REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 92 OF 2015

TERESIA NJERI NJAU……..…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Cr. Case No. 2138 of 2011 delivered by Hon. C.C. Oluoch(Mrs.), S.P.M on 4th July, 2015).

JUDGMENT

Background

The appellant was charged with manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the charge were that on the 24th day of September, 2011 at Kanunga Trading Centre in Kiambu County, unlawfully killed David Mwaura Kinyanjui.

The Appellant was found guilty and convicted of the offence and sentenced to 14 years in jail. Being dissatisfied by the courts decision she decided to lodge an appeal to this court. The grounds of appeal as set out in his Memorandum of Appeal filed and dated 16th June, 2015 were that the magistrate erred in shifting the burden of proof to the Appellant, the magistrate misdirected herself on the defence of self defence particularly the application of the subjective test, the magistrate erred in failing to consider the mitigation of the Appellant and that he meted out a harsh and excessive sentence.

Submissions.

The appellant filed the appeal in person. At the time the same was canvassed, he was represented by Gatitu Wang'oo & co. Advocates. The counsel filed written submissions on behalf of the Appellant on 24th March, 2016. Further oral submissions in highlighting the written submissions were made on 31st March,2016. The premise of the appellant's case was that the defence of self defense as raised in the trial at first instance was not disproved by the prosecution to the detriment of the appellant and that the court actually shifted the burden of proving the defence to the appellant contrary to trite law where the onus lay with the prosecution to disprove the defence. In this regard the court was referred to the case of **Beckford v Republic (1987)3 All E.R 425.** On this issue counsel submitted that the court failed to apply the subjective test in evaluating whether the defence of self defence would apply. That is to say that question for consideration was whether, in hitting the deceased, the Appellant labored under a genuine believe that

her life was in danger. In this respect the court was referred to the cases of **DPP v M organ (1975)2 All E.R, Palmer v Regina (1971)1 All E.R. 1077 and R v Dean, 2 Cr. App.R.75, CCA.** Instead of addressing this issue, it was submitted, the trial court introduced its own presumptions and evidence. For instance, it created the presumption of use of excessive force which was never raised by the prosecution. According to the counsel, even if this issue had been raised by the prosecution, the trial court did not still apply it properly to the circumstances of the instant case. He referred the court to the case of **Republic v Joseph Kibet Rotich (2010)eKLR** in which it was held that, ' **It would be wrong to expect that when one is attacked in circumstances that warrant one to defend oneself, one should not use reasonable force to defend oneself. All that the law requires is that reasonable force is used in defending oneself where danger of bodily harm is eminent. The issue of what the force used might result in is not material'.** Counsel submitted that the same argument was used by the Court of Appeal in the case of **Ahmed Mohammed Omar & 5 others v Republic (2014) e KLR.** Further that the trial court insinuated that there was evidence of a love affair existing between the Appellant and the deceased which was not borne by the evidence on record.

On sentencing, counsel submitted that the trial court erred in sentencing the appellant to 14 years which was harsh given the circumstances leading to the death of the deceased. He further argued that the appellant's mitigation was not considered by the learned magistrate and that he handed down a harsh and excessive sentence.

The Respondent, represented by Ms. Aluda, submitted that the conviction for manslaughter was safe and that the charge was proved beyond a reasonable doubt. She however conceded that given the circumstances under which the deceased died, a sentence of 14 years was excessive and that a non-custodial sentence would have sufficed.

Evidence.

The prosecution's case was that on 23rd September, 2011 the appellant and PW 7, Jane Wanjiru Mbete, were employees of Baghdad A and Baghdad B pubs in Kanungatown within Kiambu County respectively. Bagdad A pub was on the 1st floor and Bagdad B pub on the ground floor of one building. Both closed business early at about 9.00 p.m. due to low customer turnout. PW7 was the first to closed her pub and she headed to the ground floor, where Baghdad A was located to assist the appellant. She found the appellant in the company of the deceased, David Mwaura Kinyanjui, whom she described by PW7 as the Appellant's boyfriend and who appeared to be visibly inebriated. Pw7 explained that she thought the deceased was the appellant's boyfriend because she did not expect her to be the accompanied of someone else other than a close friend at that hour. The appellant closed the pub and together with PW7 left for their house located within the same building. The deceased accompanied them. Whilst inside the house the deceased proceeded to sit on the bed. Bothe the appellant and PW7 shared the one roomed house. The appellant set about washing utensils whilst PW7 sat on a stool next to the door cooking Ugali. A candle lit the room.

The deceased left to relieve himself at around 10.40 p.m. when he met PW4, Peter Mungai Maraga, a neighbour and the caretaker of the building. The two had a short chat after which the deceased returned to the appellant's house. Upon his return, according to PW7, the deceased started insisting on the appellant joining him and sitting next to him on the bed. She did not acquiesce to his request and he became 'nagging' in his attempts to get her to sit next to him. The deceased then pulled the appellant's hair in an attempt to get her to sit next to him. The appellant who was still doing the dishes had a plate in one arm and she asked the appellant to leave her alone but he was not deterred by her protests and proceeded to twist her arm. That is when she hit the appellant on the head with a plate.

The deceased was hurt and he started bleeding profusely. The appellant tried to stop the bleeding while PW7 left the house and went to fetch PW4 to come and *'see what Njeri had done'*. When PW4 arrived he found the deceased and the appellant sat on the bed with the deceased bleeding and the appellant wiping it off using a sweater. The appellant was facing financial constraints and she requested PW4 to pay for the deceased's transport to Kiambu District Hospital. On arrival they were asked to pay for the medical services and PW4 gave PW7 the money to do so. However, the deceased kept insisting he was not sick

and at some point ran out of the hospital forcing PW4 and others to restrain him to enable medical procedures be carried out. The deceased was treated by a doctor under protest. Unfortunately, at around 4 .00 a.m. he passed on.

The appellant, PW4 and PW7 all made a report at Kiambu Police Station and the appellant was detained. PW4 and PW7 accompanied two officers to the scene at Kanunga where PW3 (Police Corporal Virginiah Wanjiku) and PW8 (Police Constable Tom Odhiambo) observed blood stains on the appellant's clothes, a pool of blood, a blood stained knife and pieces of blood stained plate particles. The investigating officer, PW8, made a sketch plan of the scene. He collected various exhibits which he used in the course of his investigation. PW3 took various photographs of the room and the building in general.

The appellant was arraigned in court on 26th September, 2011 and orders were granted to extend her detention pending investigations. She was taken to Dr. Kamau, PW9, to undergo a psychological evaluation and was found to be mentally fit. A postmortem was undertaken on the deceased at City Mortuary by Dr. Johansen Oduor, PW2, and he formed an opinion that the cause of the death was severe bleeding due to a penetrating injury to the head.

The investigating officer then compiled a police file which he forwarded to the office of the Director of Public Prosecutions for perusal and advice. He recommended that the appellant be charged with the offence of manslaughter.

After the close of the prosecution case the learned magistrate ruled that the appellant had a case to answer. She was put on her defence. She gave a sworn statement of defence. She described the deceased as a customer in the pub where she sold and who arrived at the pub as she was closing business. She stated that the deceased looked extremely drunk and she and PW7 offered him one of the rooms in the building to sleep in as they feared he could be involved in an accident at night. Incidentally, the deceased accompanied the two to their house. He sat on the bed. PW7 started preparing ugali whilst the appellant washed the dishes. The deceased called the appellant to go to where he was but the appellant declined insisting she had to finish the dishes. This annoyed the deceased who pulled the appellant's braided hair and twisted her hand in an attempt to get her to where she was. The appellant thought that the deceased wanted to rape her as the two did not have an intimate relationship. In self defence and to let him off her body she hit him with a plate. He started bleeding. With the help of PW7 they called PW4 and took the deceased to Kiambu District Hospital where he passed on while undergoing treatment. They thereafter reported the matter to Kiambu Police Station where she was detained and later charged accordingly.

Having summarized the evidence on record I now narrow down the issues for determination as follows;

1. **Whether self defense was a valid defence available to the appellant.**
2. **Whether the sentence meted on the appellant was harsh and excessive.**

Determination.

This is a first appellate court whose duty is to re-evaluate and re-examine the evidence before it afresh and make its owned independent conclusion. See ***Okeno Vs Republic*** **(1972) EA 32.**

The first issue that the court must grapple with is the contention by the appellant that her defence of self defence was not considered. The appellant raised the defence of self defence stating that when she hit the deceased with the plate she was acting to protect herself from being raped. Under our statutes the defence of self defence is provided for under Section 17 of the Penal Code which reads thus;

> ***"17. Subject to any express provisions in 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."***

The principles governing self defence under the common law are borrowed from the Statute Law, being Section 3(2) of the Criminal Law Act, 1967. Both subsection (1) and (2) provide as follows;

"3. - (1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons at large.

(2) Subsection 1 above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

Therefore, the common law jurisprudence on self defence as a defence has sought solace from this provision. For instance**,** *the Queen's Bench findings in* ***Cousins [1982] QB 526*** *that the common law defence of self defense and the statutory defence of self defense as contained in Section 3(2) of the Criminal Law Act, 1967 are available to the same facts.*

That being the case, this court ought to revert to the current principles applicable to self defense jurisprudence that has emerged after the enactment of the Act which turned self defense into a statutory defence. Guided by this statutory provision courts have now adopted the subjective test in evaluating whether the defence of self defence is available to an accused person where the actions of an accused have resulted in the death of the deceased. But before I analyze whether or not to uphold the appellant's defence, it is important that I revert to its definition.

Manslaughter is defined in the Black's Law Dictionary(9th Edition) as:

manslaughter, n. **(15c) The unlawful killing of a human being without malice aforethought.**

Under our statute, it is defined under Section 202(1) of the Penal Code thus;

202. **(1) Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.**

The words '***unlawful omission'*** are defined under sub – section (2) as follows;

*"**An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.''***

I would then narrow down the elements constituting the offence of manslaughter as;

A) The unlawful act or omission by an accused person;

B) The unlawful act or omission must cause the death of the deceased, or

C) The act or omission amounts to culpable negligence to discharge a duty tending to the preservation of life or health of a person, notwithstanding that the omission is not accompanied by an intention to cause death or bodily harm.

In this particular case, the parties are in agreement that the appellant did indeed hit the deceased with a plate thereby occasioning his death. By preferring the charge of manslaughter the state was, prima facie, of concurrent mind that the death was unintended. What then I have to determine is whether, in so reacting, the appellant was laboring under a genuine apprehension that her life was threatened; in this case if she truly believed that the deceased wanted to rape her and to repel him she took the nearest weapon and hit him. If the court upholds this defence, the same is absolute and would accord the appellant an acquittal.

The appellant's acts constituting manslaughter are vindicated by the evidence of both the appellant and PW7. It was the incessant deceased who finally pulled her hair and twisted her hand that sent the signal that all was not well. She feared that the deceased would rape her. And since both she and the deceased were not intimate friends, the latter reacted by hitting the former with a plate. And as fate had it, the

deceased succumbed to the injury. It is then a question of whether the appellant acted in a manner that was tantamount to self defence.

This court is guided by the definition in subsection 3(1) of the Criminal Law Act 1967(supra) of circumstances where one could use force under the ambit of self defence. The appellant agrees that she did hit the appellant with the plate but she further qualifies the same by stating that she used force in self defence. This provision to me appears to be buttressed by the following statement from ***Smith and Hogan, Criminal Law, 9th Edition(1999) at page 253:***

> ***"the law allows such force to be used as is reasonable in the circumstances as the accused believed them to be, whether reasonable or not. For example, if D believes that he was being attacked with a deadly weapon and he used only such force as was reasonable to repel such an attack, he has a defence to any charge of an offence arising out of his use of that force. It is immaterial that he was mistaken and unreasonably mistaken."***

This statement vindicated the statutory definition in requiring that the force used must be reasonable. So then, does hitting the deceased with a plate fall in the category of reasonableness? In ***Shaw (Norman) vs The Queen[2001] 1 WLR 1519*** *the Privy Council stated that,* ***"a person defending himself cannot be expected to weigh precisely the amount of defensive action which is necessary."*** *Reverting to the instant case, upon the deceased twisting the appellant's arm the appellant hit him with a plate that was in her hand which she was cleaning. This was a knee jerk reaction and as such she could not appropriately 'weigh precisely' the amount of force necessary to ward off the deceased.*

The issue of her aunt being in the room and being a possible deterrent to any potential rape was raised at the original trial and has also crossed this court's mind but upon further deliberation this court is once again guided by the Privy Council's decision in ***Shaw (Norman) vs The Queen[supra]****where it was stated that,* ***"...it was not the actual existence of a threat but the appellant's belief as to the existence of a threat which mattered. The(sic) ... were obliged to assess the situation as it appeared to the appellant, a factual enquiry which was pre-eminently one for them which...they never carried out...".***

The trial court thus ought to have evaluated the facts leading to the offence and subjectively assessed whether the appellant may have felt that she was in danger of being raped. That is what the subjective test is all about. That in evaluating whether or not an accused used reasonable force in self defence is a matter to be considered on a case to case basis. In my view, it was not an issue of whether PW7 was in the room. When the appellant picked the plate, the deceased was already pulling her hair and twisting her hand. The reactive instinct was that she had, as fast as possible, to ward off the attacker. And she did so with the nearest weapon; a plate. She did not have the time to call PW7 for help. In those circumstances, she was not using the plate bas a lethal weapon but as a protective object meant to ward off the attacker. It is then safe to conclude that the appellant may have reasonably felt threatened. Therefore, the hitting with the plate of the deceased was a reasonable remedy at the point in time.

As I had earlier observed, the application of the subjective test is the way to go in determining whether or not to uphold the defence of self defence. That is to say that the defence should be considered on a case to case basis. To cite but one of the decided cases in our local jurisdiction is the case of ***Ahmed Mohammed Omar & 5 others vs Republic [2014] eKLR*** *where the Court of Appeal Stated:*

> ***"It is acknowledged that DPP vs Morgan(Supra) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one."***

In that case, the appellants were convicted for the murder of seven victims. A co- accused one Alex Muteti Mutisya was acquitted in the trial. The Appellants were administration police officers. The 1st, 2nd, 3rdand 6th appellants were on patrol within Kawangware. They raised alarm that they had been attacked by armed men. The duty officer sent, among others, the 4th and 5th appellants to reinforce the rest. There was a crowd they tried to repulse but which refused to disperse. According to the appellants,

they heard gunshots and realized that the crowd was armed. When it surged towards them, they opened fire killing seven of them. None of the deceased persons was armed. The prosecution's case was that the appellants used excessive force in the circumstances. The case for the prosecution was upheld by the trial judge who observed that the appellants were not in imminent danger at the time they shot and killed the deceased persons. The Court of Appeal differed with the trial judge whilst delivering itself as follows;

> ***"We have already stated that the shoot-out occurred at night when there was no good visibility. The appellants identified themselves as police officers and fired at least twice into the air to disperse the deceased but the deceased kept advancing. In these recent days, when so many police officers are being killed in the line of duty by armed criminals, the appellants not knowing that there had been physical confrontation between the taxi operators and motor cycle operators, could have reasonably believed that their lives were in danger and decided to pen fire. As held in DEANE v R (Supra), in such circumstances, a police officer cannot wait until he is struck before striking in self-defence. The learned trial Judge rightly observed that police officers "perform their duties in circumstances that are often fraught with danger to their lives, it is not an easy job.'' That notwithstanding the trial court blamed the police for shooting live bullets towards the taxi drivers.***
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> ***We pause here to state that the appellants had not been dispatched to Kawangware to quell a reported commotion between two feuding groups of people. They had therefore not been issued with plastic bullets which are ordinarily used against rioters. They had been issued with guns and live bullets. The 1st, 2nd, 3rd and 6th appellants were on patrol duties at night, in an area that is famous for criminal notoriety at night. They heard someone screaming – 'don't kill me, don't kill me'. It was about 12.30 a.m. They fired twice into the air. Undeterred by the warning shots, the deceased, who were armed with pangas, swords and what looked like a gun, confronted the appellants. We think, in the circumstances, the appellants reasonably believed that their lives were in danger or were in danger of serious bodily injury. A number of police stations have even been raided by criminals, police officers killed and arms stolen. There are also reported cases of armed police officers being attacked by criminal gangs and robbers of their loaded guns."***

Certainly, the appeal was allowed.

