REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 8 of 1995

JOHN ANDABWA ……………….. …………………………………APPELLANT

AND

REPUBLIC ………..……………………………………………… RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Eldoret (Lady Justice Nambuye) dated 8th day of August, 1995

IN

H. C. CR. C. NO. 12 OF 1993

****

JUDGMENT OF THE COURT

On 24th day of October, 1991 the appellant John Andabwa killed Elizabeth Chepchumba and her son Kiptanui Kibor. In a repudiated confession allegedly made on 8th November, 1991 the appellant admitted the two killings. This confession was admitted by the trial judge after a trial within a trial on the basis that it was voluntarily made and was so detailed as to warrant a finding that the same could not have been made up by the recording acting Inspector of Police, one Nelson Musungu.

During the course of the arguments before us Mr. Konosi, for the appellant, in our view, quite properly, stated that the said confession statement was voluntarily made by the appellant and that what the appellant told the trial judge (R. N. Nambuye J.) by way of an unsworn statement indicating his defence was wrong and that it was probably made under incorrect advice.

The supplementary memorandum of appeal upon which Mr. Konosi relied sets out grounds of appeal which tend to say that the killings were not as a result of malice aforethought but rather on account of provocation by the deceased Elizabeth Chepchumba.

The true facts therefore are that on the night of 23rd October, 1991, at about 8. 00p. m. the appellant went to pay a visit to Elizabeth Chepchumba and was denied entry to her house. The appellant claimed that she was his girl friend and that he got annoyed when he heard the voice of another man in

Chepchumba's house. Still he left the house and went away and slept at his own place.

The next morning the appellant saw the deceased who was accompanied by her son Kiptanui Kibor. The appellant then sought to know from the deceased as to who was in her house the previous night. He was told the man in the house was her former boyfriend. At that stage the appellant got annoyed and slapped her twice. That being over, the deceased left with her child and the appellant followed them armed with a machete ('panga'). The appellant lodged the machete on a fencing post. Thereafter the deceased, during the course of conversation between her and the appellant, told the appellant that she was not his wife (which is a fact). The appellant got annoyed and hacked Elizabeth to death. Not stopping at that he also hacked Kiptanui Kibor also to death.

Mr. Konosi urged us to hold that there was sufficient provocation to enable us to reduce the charges of two murders to manslaughter. What is provocation? When a wrongful act or insult is 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 in the heat of passion and before there is time for the passion to cool, to assault the person by whom the act or insult is done or offered amounts to provocation so that if killing is done in such circumstances the offence of killing could be termed as manslaughter.

The circumstances in this case by no stretch of imagination amount to such provocation as to warrant a finding of manslaughter as opposed to murder. There was a whole night of cooling off period if we were to assume that the refusal by the deceased to allow entry by the appellant into her house on the previous evening amounted to such provocation. But that per se could not amount to provocation. In any event as we have stated, there was a cooling off period.

What happened on the morning of 24th October, 1991 does not establish legal provocation to enable us to reduce the charge of murders to manslaughter. The killing of the child Kiptanui was even more heinous. The killing of such an innocent child without any legal provocation amounts to murder.

What the appellant did amounts to unwarranted and unprovoked killing and he was in our view properly convicted of murder on both counts. The learned trial judge convicted the appellant as charged. She should have found the appellant guilty, separately on both counts and sentenced him on one count only as each charge carries a mandatory death sentence.

The appellant was properly convicted and we order that this appeal be dismissed.

Dated and delivered at Nakuru this 1st day of March, 1996.

R.O. KWACH

…………………….

JUDGE OF APPEAL

P. K. TUNOI

…………………..

JUDGE OF APPEAL

A. B. SHAH

……………………….

JUDGE OF APPEAL