IN THE COURT OF APPEAL

AT NYERI

(Cram: Law, Miller & Potter JJ A)

CRIMINAL APPEAL NO 29 OF 1978

Between

BENSON MBUGUA KARIUKI .....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

After setting out the facts, quoting from the extra-judicial statement of Benson Mbugua Kariuki ("Benson") and from his evidence at his trial, and describing the version of events related in evidence by David Kamau Patterson ("Kamau"), Law JA continued: In considering the reliability of the two vital witnesses, Cockar J when dealing with Benson described his charge and caution statement as "remarkable for its clarity" and as "a clean breast of all that in his view mattered". As regards his evidence at the trial, the judge did not say in terms that it was untrue or unreliable; but he seems to have been surprised that the charge and caution statement did not specify the actual remarks or refer to the alleged arrogance of Kamau on which Benson relied as constituting provocation when he gave evidence. As regards Kamau, the judge did not think much of him as a witness of truth. He said:

> In fact, I am not accepting his evidence in relation to any portion or event unless it is undisputed or unless it is strongly corroborated by independent evidence.

Nevertheless, the judge preferred Kamau's evidence to Benson's in several instances where there was conflict between them, and without corroboration. As to the alleged speaking of the provocative words, he said (referring to Kamau):

> How could such a man within 15 minutes change into an arrogant and provocative man shouting to [Benson] virtually that, whether he liked it or not, he intended to seduce his woman sexually. That on balance is completely unbelievable, unacceptable, and is rejected.

Note the use of the words "on balance". In coming to his findings of fact in this case, the judge on no less than thirteen occasions based his finding "on balance" or "on balance of probabilities"; eight of these findings being adverse to Benson, one of them being whether Benson believed that the "husband and wife" relationship between himself and Elsie was still in existence on 16th March. A balance of probabilities is not a proper basis for establishing proof in criminal cases; see *Festo Shirabu s/o Musungu v R* (1955) 22 EACA 454, cited with approval in *Oloo s/o Gai v R* [1960] EA 86. In that case, the Court of Appeal said:

> In the instant case the use of the phrase "balance of probabilities" in relation to the establishment of the defence of self-defence or accident is most unfortunate, and had we thought that it had or might have affected the impression given by the summing-up as to the onus of proof as a whole, we must on this ground alone have allowed the appeal.

In *Oloo's* case, the trial judge had only used the phrase "balance of probabilities" on one occasion in the summing-up, and not at all in his judgment. To decide issues on a balance of probabilities implies an onus being placed on both parties to the issue. That Cockar J approached the whole case on this basis is clear from his direction as to the onus of proof in criminal cases, contained in a ruling on a submission in the course of the trial, and then in his summing-up to the assessors. On the first occasion he said:

> The onus on an accused in a criminal case to prove some fact is much lighter than it is on the prosecution. The onus on accused is that on a party in civil suit: a fact to be proved on a balance of probabilities.

Then in his summing-up to the assessors he said, twice, that there was an onus on Benson which was very light, merely to prove on balance. Towards the end of the summing-up he said:

> On every issue the prosecution has to prove, and prove beyond reasonable doubt; the accused has merely to raise a doubt or prove on balance only.

It is this question of the burden of proof upon which Mr Georgiadis mainly relied in this appeal. The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond all reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if, in respect of any matter, the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self-defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was not provoked, or that he was not acting in self-defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and, if any reasonable doubt arises in respect of any matter, the prosecution has failed to discharge the burden which it must discharge.

Mr Gicheru, the State counsel, made a valiant attempt to support the judgment. He conceded that the judge's repeated use of the words "on balance" or "on a balance of probabilities" was unfortunate; but submitted that they were only used in respect of matters which were not crucial, and that no prejudice was caused to Benson. He submitted that, although there were indications of a general wrong approach to this case on the part of the judge, he nevertheless reached a right conclusion; and he submitted that on every crucial point the judge had expressed himself as satisfied beyond reasonable doubt.

In our view the objections to the conviction in this case go beyond a mere question of semantics. The judge's analysis of the facts was conscientious and thorough; he dealt minutely with every possible point; but the fact remains that his approach to the case generally was coloured throughout by his repeated statements that there was some sort of onus of proof resting on Benson. To take but one example, in his summing-up to the assessors on the vital aspect of provocation, he said:

> … emphasise that primarily the duty of the prosecution is to prove beyond reasonable doubt that there was no provocation; that the killing was done without provocation. The onus on [Benson] is merely to raise a possibility of the existence of provocation; on a balance of probabilities.

Here the judge is saying not only that there is an onus on the accused, but that it is one to be discharged on a balance of probabilities. Such a direction is fundamentally wrong, and we do not feel able to say that on a proper direction the final conclusion in this case must have been the same. This is not a case of a single misdirection affecting one finding of fact. In order to uphold the conviction in this case it would be necessary to re-examine every material finding of fact, an exercise which we do not consider to be either

practicable or desirable. Furthermore, Cockar J (in our view for ample reason) concluded that he could not accept the evidence of Kamau, except in so far as it was corroborated. Kamau's evidence as to the shooting and the immediately preceding half-hour is not corroborated in so far as it differs from Benson's evidence. Thus we must approach the issue of provocation as if Benson's evidence on the issue is uncontradicted. Being satisfied that Benson's defence of provocation would be a valid one if true, we are of the opinion that that defence having been raised and not having been demolished by the prosecution, the conviction for murder in this case cannot stand. We set it aside and quash the sentence of death passed on Benson, and substitute a conviction for manslaughter, contrary to section 202 of the Penal Code. We think this was a very bad case. We sentence Benson to ten years' imprisonment, to take effect from the date of his conviction.

Appeal allowed.

Dated and delivered at Nyeri 16th day of November 1979.

E.J.E LAW

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JUDGE OF APPEAL

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR