



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Nyarangi, Gachuhi & Apaloo JJA)**

**CRIMINAL APPEAL NO 84 OF 1986**

**BETWEEN**

**INTHITHIO..... APPELLANT**

**VERSUS**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**

**JUDGMENT**

*(Appeal from a Conviction and Sentence of the High Court at Kisumu, Butler-Sloss J)*

April 6, 1988, **Nyarangi, Gachuhi & Apaloo JJA** delivered the following Judgment.

The appellant appeals against his conviction of murder at the High Court, Kisumu on 11th April, 1986 after a trial held by Butler-Sloss, J. The following is the trial Judge's note of the proceedings of the plea:

"In Luo

Charge put again to accused: explained – he answers

"I understand the charge:"

"I killed him:"

(Mr. Nyamori allowed to advise his client – he asks the charge to be put again), charge is yet again put to the defendant who says:

"I killed him because when he approached me in the shamba where I was digging, and he asked me —"You dog – what are you doing here?"

Then I asked him

"You old man, you are insulting and abusing me;

What have I done to you? He answered:

You dog – you should not reply to me." He then hit me with his fist.

He hit me once, and I fell down: - when I fell down, I started running away. I had a hoe (jembe) in my hand”– then I hit him with the–‘Jembe’ and he fell down – I left him.”

Defendant is stopped, and Mr. Nyamori agrees to plea of Not Guilty.

Plea entered of Not Guilty.”

Next came the testimony of IP Mary Bunde (PW1) who charged and cautioned the appellant and recorded a statement in Dholuo whose English translation reads;

“I agree that I killed that man, but I did not intend to do so, it happened after he came in the shamba where I was digging and started abusing me by calling me a dog.” When I asked him why he was calling me a “dog” he then came to where I was and hit me with a fist on the side of my left eye. I then beat him on the head with a hoe – and (he) fell down and died.”

It is necessary for us to go over the facts of this case again. The facts were of the simplest. Teresia Akoth (PW2) the wife of the appellant (therefore not a compellable prosecution witness) was at Mwer Market on 28th March, 1984 when the deceased, her brother-in-law according to their custom insulted her by calling her a dog, and that he could have sexual intercourse with her. PW2 went home and reported the incident to her mother-in-law.

The appellant did not hear PW2 report. The next material witness was Anastasia Awuor (PW5), a daughter of the deceased who said that on her way home from “the market”, she found the appellant sitting on a stone besides a road. She wished the appellant but he did not respond. He was armed with a hoe and an axe. As she walked past him, the deceased was following whereupon PW5 heard the appellant tell the deceased to stop. The deceased did not stop and so the appellant got in front of him and then behind him and hit him at the back of the neck. He fell. PW5 added that her deceased father,

“stood up and wanted to run back where he was coming from. The accused followed and hit him again on his head. He again fell. The accused continued beating him. My mother, Consolata Onyango, was also coming from behind.”

PW5 did not however relate all that to PW8, a police officer who found the deceased’s body. According to Cosmas Okoth, Chief of the area who knew the appellant and the deceased well, the deceased and the appellant’s wife had had bitter domestic quarrels but no report had been made to him of any quarrel between the appellant and the deceased. Martin Olwande (PW 10) an uncle of the appellant and a cousin of the accused saw the appellant at his house at 5 p.m. on 28th March, coming from his farm carrying a hoe. The appellant stood where his mother and his wife, who was crying, were. He had the hoe. While PW 10 was at a distance, the appellant, his mother and wife talked. As he got near, the wife stopped talking. PW 10 then saw the appellant turn his back and thrice hit a stone with the hoe and saying, “To-day I must kill a person.” The appellant continued standing within his homestead and in the view of PW10, was “very much provoked”.

Consolata Anyango (PW11), the mother of PW 5, came from Mwer Market 5.30pm. The deceased – her brother-in-law passed her on a bicycle. At the same time, PW11 saw the appellant come from the right hand side of the road carrying a hoe and hit the deceased who was then on the left side of the road. PW11 then ran back towards the market to call the wife of the deceased. PW5 was present, and very close to them.

On the facts, Mr. O’Piyo Odero challenges the conviction for murder and his grounds of appeal are that:

1. The Honourable Mr. Justice Joseph Butler-Sloss erred in law in not finding whether or not the assessors had known the accused or the deceased and whether or not the accused had any objection to any or all the assessors.

2. The Honourable Mr. Justice Joseph Butler-Sloss erred in law in not convicting the accused on a lesser charge of manslaughter when the appellant had proved it.
3. The Honourable Mr. Justice Joseph Butler-Sloss erred in law in relying only on the evidence of the prosecution witnesses some of whom were relatives of the deceased hence not independent witnesses.
4. The Honourable Mr. Justice Joseph Butler Sloss-erred in law in rejecting the evidence of the appellant which gave reasonable explanation to how the deceased met his death.
5. The Honourable Mr. Justice Joseph Butler-Sloss misdirected himself in the Appellant's version that he acted in both self defence and provocation.
7. That judgment is against the weight of evidence.

The first argument advanced concerned the appellant's reply to the charge. Counsel submitted that upon the statement of the appellant in answer to the charge, the appellant intended to plead guilty to the lesser offence of manslaughter, that the Judge should have asked the appellant if that is what he intended and that the decision of the Judge to enter a plea of Not Guilty occasioned a miscarriage of justice.

On the third ground of appeal, counsel for the Appellant pointed out that Anastasia Awuor (PW5) who was a key witness for the prosecution was a daughter of the deceased. The complaint about the evidence of this witness was that the trial Judge did not caution himself about the relationship of PW5 with the deceased before accepting and acting on PW's evidence. It was next said that Consolata Anyango (PW11), another relative of the deceased, contradicted PW5 but that the trial Judge failed to analyse the evidence.

The last two grounds were argued together whereupon Mr. Opiyo Odero contended that if the statement of the appellant made in Court is believed, then he should be held to have attempted to defend himself. Another point was argued and we thought it was going to be the main point in the case. The point was that at the time the appellant hit the deceased he was under the provocation he sustained on learning from his wife what the deceased had said to her and that the appellant should have been convicted of the lesser offence of manslaughter and acquitted of the charge of murder.

Mr. Gimose for the Respondent Republic submitted that the main argument is whether on the evidence there was sufficient provocation to reduce the crime to manslaughter. Counsel argued that the appellant could not rely on self-defence because the appellant waited for the deceased at the road and attacked him there. As for provocation, Mr. Gimose referred to the evidence of Olwande (PW10) and told the Court that on that evidence the appellant did not discuss with his wife (PW2) what had gone on at the market, that the appellant had had time to cool and so did not kill the deceased in the heat of passion whilst the appellant was deprived of selfcontrol by that provocation and hence his conduct does not come within Sec. 207 of the Penal Code.

The real point of this appeal turns upon whether or not legal provocation as defined in Sec. 208 (1) of the Penal Code was disclosed and if the appellant acted under stress of that provocation.

Section 207 of the Penal Code provides,

“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.”

Section 208 (i) of the Penal Code defines the term “provocation” as follows:

“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 prosecution’s evidence was that on the material day at 5 p.m. PW 10 saw the appellant in discussion with his wife and his mother outside the appellant’s house. The wife of the appellant was in tears. Moments later, PW10 saw the appellant turn his back and he then hit a piece of stone three times with his hoe. PW10 thought the appellant was very much provoked. Indeed the appellant was upset. His wife related to the appellant’s mother, in the presence of the appellant, the insults which the deceased had hurled at her. The report of the insult so incensed the appellant that he hit nearby stone with his hoe.

According to Consolata Anyango (PW11) the appellant appeared from the right hand side of the road she was following and hit the deceased with a hoe. The time was 5.30 p.m. – thirty minutes after the appellant had been told the sordid facts of the insult directed at his wife, a person to whom the appellant stood in conjugal relation.

Awuor (PW5) the deceased’s daughter agreed that her father was attacked about 5.30 p.m. It would appear that the appellant rushed forward towards the market where the appellant insulted his wife but met the deceased riding his bicycle from the market and hit him.

Consolata did not say that the appellant emerged from a bush or that the appellant was lying in wait or that the appellant sat patiently waiting for the deceased. The appellant however accosted the deceased thirty minutes after his wife was insulted in his absence. It could not therefore be said that the appellant hit the deceased whilst he was deprived of self-control by grave provocation and in the heat of passion: as in *Saleh bin Mohamed bin Salem Shikel v R* (1956) EACA 437 at page 438. Admittedly the words which the deceased used in these particular circumstances are more than vulgar abuse and would amount to legal provocation in terms of section 208(1) of the Penal Code. On the evidence, the wife of the appellant was not insulted in his presence so as to deprive him of the power of selfcontrol and to induce him to commit an assault. Legal provocation as defined in section 208(1) of the Penal Code was not established and therefore the appellant could not benefit from the rule as laid down by the predecessor of this court in *R v Hussein s/o Mohamed* (1942) EACA at page 55: that,

“When once legal provocation as defined in our code has been established and death is caused in the heat of passion whilst the accused is deprived of self-control by that provocation, the offence is manslaughter and not murder, and that irrespective of whether a lethal weapon is used or whether it is used several times or whether the retaliation is disproportionate to the provocation. The presence of one or more of these factors is of course a matter to be taken most carefully into account when considering the question of sentence, but will not of itself necessarily rule out the defence of provocation.”

The prosecution evidence negated the appellant’s claim that the deceased attacked him. In the result, the appeal is dismissed.

That is the order of the Court.

**Dated and delivered at Kisumu this 6th day of April , 1988**

**J.O NYARANGI**

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**JUDGE OF APPEAL**

**J.M GACHUHI**

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**JUDGE OF APPEAL**

**F.K APALOO**

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**JUDGE OF APPEAL**