IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 52 OF 2013

BETWEEN

LUCY MUENI MUTAVA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Mombasa (Muya, J.) dated 19th June, 2013

in

***H. C. Cr. C. No. 20 of 2012*)**

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JUDGMENT OF THE COURT

1. The appellant, **Lucy Mueni Mutava**, is before us challenging her conviction and sentence for the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***. The crux of her appeal is hinged on her view point that whilst she inflicted fatal injuries which caused Hassan Swaleh Almasi's (deceased) death she did not do so intentionally. In other words, that one essential ingredient for the offence of murder was not present, that is, *malice aforethought* or *mens rea* on her part. She claimed her actions were actuated by the deceased's provocation and were otherwise in self defence. As such, she contended, her conviction for the offence of murder was not sound in law.

2. Before delving into the merits of the appeal, the brief background to the appeal is that the appellant and the deceased who happened to be a Tanzanian national, were involved in an intimate relationship for over a year prior to his death. It would seem that the deceased would frequent the appellant's house in Kasaani Village within Taita Taveta County. Of relevance, was that on 23rd April, 2012 the appellant killed the deceased by inflicting severe cuts wounds on his body using a panga. As to what led and/or transpired between the two before the attack. This was derived from the appellant's version of events since there was no eye witness account.

3. As per the appellant, on the material day the deceased came home at around 6:00 a.m. and tried to embrace her in front of her daughter which she deemed inappropriate and therefore she would have none of it. The deceased went on to try to push her into the house with the aim of having sexual intercourse but once again she resisted his advances. Consequently, a struggle ensued and according to the appellant, she managed to take hold of a panga which the deceased was armed with and used the same to defend herself. The appellant also stated that prior to the incident, the deceased had on several occasions slaughtered some of the chicken and goats she kept without her consent. Every time she confronted him on that issue, the deceased would beat her up.

4. Upon considering the evidence on record, the trial court (Muya, J.) was convinced that the appellant had acted with *malice aforethought* in killing the deceased and he expressed:-

> ***"They all go to show the accused's singular and determined intention to inflict maximum injuries on the deceased. The Accused herself was not reported or complained of having sustained any injuries during the incident so as to warrant the vicious attack she visited on the deceased. Hers was not a one stab or cut affair but a sustained repetition of several cuts on the deceased's hands, shoulders and neck culminating in severance*** *(sic)* ***of the spinal column and death.***

The accused may be a struggling single mother as she alleges, the deceased could have slaughtered her chicken and goat but this was not provocation enough commensurate with her vicious attack or slaughter of her former lover. There was clearly malice aforethought. She had the intention to cause death of the deceased and she did indeed cause that death.

The defence of provocation is not available to her as the alleged slaughter of her chicken and goat had not happened at the time and there was enough time to cool her passion.

I find the State to have proved its case beyond reasonable doubt and I convict the accused…"

5. It is that decision that is the subject of this appeal wherein the appellant faults the learned Judge for failing to appreciate that: the appellant's actions were as a result of buildup anger caused by the constant harassment by the deceased; the appellant's defence of self defence was not displaced; and that the sentence was manifestly excessive.

6. Mr. Magolo, learned counsel for the appellant, in advancing his client's case, submitted that the appellant was denied the benefit of the defence of self defence. He also argued that the appellant's actions were a reaction to the provocation by the deceased. Further, the deceased's constant harassment caused gradual accumulation of anger in the appellant; and his conduct on the material day was the last straw that broke the camel's back which resulted in the explosion of the built up anger. Counsel urged us to either acquit the appellant or substitute her conviction for the lesser offence of manslaughter. We were also invited to reconsider the appellant's sentence taking into account that she has been in custody since the year 2012.

7. Opposing the appeal, Mr. Isaboke, the learned Senior Prosecution Counsel, argued that the appellant's testimony was clear that on the material day the deceased had pushed her slowly and was not violent. The evidence as a whole demonstrated that the appellant had planned to kill the deceased. For those reasons, he asked us to dismiss the appeal and uphold the appellant's conviction.

8. We have considered the record, submissions by counsel and the law. We are also conscious that this being a first appeal, this Court is tasked with the duty of looking at the facts afresh in a bid to reach its own independent conclusions and findings. See. ***Okeno vs. R [1972] E.A 32***.

9. Provocation is a defence available to a person who by his/her actions causes the death of another and is faced with a charge of murder. Provocation was succinctly defined in the case of **Duffy [1949] I ALL 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 …"

See also ***Section 208*** of the ***Penal Code***. The person relying on the defence simply states that at the time he committed the offence he was under a diminished capacity and acted in the heat of anger or passion. See ***Elphas Fwamba Toili vs. R [2009] eKLR***.

10. It therefore follows that for such a defence to suffice two conditions must be satisfied as deduced by this Court in ***Peter King'ori Mwangi & 2 Others vs.***

R [2014] eKLR namely:-

"The "subjective" condition that the accused was actually provoked so as to lose his self-control; and

The "objective" condition that a reasonable man would have been so provoked."

Was the defence available to the appellant? Whether the appellant was provoked to lose her self-control is a question of fact which is to be determined on the evidence presented. See ***V M K vs. R [2015] eKLR***.

11. In our view, having appraised the evidence on record, we are not satisfied that the appellant could call upon the defence of provocation. Why do we say so? In as much as, the appellant alluded that the deceased used to slaughter her livestock without her consent and whenever she questioned him on the same he resorted to physically assaulting her, there was no evidence to demonstrate that he had either done so on the material day or that it was the catalyst that led to her attack on the deceased. There was nothing to show that her actions on the material day were the cumulative effect of the aforementioned deceased's behavior or in other words that she acted under diminished responsibility.

12. Furthermore, her evidence to the effect that the deceased on the material morning was acting inappropriately in front of her daughter to us could not reasonably have provoked the appellant to savagely attack the deceased in the way she did.

13. Equally, her defence of self defence does not hold water. This is because as was correctly observed by the trial court there was no mention that the deceased had attempted or threatened to attack the appellant with the panga that she alleged he was armed with. In point of fact, in her own testimony, the appellant stated that the deceased

"…he got hold of me and pushed me slowly to my house so as to make love."

Besides, the multiple cut injuries she inflicted on the deceased at the back of his neck which led to the spinal cord being severed, in our view, was way excessive and negated any defence of self defence, if any, in light of the surrounding circumstances. See ***Racho Kuno Hameso vs.***

***R** [2014] eKLR*.

14. Our position is further fortified by the case of ***Victor Nthiga Kiruthu & another vs. R** [2017] eKLR* wherein this Court while discussing self defence 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 one self, one's family or ones 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.*** *[Emphasis added]*

15. All in all, we, like the trial court are satisfied that the appellant's actions and more specifically the vicious nature she attacked the deceased and the resulting injuries are indicative of *malice aforethought* on her part as defined

> under ***Section 206*** of the ***Penal Code***:
>
> ***"206.***
>
> ***Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***
>
> ***a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;…***

Accordingly, we find that the appellant's conviction for the offence of murder was within the confines of the law.

16. Last but not least, on the penalty of twenty years imprisonment meted out on the appellant, we cannot help but note that the trial court addressed its mind on the mitigating factors in line with the Supreme Court's decision in **Francis Karioko Muruatetu & Another vs. R [2017] eKLR**. Therefore, we see no reason to interfere with the same.

17. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Mombasa this 28th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR