REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1829 OF 1983

VIRGINIA WANGECHI WACHIRA.....PLAINTIFF

VERSUS

WANJOHI.....DEFENDANT

JUDGMENT

March 9, 1988 **Mbaluto J** delivered the following Judgment.

This suit arises from an incident that occurred on 16th April, 1981 at Kiganjo Township, Nyeri when a man known as Sebastian Stephen Wachira S/0 Kaguchia (hereinafter referred to as "the deceased") was hit by the defendant with a piece of an iron pipe. The blow caused the deceased to fall down, sustaining thereby (either from the blow directly or the fall) such grave injuries that he died, from the injuries some hours thereafter.

The plaintiff has brought this suit as the adminstratrix of the estate of the deceased under the Law Reform Act and also under the Fatal Accidents Act to recover damages for the estate and for the dependants of the deceased which she claims were occasioned by the killing of the deceased by the defendant. The plaintiff alleges that the defendant unlawfully and without just cause killed the deceased.

It is not disputed that the defendant was as a result of the incident charged with the murder of the deceased and later, on his own plea of guilty, convicted of the lesser offence of manslaughter, contrary to section 205 of the Penal Code, and, sentenced to 12 months imprisonment. In his written statement of defence to the suit, the defendant admits that the fight between him and the deceased took place and that the deceased was fatally injured, but he denies that he unlawfully or without any justifiable cause killed the deceased. He has averred that the deceased was the author of his own misfortune, by provoking the defendant into a fight. He further averred that he was acting in self defence after having been suddenly assaulted by the deceased.

Learned counsel for both parties have framed 5 agreed issues which they think call for determination in this suit, but in essence, what is in issue in this suit is, in my ivew:

(a) Whether the defendant unlawfully and without any justifiable cause killed the deceased and,

(b) If the answer to (a) is in the affirmative, whether the plaintiff is entitled to damages (and if so how much) in the circumstances of the case.

Regarding the first issue, considerable time was taken by both counsel for the parties in their attempts to show why they thought the defendant was or was not liable to pay any damages, but having regard to the undisputed facts of this case, and to the law of this country, relating to the matters in issue, I am of the

view that the question for determination is not all that complicated and that there can be no doubt that the defendant is liable to the plaintiff and the other dependants of the deceased under the Fatal Accidents act and the Law Reform Act. I will now proceed to show why, I think, that is the position.

It is, as I have stated above, not in dispute that the defendant was on his own plea of guilty, convicted of the offence of manslaughter contrary to section 205 of the Penal Code and sentenced to 12 months imprisonment.

The offence of manslaugher, of which he was convicted, is defined in section 200 of the Penal Code as follows:

> "Any person who by unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter."

That is the offence the defendant was convicted of. He was therefore guilty of having caused the death of the deceased by unlawful act (the part of the section relating to omission does not apply). The question that arises therefore is whether the defendant having been so convicted can now in this subsequent suit contend, as he has attempted to do, that what he admittedly did was not unlawful and that the deceased was the author of his own misfortune.

Learned counsel for the defendant argued that the defendant was entitled to raise this defence. The support his argument, he cited the cases of *Gray v Barr* [1971] 2 Q.B. 554 and *Murphy v Culhane* [1977] 1 Q.B. 94 and particularly the latter case which appear to support his views. I shall revert to these authorities later in this judgment. For the moment however, I must say that having considered the matter for myself I hold the view that in the circumstances of this case the defendant defence, that what he did was not to unlawful, cannot be sustained. My view of the matter is strengthened by the wording of section 47A of the Evidence Act, which is as follows:

> "A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision f any appeal thereon, whichever is the latter, be taken as conclusive evidence that the person so convicted was guilty of the offence as charged."

Two things must be noticed with regard to this section. Firstly it applies to both criminal and civil proceedings and in all courts (see *Queens Cleaners and Dyers Ltd v East African* [1972] E.A 229) and secondly the nearest English provision on the matter viz section 11 (1) of the Civil Evidence Act 1968 is worded differentially from on section 47A of the Evidence Act and, accordingly, in referring to English decisions on the matter one should not pay slavish regard to English pronouncements on the point without due recognition of the differences that exist in the two statutory enactments. Accordingly, in my view, when the provisions of section 47A of the Evidence Act are applied to the facts of the case, the result should surely be that the defendant having been found guilty of unlawfully killing the deceased, he cannot in this suit be allowed to go behind the conviction and by explaining what the circumstances of the killing were, attempt to show that he was after all, not guilty. If such a defence were permissible, it would involve, in a subsequent civil suit, a retrial of the criminal case, with the awkward and obviously undesirable possibility of conflicting results on the same facts. In principal and in the law I find that the defendant cannot sustain a defence involving a denial of the unlawfulness of his acts after having been convicted of manslaughter.

As to whether he can plead contributory negligence, my view of the matter is that he could not because this is not an action on negligence but a suit grounded on assault, in which case the question of contributory negligence cannot arise. "The idea of negligence – and contributory negligence – is quite foreign to men grappling in a struggle" per Lord Denning in *Gray v Barr* – supra).

The above would, in my view, be sufficient to dispose of the issue of liability, but in case I am wrong, I wish now to consider the two authorities cited by learned counsel for the defendant on his submission that his client's defence is meritorous in the circumstances of the matter.

Both are English Court of Appeal decisions and in both, the leading judgment was delivered by Lord Denning. In the first one (*Gray v Barr*) a distraught, fearful, anxious husband of a wife (who had had a prolonged affair with another man) was beyond endurance with the thought that the wife had gone back to the man once again, had shot the man as they (the husband and the man) grappled for a gun the husband had gone with at the man's house, the intention of the husband being only to frighten the other man. After stating that the wife of the deceased could not recover from an insurance policy covering accidental death as the incident was not an accident, Lord Denning, in considering the question of compensation to the dependants of the deceased had this to say :

> "Whenever two men have a fight and one is injured the action is for assault, not for negligence. If both are injured, there are cross-actions for assault. The idea of negligence, and contributory negligence is quite foreign to men grappling in a struggle. In an action for assault in awarding damages, the judge can take into account not only circumstances which go to aggravate damages, but also those going to mitigate them."

Later in the same judgment with reference to the claim by the widow and the children under the Fatal Accidents Act the judge said:

> "They (the dependants) are entitled to recover the pecuniary loss occasioned to them by his (the deceased's) death. In the claim, all questions of provocation to (the defendant) are irrelevant."

There would appear to be nothing in the case of *Gray v Barr* to support the view urged by learned counsel for the defendant.

The second authority cited by learned counsel for the defendant is the case of *Murphy v Culhane* (supra) in which the defendant had pleaded guilty to manslaughter of the deceased but the Court of Appeal held that because the deceased had taken part in a criminal affray the deceased might have deprived himself of a cause of action arising from its consequences and therefore the defendant was entitled to put forward the defences of *ex turpi causo non oritur actio* and *volenti non volenti non fit injuria*. In that case the deceased Murphy, a self-employed builder, is said to have made a wicked plot, together with some other men to beat up another man, the defendant Culhane. The details of the attack were not established except that there was a "criminal affray" during which the defendant Culhane struck the deceased with a plank and killed him. In those circumstances Lord Denning held that it was open to the defendant to raise the defences mentioned above.

The judge did however recognize that where the conduct of the deceased was trivial and that of the defendant savage – entirely out of proposition to the occasion – so much so that the defendant could fairly be regarded as solely responsible for the damage done, then the position could be different. In my view the undisputed facts of this case do not bring this case within the dicta pronounced by Lord Denning in the *Murphy v Culhane* case and I do not think that the defence of *ex turpi causa non oritur actio* or *volenti non fit injuria*, would be available to the defendant.The reasons for my views will emerge from the facts of the instant case which I now propose to summarise.

The defendant and the deceased were family friends. Both were working at Kiganjo Police Collge, the defendant as accounts clerk and the deceased as an instructor. In his evidence the defendant claimed that his family and that of the deceased were close and that members of both families used to visit each other. The plaintiff did not agree with that piece of evidence. She said that though her husband, the deceased, and the defendant used to drink together, the friendship between the families was not as close as the defendant claimed, and, in fact she never visited the defendants home; neither was she aware that her husband visited the defendants home.

Trouble between the two families started on 3rd April, 1981 when the deceased committed adultery at Kiganjo with the wife of the defendant during the absence of the defendant, who was away on a course at Mombasa. The plaintiff knew of the affair having caught the wrongdoers almost in the very act. All the three person i.e. the deceased, the defendant's wife and the plaintiff are according to the defendant's evidence supposed to have informed the defendant, on one date or another, of the affair, but apparently,

the first time he became aware of the full extent of the matter was 13th April, 1981. The defendant told this court that having reflected on the matter, his idea was that the problem could be resolved by a discussion between the parents of the deceased and those of the defendant. Whether in fact that was the defendant's correct attitude of mind on the date of the incident will never be known.

What is known is that 3 days later, on 16th April, 1984 at about 6.00 pm the deceased and the defendant went for a drink at Kiganjo shopping center. The defendant was carrying an iron pipe, half an inch wide and 11/2 feet long. He testified that he always carried the iron pipe for defensive purposes whenever he went out. Again whether this is true or not cannot be verified. Be that as it may, the two friends, having had their drinks until 9.30 p.m., decided to go home, to collect more money, ostensively because they had run short of cash. As to this and, of course, what followed thereafter there is only the defendant's unverified word.

The defendant said that as he and the deceased walked home, he asked the deceased to tell the truth about the affair. What truth he wanted from the deceased is not clear as all the details of the sordid affair between the deceased and the defendant's wife had been disclosed to him by the two parties concerned as well as by the plaintiff. Be that as it may, the defendant testified that when he and the deceased were a mere 20 metres from the deceased house, the deceased started abusing the defendant, saying that the deceased had committed adultery with the defendant's wife and claiming that the defendant being useless could not do anything about it.

The defendant said that the personal abuse was followed by a kick by the deceased upon the defendant which said kick knocked the defendant down. Another kick followed as the defendant rose up and he was forced down again. According to the defendant, it was when the deceased was preparing to deliver the third kick to the defendant that the defendant, decided that enough was enough, and, in self defence, hit the deceased with the iron pipe he had been carrying all evening, knocking him down. The blow by the defendant upon the deceased must have been extremely hard for after delivering it, the defendant, says, he also says fell down. According to the defendant, the deceased rose up quickly from the ground after the fall and ran towards his house with the defendant chasing him. By the time the defendant caught up with the deceased, the later was already in his house and the defendant decided to go home and sleep. The fight, according to the defendant, took between 5 to 10 minutes and is said to have taken place on a surface full of pieces of hardcore and mud.

Having examined the evidence of the defendant carefully, I have serious doubts as to the veracity of his testimony. He said that the fight took place virtually within the vicinity of the deceased's house i.e twenty metres from the house. There was a lot of moonlight and the fight took a full 5 to 10 minutes. In those circumstances why was it that no one from the deceased's house (both his wife or the maid were not yet asleep) heard the commotion arising from the fight. Again the defendant claims that it was the deceased who initiated the fight by attacking the defendant and knocking him to the ground twice before the defendant responded, in self defence, with the blow that we now know sent the deceased to his grave. And yet the defendant, on examination immediately after the fight was found to have had"no noticeable external injury".

One may therefore legitimately ask, what part of the defendant's body received the two kicks and how come neither the kicks nor the knockdown on the muddy surface, which is said to have been full of hardcore on it as well, resulted in no injuries at all. And finally why was the defendant chasing the deceased, after administering upon him the fatal blow, up to the deceased's house. Is the answer not that the defendant wanted to finish off the deceased?

There are obviously no facts on the basis of which most of these questions can be answered. However, having regard to all the circumstances of the matter and particularly the location of the scene of the fight in relation to the deceased's home the injuries sustained by the deceased and the absence of any injury on the defendant the fact that the deceased had to run up to his house to escape further punishment from the defendant, I am constrained to conclude that this was not a case of a criminal affray or fight as alleged by the defendant but a straight forward case of an attack by the defendant upon the deceased arising from the defendant's obvious anger, following the disclosure that the deceased had committed adultery with the

defendant's wife. I do not therefore accept that the attack was made in self defence as I do not believe that the deceased attacked the defendant as alleged.

In any event, even if I were to accept that there was an attack by the deceased upon the defendant and that the defendant was reacting to such an attack, I would still find that the defendant reaction to the alleged attack and provocation, was so strong and excessive as to be unjustified. For three full days prior to the attack upon the deceased, the defendant had been aware that his wife had committed adultery with the deceased. During that period he had not shown any animosity to the deceased. Indeed in his evidence before me he said he was prepared to have the matter resolved by parties parents.

Consequently it is clear to me that the defendant did not consider his wife's adultery with the deceased sufficient provocation to cause him to attack the deceased. In law it could not afford him any defence, nor could, in my view, the alleged insult which the deceased is alleged to have directed at the defendant prior to the attack. There was therefore nothing, in the deceased conduct which could remotedly avail the defendant any defence of provocation or which could warrant the defendant's assault upon the deceased and, to borrow from Lord Dennings judgment in *Murphy v Culhane* (*Supra*) the conduct of the defendant was in my view so "savage – so out of proportion to the occasion – as to take him out of the possible defences of *ex turpi casue non oritur actio* and *volenti non fit injuria*'. Those defences are not therefore available to the defendant.

Accordingly I find that the assault by the defendant upon the deceased was totally unjustified and unlawful and the defendant has no defence to the plaintiffs claim. He is liable in full to the plaintiff and the other dependants of the deceased for the loss they have incurred. I now turn to consider the quantum of damages payable by the defendant to the plaintiff.

The plaintiff has brought this suit on her behalf and behalf of the three children of the deceased namely Faith Wamuyu born on 1st May, 1974, Rachael Wairimu born on 28th November, 1975 and Lucy Wanjiku born on 15th November, 1979. The children were therefore aged 7,6 and 2 respectively at the time of their father's death. I think it is fair to take the age of 21 as the age at which the three children would have ceased to be dependants on the deceased i.e if he had lived. Consequently the duration of their dependencies would have been 14, 15 and 19 years respectively. The plaintiff was 31 at the time of her husband's death in 1981 and accordingly her dependency would have been 24 years until the deceased normal retirement age of 55. The average duration of the four dependencies is therefore 18 years. This I think should be scaled down a little to take account of the usual imponderables of life. I would therefore think that the correct multiplier in this case should be 16.

What is the correct multiplicant? Accordingly to the plaintiff's evidence, the deceased was a SI teacher with a gross salary f shs 3,348/= per month, out of which he used to spend shs 2,000/= for the family up-keep, the family comprising the plaintiff, the three children and of course, the deceased himself. This money must have gone to meet the family's expenditure on such things as food, clothing and other household expenses.

In addition by virtue of having been given official accommodation the deceased was also providing some further benefit. The value of that benefit is difficult to quantity on the evidence before me. However, having regard to the fact that there has been a general increase in salaries in the teaching profession as well as elsewhere in Government I am of the view that the deceased support for the wife and three children would not in any event have been less than what was their share of the sum of shs 2,000/= which he provided for the family up-keep up to the time of his death. I estimate this at 4/5 of the said figure i.e shs 1,600/= each month. It is therefore fair and reasonable to assess the dependants actual pecuniary loss on the basis of a monthly dependence of shs 1,600/=. Accordingly the actual loss suffered by the plaintiff and her 3 children is shs 1,600x16x12 = shs 307,200/=.

In his submissions before me learned counsel for the defendant argued that any damages found to be due to the plaintiff should be reduced by shs 66,960/= allegedly paid to the estate on the death of the deceased, but I can find no evidence to show that any such figure was in fact paid. The plaintiff admitted that she received shs 14,000/= death gratuity but she did not specify what the other dependants received

and the matter was not pressed by counsel for defendant. I accept that where a dependant receives an accelerated benefit from the estate of a deceased such benefit from the estate of a deceased such benefit should be reduced from the dependants overall entitlement. The benefit does not necessarily mean the full capital value of the estate nor is the deduction to be made in every case as the issue must be determined upon the peculiar facts of each particular case.

Having regard to the circumstances of the instant case I find that it has not been established that the payment received by the plaintiff should be deducted from her overall entitlement. If the plaintiff did receive any benefit at all from the small death gratuity mentioned, it appears to have been substantially less than what she would have received if the deceased had lived for several more years (see *Kampala Aerated Water Co Ltd v Gulbane Rajabhai Kassam* [1961] EA 291). For those reasons, I do not propose to make any deduction in respect of the sum of shs 14,000/= paid to the plaintiff after the death of the deceased.

Mr Wambugu also argued that the damages to the dependants should be reduced in accordance with the dicta set out by Lord Denning in *Gray v Barr* and *Murphy v Culhane* (*supra*) but in my view the facts of this case and its circumstances are totally different from those of the two cases and the principles therein pronounced have no application to this case.

Accordingly I find that the plaintiff and her three children are entitled to the full amount of the pecuniary loss they incurred which I have assessed at shs 307,200/=. In arriving at this figure I have borne in mind the submission of learned Counsel for the defendant that the court should not award such damages as would ruin the defendant.

There will therefore be judgment for the plaintiff against the defendant for Shs 307,200/= general damages plus shs 5,000/= special damages together with costs and interest thereon.

The general damages will be apportioned amongst the four dependants as follows;

(i) The plaintiff Virginia Wangechi Wachira ...Shs 112,600/=

(ii) Faith Wamuyu...Shs 56,200/=

(iii) Rachel Wairimu..Shs 60,200/=

(iv) Lucy Wanjiku.....Shs 78,200/=

Orders accordingly.

Dated and delivered at Nairobi this 9th day of March, 1988

T. MBALUTO

JUDGE