



**Mbuthia v Republic (Criminal Appeal 25 of 2022)  
[2023] KECA 1297 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1297 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 25 OF 2022  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**PHARIS KABAIKU MBUTHIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of the High Court at Nairobi (S. N. Mutuku, J.) delivered on the 28th October 2015 in Nairobi HC.CR No. 4 of 2013)*

**JUDGMENT**

1. This is a first appeal from the High Court where the information before the court was that the appellant, Pharis Kabaiku Mbuthia was charged with the offence of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence were that on 5<sup>th</sup> January 2013, he murdered Mary Kathambi Koome (the deceased).
2. The appellant pleaded not guilty and gave a sworn defence. At the trial, the prosecution called 10 witnesses. Upon considering the evidence, the trial judge found the appellant guilty and convicted him for the offence of murder contrary to the provisions of section 203 as read together with section 204 of the Penal Code and sentenced him to suffer death as by law prescribed.
3. Aggrieved by the trial court's decision, the appellant has brought this appeal, and in his Supplementary Memorandum of Appeal, the appellant raised the following grounds;
  1. That, the learned Judge of the High Court erred in law and fact by failing to find that the appellant was acting in provocation.
  2. That, the learned Judge of the High Court erred in law and fact by failing to find that the appellant was entitled to the right to self- defence in the circumstance.



3. That, the learned Judge erred in law and fact by failing in holding that death penalty was mandatory.
4. The facts of the case that were before the court were that, Bishop Johana Kingori Nguyo, (PW 1), of Assembly Gospel Church in Dandora Phase 5 and chairman of community policing of KCC stated that on 5<sup>th</sup> January 2013 at 7.45 p.m., some people came to his house to inform him that someone had been killed in a house nearby. He went to the house, and when he entered, he saw blood stains. The house was at KCC Village, located on a big plot with many tenants. He opened the curtain and saw the deceased lying on the bed. He then reported the matter to the OCS Buruburu, the Chief and APs camp. He stated that he knew the deceased and her husband, the appellant, and that the Buruburu police had informed him that the appellant had gone to the police station to report that he had killed his wife. The appellant had also taken the police to Umoja 3 where the knife was recovered.
5. In cross examination, he stated that the house where the body of the deceased was found belonged to one Paul Wanjohi whom he did not know and who had escaped because he had been with the deceased; that Paul was found sleeping with Pharis' wife.
6. Michael Chege Muhika, No. 83888 (PW 2) was at Buruburu Police Station on 5<sup>th</sup> January 2013 when PC Stanley Rono, (PW3) called and informed them that there was a murder scene at KCC village. As they were leaving for the scene, one PC Omari who was manning the report office informed them that a person at the desk told him that he had murdered his wife. The person was Pharis Kabaiko, the appellant. They arrested and proceeded to the scene with him at around 8.00 p.m. They entered the house which was in disarray, and the deceased was lying on the bed. She had been stabbed and on the floor was a pool of blood. The appellant told them that her name was Kathambi Koome and that the house belonged to one Paul.
7. The appellant told them that Paul was sleeping with his wife, and that is what led to the murder. He further stated that the knife was at Umoja 3 and they escorted him to recover it. At Umoja 3, a kitchen knife which had a wooden handle and was blood stained was recovered from a room in an incomplete building. He testified that he escorted the appellant to Buruburu police station where he was booked.
8. PC Stanley Rono attached to Buruburu police station corroborated PC Michael Mukiha's evidence. He added that the appellant stated that when he found that his wife was not in the house, he went to look for her. He went to Paul's house, and when he entered, he found Paul in bed with his wife. This angered him and he picked a knife that was in a basin. Paul escaped, and he turned on to his wife and stabbed her. He thereafter threw the knife away at a construction site, and then reported the matter to the police station. The witness produced the kitchen knife as evidence.
9. Dr Joseph Maundu, (PW 4), a police surgeon carried out a mental assessment of the appellant and found him to be mentally stable and fit to stand trial for murder.
10. CIP Johnson Matoke, (PW 5), (OCS) was in charge of Buruburu Police Station on the material day at around 10.00 or 11.00 pm. While at the station, the officer manning the report office one PC Omani called him and informed him that a suspect who told him that he had killed his wife was at the police station. He went to the report office where he was shown the man. The OCS then narrated how the appellant took them to the scene where he saw the body of the deceased lying on the bed with stab wounds, and how the appellant later led them to where they retrieved the knife. They went back to the scene and summoned the scenes of crime who took photographs. The body was moved to city mortuary, under the escort of PC Kyalo Kilundo, (PW 6) where post mortem was conducted by Dr. Oduor.



12. He confirmed that he did not find the owner of the house where the body was found; that he escaped immediately after the incident and that the appellant surrendered to the police station and reported having killed his wife.
13. Elizabeth Waithera Onyego, (PW 7), a Government Analyst received from PC Kyalo Kilundo on 10<sup>th</sup> January 2013; Item "A" blood sample indicated as belonging to Mary Kathambi Koome; Item "B" blood sample indicated as that of Pharis Kabaiku; Item "C" a knife in a khaki envelope; Item "D" a white jacket indicated as belonging to the deceased, Mary Kathambi Koome. The analysis showed that the knife which was moderately stained with blood of human matched with the DNA of the deceased, as did the blood on the jacket.
14. Cpl Stella Eshitemi, (PW 8), also attached to Buruburu police station investigated the murder of the deceased, and PC Edward Koech (PW9) recorded the witness statements.
15. Dr. Kizzy Shako, (PW10), produced the post mortem report on behalf of Dr. Odour. The report stated that upon examination, the doctor noted that the deceased's body had a stab wound across the cheek, right elbow, right side of the chest, right lung had collapsed and the heart had penetration. The doctor was of the opinion that the cause of death was due to chest injury due to penetrating trauma.
16. When placed to his defence, the appellant on oath narrated how he did not go to work on that day as he and his wife, the deceased intended to move houses. He was to look for transport to move the household items to their new residence. In the meantime, the deceased went to see her friend one, Nduta who lived at Umoja Inner Core, while he meets his friend one Mburu. He spent the day with various friends or acquaintances and when he returned to his house, he found the door locked. When he finally accessed the house, he found it empty with all the household items having been removed. He thought this was not unusual since his wife had moved house before. Since his phone battery was low, he decided to go to the house of one Paul Wanjohi, a neighbour. Paul opened the door, and he borrowed his phone to call one Hussein, while Paul charged his phone. After reaching Hussein, the latter told him to call again after 15 minutes. As he waited, he decided to go and buy cigarettes which he decided to smoke outside Paul's house. He went back into Paul's house as the door was open, and that was when he saw his wife in bed with Paul having sex. On seeing the appellant, Paul dressed up quickly and picked a coffee table intending to hit the appellant with it. A struggle ensued.
17. Paul picked a knife and as they struggled over the deceased, who remained in bed all the time, and was subsequently stabbed. Paul escaped and the appellant after pulling the knife from the deceased's chest went to Umoja Phase 3 to his friend Mburu's house. He told Mburu what had happened and asked him to accompany him to Buruburu Police Station to report, but Mburu refused to go with him; that he decided to discard the knife at a construction site and thereafter went to Buruburu Police Station where he reported the murder.
18. Both the appellant and the respondent filed written submissions, and when the appeal came for hearing on a virtual platform, learned counsel Prof. Nandwa appeared for the appellant and submitted that his conduct after the incident clearly indicated that he was confused and showed that he had not comprehended what transpired. Counsel further argued that the evidence pointed to a case of sudden provocation of the appellant; that the evidence showed that after he entered the house a second time, he found the deceased in bed naked and having sex with Paul. Counsel asserted that, "any man finding his wife in this position would have been severely provoked"; that the trial court failed to consider that the appellant was provoked when he stabbed the deceased.
19. Counsel further submitted that the evidence also demonstrated that the appellant faced eminent danger from his assailant, Paul whom he found in bed with his wife; that pursuant to the provocation,



