IN THE COURT OF APPEAL

AT NAKURU

(Coram: Masime, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 26 OF 1992

Between

MWANCHA............................APPELLANT

AND

REPUBLIC.........................RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Aganyanya, J) dated 15/11/91

in

HCCRC No 8 of 1991)

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JUDGMENT

In this appeal, the appellant's complaints are that the trial Judge was wrong in convicting him of manslaughter contrary to section 205 of the Penal Code while the evidence on record demonstrated a clear case of self-defence; and that the sentence of 4 years imprisonment was excessive in the circumstances of the case.

Before concluding that the appellant was guilty of manslaughter, the learned trial Judge made the following observation and finding:

> "I have considered the opinion given by gentlemen assessors in this matter but, with respect to this opinion, in view of all the evidence adduced, I am of the view that the accused shot the deceased under an apprehension that if he did not do so he himself was likely to be shot. Nevertheless, the circumstances prevailing reveal that the force the accused used though to defend himself, was excessive and that if anything he committed a lesser offence than that of murder. He unlawfully killed the deceased without an intent to do so."

He then convicted him of this offence and sentenced him to 4 years imprisonment.

In most cases, where the issue is one of self-defence, it is desirable and indeed necessary to remind oneself that the state of mind of the accused, that is, his view of the danger threatening him at the time of the incident, is material. The test of reasonableness is not, to put it at its lowest, a purely objective one. What is reasonable, judged from the viewpoint of an outsider looking at a situation quite dispassionately

and the viewpoint of the accused himself with the intellectual capabilities of which he may in fact be possessed and with all the emotional strains and stresses to which at the moment of unexpected anguish he may be subjected to, is what would amount to his having done what he honestly and instinctively thought was necessary. Indeed, that may be the only reasonable defensive action he would have had to take in the circumstances; for when the moment is one of crisis for the accused person who is in imminent danger, it may be necessary to take instant action to avert that danger. See the cases of *R v Whyte* [1987] 3 All ER 416; and *James Russel Shannon v R* (1980) 71 Cr App R 192.

Self-defence is a plea of justification and by that plea the accused is saying that he committed no unlawful act. In any particular case where it is raised, the prosecution must prove beyond reasonable doubt that it has no basis. It is a matter which the prosecution must disprove as an essential part of their case before a verdict of guilty can be justified. See the cases of *Regina v Lobell* [1957] 1 QB 547; *R v Alan Abraham* (1973) 57 Cr App R 799; and *R v Wheeler* (1967) 52 Cr App R 28.

In the present appeal, the appellant was at the material time a police sergeant attached to Lessos Police Station within Nandi police division of the Rift Valley province. Philip Kimagut Melly, the deceased, was a police inspector in the directorate of security intelligence and was stationed at Kakamega.

At about 7.30 pm on 16th July, 1990 the appellant received a report originating from Kapsabet police divisional radio room to the effect that motor vehicle registration No KUV 944, Subaru, white in colour had been stolen in Kakamega area and was said to be heading towards Nandi area. In it were some armed men. The appellant was required to put up a road block to check on this vehicle. At about 8.00 pm, the appellant together with Corporal Harun Cheruiyot (PW15) booked out on patrol duties around Lessos trading centre. They did not trace this vehicle. The two police officers therefore returned to Lessos Police Station, where they booked themselves in and went to sleep.

Meanwhile, on the same day and at about the same time, the deceased who was travelling to Nairobi from Kakamega in his official motor vehicle registration No KYL 895, Nissan Sunny and was accompanied by his girlfriend together with her three weeks old child and two other persons decided to stop at Lessos trading centre for the night after the vehicle aforementioned broke down near the said trading centre. He and his girlfriend booked in room No 31 at Cheptungey Bar and Lodging while his other two companions booked in room No 29 at the same bar and lodging. The latter was adjacent to Salama Bar and both were owned by one William Birgen and were both managed by Julius Jabuya Wandere (PW8). Once the appellant was booked in the room mentioned above, he went into Salama Bar where he and some of his friends drunk beer until about 11.00 pm when he and one of his friends moved to Cheptungey Bar where they continued to drink beer. At about mid-night, the lights in the bar were put off as that was the closing time for the day's business. The deceased and his friend had not at the time finished drinking the beer they had. He therefore asked the bar attendant, Mary Baris Ashihundu (PW3), why the lights were put off while they were still drinking beer. PW8 intervened and told the deceased and his companion to leave the bar as the legitimate time for drinking beer in the bar was over. PW8 also refused the deceased's request to be allowed to complete drinking his beer. In the meantime, the bar watchman, Joseph Kipkorir Kogo (PW7), came into the bar flashing his torch with a view to ejecting the deceased and his friend out of the bar. As he did so, the deceased pulled out a pistol and pointed it at him. PW7 then went out of the bar. Thereafter, the deceased who was dressed in a Kaunda suit left the bar together with his friend. The bar was closed for the night. At the verandah of the adjacent Salama Bar there was electric light. At that verandah. PW3, PW7, and PW8 saw the deceased holding a pistol and hear him say to them: "say what you were saying" to which PW8 responded by raising up his hands and said: "old man, go and sleep. We have no problem with you." Deceased agreed to go and sleep. It was now about 1.00 am. Startled by what kind of person the deceased was, PW3, PW7, and PW8 decided to report to Lessos Police Station that there was somebody at Cheptungey Bar and Lodging who was armed with a pistol. On making this report, they were given three police officers who were in uniform. Two of the police officers were each armed with a G3 military rifle while the third police officer was armed with a "*rungu*".

The two police officers armed with G3 military rifles were the appellant and PW15 while Sergeant Barmao Koech (PW14) was armed with a "*rungu*". These police officers were then led to the room where the deceased was sleeping by PW3, PW7, and PW8. Outside that room the appellant knocked at the door

which was locked from inside and identified himself and his colleagues as police officers. He told the deceased to open the door but the deceased said that he would not do so as he had committed no offence. The appellant continued knocking at this door while at the same time he was telling the deceased that he and his companions were police officers. Electric light was switched on in the room but the deceased did not open the door. Eventually, the appellant told the deceased that if he did not open the door he would break it. He then kicked the door four times in an attempt to break it open. Suddenly the door was opened and the deceased confronted the appellant pointing a pistol to him. According to the appellant, with this confrontation, he tried to dodge and found no way of escape. Immediately thereafter, it all became dark to him and impulsively he fired his loaded G3 military rifle. The deceased staggered backwards towards the bed he had been sleeping on dropping the pistol on the floor of the room and then sat on the said bed with his back leaning against the wall of that room. He died shortly afterwards as a result of a penetrating gunshot wound on the lower part of the right side of the abdominal cavity with injuries to the right femoral artery, vein and common iliac artery with the resultant arterial external hemorrhage leading to post hemorrhagic anaemia.

Before making the observation and finding set out above, the learned trial Judge had found that the full account of how the shooting of the deceased took place was only given by the appellant in his unsworn statement. He then said.:

“The accused himself confirmed to the Court that the door was flung open and immediately it did so he confronted the deceased who pointed a pistol at him. And although he said he dodged, there was no evidence that the deceased ever fired at him. There must have been confusion with the accused believing that he was being shot at hence his action in dodging a shot which never was.

> “This also establishes that the deceased opened the door suddenly and the circumstances under which the door was opened sent lots of fear and apprehension into the mind of the accused who believed he was being shot at.”

The trial Judge was alive to the possibility that the appellant may have suspected that the deceased may have been amongst the people who had been alleged to have committed an armed robbery in Kakamega area for which he had earlier that night been detailed to patrol Lessos trading centre. He also found that the deceased must have opened the door with fury because he was being disturbed and immediately pointed his loaded pistol at his intruders although he fired no shot.

From the observations set out above and applying the law relating to self-defence as is outlined above to the evidence before the trial Judge, it becomes plainly obvious that the appellant’s plea of self-defence was not disproved by the prosecution. Indeed, at the conclusion of the appellant’s trial before the High Court at Eldoret, his plea that he had committed no unlawful act starkly remained begging to be resolved. We are therefore unable to uphold his conviction of manslaughter contrary to section 205 of the Penal Code. Having come to this conclusion, it is unnecessary to deal with his complaint against the sentence of 4 years imprisonment. Accordingly, we allow this appeal, quash the conviction and set aside the sentence. The appellant is to be set at liberty forthwith unless otherwise lawfully held in custody.

Those then are the orders of the Court.

Dated and delivered at Nakuru this 23rd day of December 1992.

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR