IN THE COURT OF APPEAL

AT NAKURU

(Coram: Cockar, Omolo & Tunoi JJ A)

CRIMINAL APPEAL NO. 92 OF 1992

BETWEEN

TARSISIO WEINO LETWAMBA...APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Mr Justice B K Tanui) dated 31st July 1992)

JUDGMENT

The appellant, Tarsisio Weino Letwamba was convicted of the murder of one Lembukon Lesurmat on October 27, 1989 at Ndonyo Wasin village in Samburu district of the Rift Valley province and sentenced to death. At his trial he did not deny that he had killed the deceased but he claimed that he had done so in the circumstances that amounted to extreme provocation, sufficient to reduce his offence to manslaughter; and in the alternative, he averred, the plea of self-defence was available to him as he was entitled in the circumstances to use reasonable force to defend himself.

The following were the facts of the case as led in evidence by the prosecution. The appellant is a Samburu and was aged about 27 years old at the time of his arraignment on the charge of murder. He was recruited into the Administration Police Force in 1987 and was stationed at Ndonyo Wasin out post in Samburu district. The total force at that post during the material time was four and each of the officers was armed with a rifle and several rounds of ammunition. The main duty of the force was to reinforce homeguards in providing general security in the area. The force was under the command of Assistant Chief Lenanyoike. Situated within the same locality is a mining enterprise known as Vermuculate Company whose manager is Simon Gatitu (PW5). It employed and housed the deceased amongst other workers in its labour camp.

On the fateful day at about 11 am the deceased slaughtered a goat for sale at the local market centre. The Assistant Chief and other people including the accused went to buy its meat. A quarrel erupted between the deceased and the appellant who complained that a young customer had been sold a piece of meat over the neckbone which according to the local custom is a usual preserve for old men and women. The appellant, after an argument abused the deceased but the Assistant Chief intervened and told them that as they were responsible people they should not quarrel over such trivial matters. The deceased, it would appear, then returned to his work at the company.

At about 5.00 pm the appellant and two other Administration Police officers also originally jointly tried with him but had the charge against them withdrawn, armed themselves with guns and went and arrested the deceased at his place of work and led him to their camp. When questioned by Simon Gatitu (PW5) as to why they had arrested him they responded that the deceased had abused the appellant and that they were taking him to their camp for interrogation. This fact is not denied by the appellant. The mother of the deceased Nalipei Lesornmat (PW7) who had observed her son being led to the AP's camp ran and informed the Assistant Chief that her son had been arrested from his place of work and was being tortured at the AP's camp and that the Assistant Chief should go and intervene. The Assistant Chief lived about half a kilometer away from the camp and as he ran towards the camp he heard a gun shot when he was half way en route.

Shem Obegi (PW2) and Isaiah Kairia (PW3) who were teachers at a primary school near the AP's camp were listening to the radio outside the verandah of their house at about 6.30 pm when they saw the deceased run into his house which was only about 10 metres from theirs. The deceased closed the door. He kicked the door and no sooner had he done so than the appellant who was hotly pursuing him arrived while armed with a gun. He kicked the door violently commanding the deceased to open it. The deceased sensing danger retorted that he was not going to do so. The appellant blew his whistle and the two other fellow AP's, also armed, arrived. These witnesses saw the appellant kneel down and aim his gun at a small opening at the door. He then fired. The witnesses became frightened and fled.

The Assistant Chief and Samwel Gatitu were the first persons to arrive at the scene. They found the deceased lying outside his house profusely bleeding from both his legs. The appellant and his fellow AP's had fled and vanished. Transport was arranged and the deceased was rushed first to a local dispensary for first aid and later in the night to Wamba Hospital where he died on arrival. The post-mortem performed on his body on October 31, 1989 showed that the deceased had suffered a massive wound on the back of the upper knee. The entire muscles around the knee were severed and both the tibia and fibula were fractured as were all the blood vessels within the region. A bullet was lodged in the bone. The cause of death was found to be due to hypotensite shock secondary to severe haemorrhage.

In his sworn testimony before the trial court the appellant testified thus:-

"The deceased was brought and when I came out I saw him and the two AP's. Our in charge was not present. I went there and in trying to find out why he abused me he was very difficult and wanted fighting. When we wanted to handcuff him he ran away. We agreed that the deceased be brought so that he would be present when our in charge arrived. I and simon Lepirkine went followed the route he took. We saw him in his house. Both of us had guns. When the deceased saw us he went into his house and locked himself in. We reached his gate. There were also some teachers there and PW2 and PW3 and PW4 and another one. His manager had come to our lines before the deceased was brought to the lines. We explained to him about the deceased .. and that nothing had been done as the deceased had run away. We left the manager at our camp. At the house of the deceased it was the first one in a row of 4 houses. We asked him to come out so as to discuss the matter. He refused and threatened us that anybody who would enter his house he would kill. We pleaded with him to come but he refused. We then decided to kick the door (I and Simon Lipirikine). When I kicked the door the deceased threatened me with a knife and I blew my whistle. Laiyan heard it and he came. He was inside the house. I blew a whistle for an assistance, as the deceased had become difficult. We all then pleaded with deceased to come out but he threatened us that he would cut anybody who would enter his house. We consulted one another and we decided to kick the door. So as to arrest the deceased. When I kicked the door the deceased came out with a sword and started to cut me. I guarded myself with my gun. The house has a small verandah of his house. The other AP were behind. He cut me 3 times and I managed to stop him and when I realized that I would be in danger and I decided to shoot the ground in an effort to frighten him. But by bad luck the bullet hit the deceased's legs and he fell down. When I realized this I was shocked and I ran to my house".

The learned judge in his carefully considered judgment found and held

that there was a quarrel between the deceased and the appellant at about 11 am over the sale of the meat

over the goat’s neck bone. The appellant had instigated the deceased’s arrest at 5 pm when they went into the factory the only offence committed by him being an alleged abuse of the appellant in the morning. The deceased ran into his house and locked himself inside. The appellant followed in hot pursuit of him while armed with a gun and when the deceased refused to open the door he shot him through an opening at the door. At no time did the deceased threaten or charge at the appellant with any weapon, a sword or whatever. Finally the learned judge rejected the evidence of the appellant.

We have carefully considered the evidence on record together with the respective submissions of the learned counsel for the parties. We have no hesitation in concluding that the findings and the holding of the learned trial judge were correct.

The question arises in this appeal: was there in fact such sudden provocation as defined in sections 207 and 208 of the Penal Code and following on this was there, on the evidence, sufficient time for the appellant’s passion to have cooled down before he attacked the deceased? Section 207 of the Penal Code states:-

“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, he is guilty of manslaughter only.

And the relevant portion of section 208 states:-

“(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 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 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.”

The learned trial judge did not deal fully with this aspect of the case in his judgment but he found that the circumstances here were such as not to amount to legal provocation as defined by sections 207 and 208 of the Penal Code. We respectfully think that he was correct and did properly direct himself and the assessors on the law in coming to this conclusion.

The evidence showed that there was a time lapse of over seven hours between the quarrel involving the appellant and the deceased and the killing. That killing was not so proximate to the quarrel so as to justify a suggestion that there was sufficient sudden provocation within the meaning of sections 207 and 208 as to have caused the appellant to get in such a heat of passion as would be sufficient to reduce his crime committed during such a state of mind from murder to manslaughter. The evidence led did support the finding that a considerable time had elapsed before the appellant killed the deceased and that he was not still acting in the heat of passion when he committed this offence. There was ample time for him to have regained his self control.

In arriving at this conclusion we have considered the issue of the degree of provocation which is a relevant factor in considering whether the heat of passion in an accused person, regarding him from the standard of the ordinary man, had had time to cool or whether the provocation would still be operating on his mind so as to deprive him of the power of self-control.

The appellant, though hailing from the Samburu pastoral tribe, was an educated man by all standards and was a subject of a disciplined force. It is difficult to imagine lesser provocation than that of the appellant witnessing the sale of less palatable and juicy piece of meat to a young man. The defence of legal provocation was certainly not available to the appellant.

The learned judge very ably considered and rejected the appellant’s plea of self-defence. In arriving at this conclusion he considered the whole circumstances of the case. The appellant admitted in evidence

that he used a gun with a calibre of 7.62 cartridges to kill the deceased. In the case of *Mancini v Director of Public prosecutions* 1964 CR A page, it was held by the House of Lords that to reduce an offence of murder to manslaughter it is necessary to take into account the instrument with which the homicide was effected.

This is what the learned Lord Chancellor said in his judgment:

“in applying the test it is of particular importance......

to take into account the instrument with which the homicide was effected, for to retort, on the heat of passion induced by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.” The underlining is ours.

As the appellant’s life was not in danger nor in reasonable apprehension of it his statement that he shot the deceased in self-defence is not a valid defence. We reject it for the deceased was not armed. He was inside his house when the appellant trained his gun and shot him through a hole at the door. There was no attempt at any time by the deceased to open the door. Moreover, in the first place, there was no justification by the appellant to follow the deceased up to the house.

The upshot is that we are satisfied that there was sufficient material upon which the trial court could come to the conclusion that the appellant was actuated by malice in shooting and killing the deceased and to warrant his conviction of murder as the opinion of the assessors clearly indicated.

For the reasons we have stated we are of the view that the appellant was correctly convicted as charged. The conviction must stand. The sentence is legal. The appeal is dismissed.

Dated and Delivered at Nakuru this 29th day of July 1994.

A.M.COCKAR

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR