charged with the murder of her husband **JARED NANGOYA MIGIRO** (hereinafter referred to as '**the deceased**'). She pleaded not guilty to the information and the trial followed.

3. The prosecution called a total of five witnesses. **PW1** was **EVANS AYIENDA NYANDORO** who was a friend and a fellow businessman to the deceased. The deceased's brother one **WYCLIFFE MIGIRO TOM** testified as **PW2** whereas **PW1's** brother one **ALBERT ORIRI ONDARI** who was also a friend a fellow businessman to the deceased testified as **PW3**. The Investigating Officer **No. 82026 Corp. CHRISTOPHER SAMOEI** testified as **PW4** while **DR. RUWA MWATELA SAMMY** who conducted the post mortem examination on the deceased's body produced the Post Mortem Report. He testified as **PW5**.

4. It was the prosecution's case that the deceased and the accused were in their one bed-roomed house in the early evening of 07/06/2015 where they disagreed over the accused person abusing **PW2** in the presence of the deceased. The deceased was so enraged and asked the accused person why she had abused **PW2** but instead the accused person hit the deceased with a glass on his face. The glass broke into pieces. The deceased then gave the accused person a thorough beating right from the house until the outside. That continued until when the accused person returned into the house and using a knife which was on the table she stabbed the deceased once on the left side of the chest. **PW2** then proceeded to seek the assistance of **PW3** and they took the deceased to Getontira Hospital in Isebania. On being referred to Pastor Machage Hospital in Migori, **PW2** and **PW3** called **PW1** who organized for the transport. **PW1** and **PW3** proceeded to the said Pastor Machage Hospital with the deceased where he was pronounced dead on arrival. They informed **PW2** who made a report at the Isebania Police Station. The police visited the house of the deceased and eventually arrested the accused person who had locked herself inside the house. They also recovered the knife allegedly used to stab the deceased, broken glasses, blood-stained table cloth and a white vest which were produced as exhibits.

5. The deceased's body underwent a post mortem examination that confirmed that the cause of death was

severe internal and external hemorrhage secondary to penetrating stab wound to the chest. The accused was taken for mental assessment prior to being charged in Court.

6. At the close of the prosecution's case the accused person was placed on her defence. She opted to give an unsworn statement. She also narrated the way the events unfolded on the material day and indeed admitted that she abused PW2 and that was the beginning of the confrontation with the deceased and after the deceased called the accused person a prostitute. The deceased mounted on her a very fierce attack and pursued her even when she went out of the house. That so continued until when she returned into the house and the accused did not know exactly what happened as she heard the deceased say that she had been injured. The deceased was then taken to hospital by PW2 where he later on died and she was arrested by the police that very night.

7. Those are the facts upon which this judgment is premised on. I have carefully considered the evidence on record as well as the exhibits. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;

(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.

I will therefore consider each of the issues independently.

8. As to the proof of the fact and cause of death of the deceased, it is not in dispute that the deceased in this matter died. That position was confirmed by PW1, PW2, PW3, PW4 and PW5. The first limb is hence answered in the affirmative.

9. As to the cause of the death of the deceased, PW5 produced a Post Mortem Report which he prepared upon conducting the examination himself. The said report gave the possible cause of death of the deceased to have been severe internal and external hemorrhage secondary to penetrating stab wound to the chest. Since there is no contrary evidence to that end this Court so concurs with that medical finding. The other limb is likewise answered in the affirmative.

10. I will now turn to the second ingredient as to ascertain whether the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person, I am aware that the evidence touching on the accused person's involvement in the death of the deceased was by PW2 who was the sole witness. PW2 gave a narration of what transpired on the material day. The accused person also gave a more or less closer version of the events of that day but denied ever stabbing the deceased as was alleged by PW2. There were only three people at the scene that night. They were PW2, the deceased and the accused person. The accused person admitted in her evidence to have abused PW2 when PW2 went to the house of the deceased where he used to spend with the deceased and the accused person. That was PW2's evidence as well. The accused person also stated that the deceased pounced on her with a thorough beating which continued even when she went out of the house and until she returned into the house. That was again PW2's testimony. It seems that the only point of departure between the evidence of PW2 and that of the accused person is what happened when the deceased and the accused person returned into their house. To that, the accused person stated in her unsworn testimony that she could not recall what happened until the deceased was injured. On the other hand PW2 stated that it was the accused person who stabbed the deceased with a knife on the chest which knife the accused person picked from the table which the two were using in taking their evening meal. PW5 also confirmed that the deceased died as a result of a severe internal and external hemorrhage caused by a penetrating stab wound to the chest and as such partly corroborated the evidence of PW2. Further corroboration was found in the exhibits which were produced in Court.

11. When I place the version by the accused person on how the deceased sustained the fatal injury side by side with the version of PW2, I find that PW2 was truthful. The accused person could not candidly narrate all the other events immediately before the deceased sustained the injury but happens 'not to know' how the injury came about. It is clear the accused person is just falling short of being truthful on exactly what happened. Furthermore the evidence of the accused person was not tested on examination since it was unsworn.

12. In a persuasive decision of the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** the Court when it dealt with the issue of corroboration presented itself thus:

".....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

13. I therefore find that it was the accused person who inflicted the fatal injury on the deceased. But was the accused justified in acting in such a manner? I have looked at the circumstances that prevailed then and I am of the considered view that the accused person acted under provocation In this case. The fact that there was a disagreement between the deceased and the accused person is not denied. It is also on record that it was the deceased who first hit the accused person when the accused person abused PW2. That act led to the accused person using the glass to hit the deceased and that prompted a massive beating on the accused person. PW2 and the accused person gave a version of how the deceased beat the accused person. Both agree that the accused person was beaten from inside the house until she ran out of the house and away from the deceased but the deceased followed her and continued beating her as he dragged the accused person back into the house and as the chastisement went on. The accused person must have felt the real beating of a man and reached a point when she could no longer control herself. In such a state of affairs the accused person then went for the knife which happened to have been then available.

14. By taking the totality of the events as they unfolded, it is apparent that the accused person was utterly overpowered by the deceased and lost the power of her self-control. She was provoked into action. As the beating was sustained, the accused person must have acted in the heat of passion as its clear that there was no time the said passion could be said to have cooled down. The accused person hence benefits from the provisions of **Section 207** and **Section 208** of the **Penal Code**, Chapter 63 of the Laws of Kenya, which states as under:

"207. 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."

208(1) The term 'provocation' means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, 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."

(2)When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault."

(3)A lawful act is not provocation to any person for an assault."

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

15. The above finding has some guidance from various binding decisions of the Court of Appeal. One of the decisions which happens to fit into a like matter is the case of **VMK vs. Republic (2015) eKLR** where the Court of Appeal sitting in Mombasa discussed the defence of provocation in great detail and as follows: -

"Provocation was defined in the case of Duffy {1949} 1ALL ER 932 as:-

"Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind..."

As deduced by this Court in Peter King'ori Mwangi & 2 others v Republic [2014] eKLR the above definition requires that two conditions be satisfied for the defence to be made out, namely:-

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

b. The "objective" conductivity that a reasonable man would have been so provoked.

Indeed, Section 209(1) of the Penal Code also defines "provocation" to mean and include '....except hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master servant, 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...' Whether the accused was provoked to lose his self control is a question of fact which the trial court has to determine based on the evidence presented. See Criminal Law by J. C. Smith and Brian Hogan, 7th Edn. Pg 352.

Looking at the facts of this case, PW1, PW3, PW4 & PW5 attested to the appellant having reported a theft and the rape of his wife, one CN, with a P3 Form being issued to that effect. The P3 report confirmed sexual assault having been committed on the said CN. While producing the report in evidence, PW1 appeared to be ill informed about the circumstances surrounding the rape. Nonetheless, PW4 confirmed that it is not the first time such allegations ofpetty theft and moving with other mens 'wives' were being levelled against the deceased. Coupled with this, is the testimony of PW2, the sole eye witness to the crime, who stated that he and the deceased had gone to the appellant's home and that when he saw them, the appellant was incensed and repeatedly ordered the deceased to leave his homestead. On his part, the appellant alleged that his wife had identified the deceased as the rapist. The arrival of the deceased and PW2 at the scene came barely an hour after the deceased had learnt of the theft from and rape of his wife. This evidence, albeit circumstantial, points to the provocation of the appellant by the deceased. Suffice it to say, that the mind of an ordinary man in such circumstances would be saddled with anger as to interfere with his logic and or thinking and ensure sudden and temporary loss of self-control. Worth nothing as well, is that no other motive was established by the prosecution as to why the appellant would want the deceased dead, though motive perse is not a legal requirement. In view of the foregoing, once evidence is laid capable of supporting a finding that the accused was provoked, the burden is shifted to the

prosecution to prove beyond reasonable doubt that the case was not one of provocation. See R v Cascoe [1970] 2 ALL ER 833 and Doto s/o Mataki v R [1959] E. A. 860. Given the foregoing, we find that the learned Judge erred when she disregarded the prosecution's self damning evidence on provocation and instead held in part that:-

“.....Suffice it to say that PW7 Dr. Allan Cherop who produced the P3 form allegedly filled in respect of this 'rape' case some doubt on both the P3 form as well as the supporting medical notes. In my view, nothing would have been easier to persuade this court that such a rape did actually occur (or even prove that the accused had reasonable cause to believe that his wife had been raped), than for the accused to call his wife as a defense witness on his behalf, it is curious that accused chose not to call the one person who could have supported his defence. Failure to call his wife leads to legitimate doubts as to whether this alleged rape actually occurred...”

This statement has serious flaws and or misdirections. An accused person is under no duty to prove his innocence nor is he required to call evidence to supruce up his defence. Indeed, as established in the Doto case(supra), the burden of proof never shifts to an accused person to establish the defence of provocation. The appellant did not have any duty to prove provocation. It is for the prosecution nonetheless to prove malice aforethought. This is a position that was also captured by this court in the case of Benson Mbugua Kariuki v. Republic [1979] eKLR thus:

“The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt just go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge.”

Once the facts pointed to the provocation of the accused person, the onus lay upon the prosecution to rebut that provocation. Having failed to do so, the defence should have thus succeeded and the charge of murder reduced to manslaughter.

In other words, we think that in the particular circumstances of this case the defence of provocation ensure to the benefit of the appellant and that the information of murder should be reduced to manslaughter. As stated earlier in this judgment, there can be no doubt that the circumstances prevailing at the material time would have provoked a reasonable person. Barely an hour after learning of his wife's alleged rape and robbery by the deceased, the appellant found the deceased seated comfortably in his compound. This was more than sufficient to cause the ape plant's temper to flare up. To add insult to injury, the deceased appears to have been reluctant to leaved the premises despite having been ordered by the appellant to do so. The altercation that followed left no time for the appellant's temper to cool off. Such is the essence of provocation, and the learned trial Judge erred in failing to hold as much.”

16. As I have pointed out earlier in this judgment the accused person acted under provocation. She is therefore not guilty of the offence of murder as charged and she is accordingly acquitted and instead the accused person is found guilty of the offence of **Manslaughter** under **Section 202** of the Penal Code as read together with **Section 204** of the **Penal Code** and she is accordingly convicted.

17. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2017.

A. C. MRIMA

JUDGE