In the case of ***R vs Deana, 2 Cr. App. R. 75, CCA,*** *which was referred therein, it was held that there was no rule of law that a man must wait until he is struck before striking in self-defence. The case of* ***BECKFORD V FORD [1987] ALL ER 425*** *was also cited in* ***Ahmed Mohamed Omar (Supra)*** *case and it compared well with the latter. As summarized by the judges, the appellant who succeeded on a second appeal in the Privy Council was a Police Officer who amongst others was investigating an armed man who was said to be terrorizing and menacing his family at their home. When the police officer arrived at their home, the appellant ran through the back door and the police were in pursuit during which time the appellant shot him. The Crown alleged that the man was unarmed and that there was no reason to shoot him. He was accordingly convicted for murder. In his first appeal in the Court of Appeal of Jamaica, the conviction was upheld dismissing his defence of self defence that he had an honest belief that he had been in danger before shooting the deceased. That court observed that his belief required to be reasonable and not merely honestly held. In the Privy Council where the second appeal was allowed, the court held that "****if a plea of self defence was raised, when the appellant had acted under a mistake as to the facts, he was to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake was reasonable. Accordingly, the test for self defence was that a person could use such force in the defence of himself or another as was reasonable in the circumstances as he honestly believed them to be.***

The subjective test rather than the objective test was obviously used by the Privy Council.

The instant case well compares with the above cited case law. It is demonstrated by the fact that the appellant honestly believed that she was in danger by the act of the deceased twisting her hand and pulling her hair. Her intuition was to react as fast as possible to dispel the danger. She accordingly picked up a plate which was the object nearest to her and hit the deceased with it. Unfortunately, the

deceased succumbed to the injury.

Another issue that arises in matters of self defense involves the need for the party seeking to rely on the defence to show that he had tried to evade the attacker before resorting to the use of force as a deterrent. This however was dispelled in the case of ***Regina vs Julien[1969] 1 W.L.R 839*** *where the UK Court of Appeal stated,* ***"It is not, as we understand it, the law that a person threatened must take to his heels and run… but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and that that is necessary as a feature of the justification of self-defense is true, in our opinion, whether the charge is a homicide charge or something less serious."***

The appellant did show an unwillingness to fight given that she did not react to the first ingress which involved the deceased pulling her hair but when things escalated to hand twisting she may have felt threatened and resorted to the use of force to defend herself. The same is further buttressed by the following from ***Regina vs McInnes[1971] 1 W.L.R 1600*** *in which it was observed that;* ***"...failure to retreat is only an element in the consideration upon which the reasonableness of an accused's conduct is to be judged … simply a factor to be taken into account in deciding whether it is necessary to use force, and whether it was necessary to use force, and whether the force used was reasonable."***

Given that a retreat is only but an element of the transaction and looking at the transaction as a full this court finds that the fact that what the appellant did was but hit the deceased once, as evidenced by PW2, Dr Johansen Oduor, who undertook a postmortem examination on the deceased and PW7 who was in the house, buttresses the fact that the appellant's motive was to dispel the dander. I must add that, in applying the objective test, even the act of an accused being required to retreat must be judged on a case to case basis. It is not in all situations that an accused may be required to retreat before reacting. He may act in an honest believe that he is in danger, in which case the court will uphold his defence of self defence.

The events leading up to the death of the deceased clearly showed that it was not truly intended. It was a case of self defence, where the Appellant acted to safeguard herself against harm. Furthermore, on realizing that the Appellant had been badly hurt she undertook to carry out first aid and immediately frantically sought help to take him to hospital. Even at the hospital when the deceased was resisting treatment the appellant insisted on him receiving treatment. These actions could not emanate from a person who intended the death of the deceased. They were compassionate acts of a person who wanted to safeguard the life of the deceased.

In my view, the prosecution totally failed to disprove the appellant's defence of self defence that she fatally hit the deceased as she believed that her life was in danger. The burden of disproving a defence of self defence as was held in ***BECKFORD VS R*** *(Supra) lies with the prosecution. The onus lay upon them to show that the appellant was not acting in self defense and had purposely hit the deceased. The failure by the prosecution to disprove the defence means that this court has no option but to find that the appellant's defence stands and that her reliance on the same was proper and in accordance with the law.*

Having upheld the appellant's defence, it is my view that her conviction was unsafe. On sentence, I would not say much since the appellant will, in any case, be set free. I add however that, if I were to uphold the conviction, I would have reduced the same. The facts of this case ought not to have warranted such a harsh sentence.

In the result, this appeal succeeds. I quash the conviction, set aside the sentence and order that the appellant be and is hereby set free. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH MAY, 2016.

G.W.NGENYE-MACHARIA

JUDGE

<u>In the presence of:</u>

1. *M/S Ngang'a holding brief for Mr. Gatitu for the Appellant*
2. *M/S Mati holding brief for M/S Aluda for the Respondent.*