the appellant naturally confronted the man who was having sex with his wife; that, the man picked a knife and charged at the appellant. The two engaged in a struggle over the knife, and while the deceased was trying to intervene between them, she was accidentally stabbed severally. Counsel argued that that the appellant's actions were in self-defense, because the knife belonged to the assailant and the appellant's blood was found on it; that it was the assailant who picked up the knife and attacked the appellant first; that in view of the imminent danger, he sought to defend himself, and accidentally stabbed the deceased.

20. On sentencing, counsel submitted that the trial court misdirected itself in holding that death penalty was mandatory since the Supreme Court case of *Francis Karioko Muruatetu vs Republic* [2017] eKLR had declared the mandatory death sentence as unconstitutional. Counsel prayed that the sentence be set aside.
21. In their submissions, learned counsel for the State, Mr. Muriithi opposed the appeal and submitted that the prosecution proved its case to the required standard. With respect to the defence of provocation, counsel stated that provocation was not founded, since the appellant had sufficient time to cool off after he found his wife with Paul; that he went to Paul's house twice, watched television, and it was the second time that he went to the house that he found his wife in bed with Paul. Counsel stated that the appellant admitted stabbing his wife, and the post-mortem report showed that the deceased was stabbed severally. Counsel asserted that if he had been provoked, the appellant would have only stabbed her once.
22. Counsel further stated that the appellant even went on to show where he had hidden the murder weapon at Umoja Phase III. In conclusion, counsel asserted that the trial court was satisfied that the prosecution witnesses' evidence, together with malice aforethought having been demonstrated in the intentional manner in which the deceased died, proved that the appellant murdered the deceased.
23. We have considered the appeal and the parties' submissions and find that the issues that fall for consideration are; i) whether the prosecution proved its case to the required standards; ii) whether the circumstantial evidence adduced against the appellant was sufficient to sustain his conviction and whether the defence of provocation and self-defence as raised by the appellant was proved.
24. This being a first appeal, this Court should be mindful of its duty as 1<sup>st</sup> appellate court, and well articulate in the case of *Erick Otieno Arum vs Republic* [2006] eKLR as follows:

It is now well settled, that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no court should run away from or play down. In the same way, a court hearing a first appeal (i.e.) a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour and so the first appellate court would give allowance for the same”

25. Bearing in mind the above guidance, we begin with whether the prosecution proved its case to the required standard. In order for the offence of murder to be established, the prosecution must establish three elements.
26. First, the death of the deceased must be established; secondly, that the death of the deceased was caused by an unlawful act or omission by the accused person(s); and finally, that the accused persons



committed the unlawful act or omission with malice aforethought. These ingredients were aptly stated by this Court in *Roba Galma Wario vs Republic* [2015] eKLR thus;

For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant; and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”

27. In the instant case, the fact of the deceased’s death is not in dispute. The post-mortem report of Dr. Oduor produced to evidence by Dr. Kizzy Shako PW 10 indicated that the cause of death a chest injury due to penetrating trauma.
28. As to whether the appellant was responsible for the deceased’s death, the learned judge stated that;

The involvement of the accused in causing the death of the deceased is not in dispute in my view. He has admitted causing it. The only issue in dispute is whether it was intentional or it was an accident as he says.”
29. There is no question that the deceased died having sustained several stab wounds. It is also not in dispute that the appellant admitted to having stabbed his wife, but he claimed to have killed her in self-defence during a struggle with Paul, and whilst in a state of provocation.
30. We have considered the judgment, and it is evident that the trial court did not consider either the question of self-defence or the defence of provocation. As to whether the defence of either self-defence or provocation was applicable to the circumstances of this case requires a re-evaluation of the evidence so as to enable us come to our own independent conclusion.
31. On the defence of self-defence, and whether the pre conditions were established, the case of *Victor Nthiga Kiruthu & another vs R* [2017] eKLR succinctly stated;

The principles that have emerged from these and other authorities are as follows: -

- i. Self-defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one’s family or one’s property from a real or threatened attack. Self-defence is therefore a justification in the application of force recognized by the common law.
- ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.
- iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self-defence. It is sufficient if he apprehends an attack and uses force to prevent it.
- iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.
- v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case”.



32. The appellant here stated that Paul grabbed the knife and tried to attack him, whereupon a struggle ensued. His defence does not however state that the deceased attacked him or in any way sought to cause him harm so as to warrant the violent act towards her. We are therefore not satisfied that in this case, the defence of self-defence was applicable.

33. As concerns the defence of provocation, section 207 of the Penal Code specifies that;

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, is guilty of manslaughter only.”

Section 208 (1) of the *Penal Code* defines “provocation”. It states;

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.”

In the case of *VMK vs Republic* [2015] eKLR this Court discussed the defence of provocation in great detail thus;

Provocation was defined in the case of *Duffy* [1949] 1ALL ER 932 as: -

“Some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind...”

As deduced by this Court in *Peter King'ori Mwangi & 2 others v Republic* [2014] eKLR the above definition requires that two conditions be satisfied for the defence to be made out, namely: -

- a. The “subjective” condition that the accused was actually provoked so as to lose his self-control; and
- b. The “objective” conductivity that a reasonable man would have been so provoked”.

34. What is inherent in the common law definition is that for the defence to be made out, two conditions require to be satisfied. They are; a) The “subjective” condition that the appellant was actually provoked so as to lose his self-control; and b) The “objective” condition that a reasonable man would have done so.

35. In the case of *Elphas Fwambatok vs Republic* [2009] eKLR this Court held;

In our view, once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals.”



36. It was this case, the appellant and his wife were to move out of their house on the material day. The deceased went to visit a friend, and did not return home. Throughout the day, the appellant tried calling his wife, but was unable to reach her. When he returned home much later, he found the door was unlocked, and his wife had moved their belongings. Since his phone battery was low, he decided to go to his neighbour, Paul's house. Paul opened the door, and he entered, and sat to watch television while his phone was charging. He thereafter requested Paul for his phone to call one Hussein, and while waiting for Hussein to call him back, he went outside to smoke. He then stated,

All this time he did not know where Mary was. As I was entering Paul's house I found (sic) door open but there was a door curtain. I did not knock the door. On Paul's bed I saw Mary lying on it having sex with Paul. The first time the curtain was covering from wall to wall and could not see second time I saw Mary in bed with Paul having sex Mary saw me. Paul had not seen me."

37. At that point the evidence shows that the appellant attacked both Paul and the deceased with a knife. In the course of the struggle, the deceased was stabbed in the chest, while Paul managed to escape.

38. It is explicit from a careful examination of the evidence that, the appellant tried and failed to reach his wife on her phone whole day, only to find her naked in bed with one Paul. He was so enraged that he attacked both of them, and ended up stabbing the deceased to death. The facts are clearly demonstrative of a man so severely provoked by trying to reach his wife on phone, and then finding her in a most compromising position in their neighbour's bed. This caused him to lose his senses, lash out and kill her. Based on the evidence, it seems to us that the appellant killed the deceased unintentionally and in a fit of rage. We agree with counsel for the appellant that in those circumstances, the prosecution did not establish the necessary mens rea, under section 206 of the Penal Code, for a conviction of murder to be reached.

39. We accordingly reduce the charge of murder to manslaughter, acquit the appellant of the charge of murder and convict him for the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*. We set aside the death sentence imposed by the trial court, and instead sentence him to the term of imprisonment already served.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of October, 2023.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CI Arb, FCI Arb**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

**DEPUTY REGISTRAR**

