IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 8 OF 2018

BETWEEN

SINARAHA BAYA..APPELLANT

AND

REPUBLIC..RESPONDENT

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

at Mombasa (Muya, J.) dated 11th February, 2016

in

***H. C. Cr. C. No. 75 of 2012*)**

****

JUDGMENT OF THE COURT

1. **Sinaraha Baya**, the appellant, is challenging both his conviction and sentence for the offence of manslaughter. This being a first appeal, our role is succinctly set out under ***Section 379*** of the ***Criminal Procedure Code***. We are required to subject the evidence adduced at the trial court to a fresh examination and arrive at our own independent conclusions. Nevertheless, we ought not to lose sight of the fact that unlike the trial court, we did not have the benefit of examining the witnesses. See this Court's decision in ***Okeno vs R* [1972] EA 32**.

2. The salient facts that gave rise to this appeal are that on 12th December, 2012 at around 4:00 p.m. a scuffle arose between the appellant and Dama Katana (the deceased). As to the cause and whether other parties were involved varies with different versions of the events given by the prosecution and the appellant.

3. As per the prosecution, while the deceased and her daughter, Ali Said Fatuma (PW2) were seated outside the house weaving palm fronds (*makuti)* the appellant passed through a foot path that was next to their compound. Apparently, the appellant for no good reason started kicking firewood which had been placed in a heap close to the footpath and a piece of firewood hit Fatuma. The deceased was not happy and expressed the same to the appellant. In turn, the appellant began insulting the deceased and even punched her. It was at that point that the scuffle ensued.

4. Meanwhile, Mwambaje Nguyo (PW1), the deceased's husband, who was inside the house came out and tried to separate the appellant and his wife. According to him, the appellant picked up a piece of wood and hit the deceased twice on the head. Immediately, the deceased fell down and he noticed she was bleeding from her nose as well as her mouth.

5. At first Mwambaje was hesitant to admit that he had also hit the appellant on his head with a bottle but he insisted that he did so only after the appellant struck the deceased. Be that as it may, the deceased was rushed to the hospital but unfortunately she died. Consequently, the appellant was arrested, arraigned in court and charged with the murder of the deceased contrary to ***Section 203*** as read with ***Section 204*** of the ***Penal Code***.

6. The appellant entered a plea of not guilty and gave a sworn statement in his defence. His account was to the effect that, on the material day while he was walking on the foot path, the deceased accused him of stepping on her firewood. She turned aggressive and started hurling insults at him whilst moving closer to him. All of a sudden he was hit on his head with a bottle and upon turning his gaze he saw that it was

Mwambaje. In his words, he stated that he held Mwambaje and that the deceased together with an unknown man who had joined in the scuffle. Subsequently, he picked up a piece of wood from the ground and tried to hit Mwambaje but he ducked and the wood hit the deceased instead.

7. At the end of the trial, the learned Judge (Muya, J.) in a judgment dated 11th February, 2016 was not convinced that the evidence as a whole disclosed an offence of murder thus he expressed:

> ***"There was some confrontation which resulted into the death of the deceased. The accused had picked a piece of wood and hit the deceased with it. The accused was hit with a bottle and sustained injuries. I found no evidence of intention to kill but his act of hitting the deceased could be said to have been*** *(sic)* ***lawful. There*** *(sic)* ***was the offence not proved beyond reasonable doubt*** *(sic)****. I am satisfied that the prosecution has proved the offence of manslaughter …"***

As such, the appellant was convicted for the offence of manslaughter and sentenced to 12 years imprisonment.

8. As we stated in the opening paragraph of this judgment the appellant lodged an appeal before this Court which is anchored on the grounds that the trial court erred by-

> ***i. Failing to properly evaluate the evidence on record.***
>
> ***ii. Convicting the appellant for the offence of manslaughter without evidence to substantiate the same.***
>
> ***iii. Issuing a sentence that was manifestly excessive.***

9. Mr. Odera, learned counsel for the appellant, started off by faulting his client's conviction. As far as he was concerned, it was clear from the impugned judgment that the learned Judge had found that the appellant's act of hitting the deceased was lawful. Therefore, he argued, that the learned Judge should have acquitted the appellant. He went on to state that the learned Judge had also failed to address his mind on the appellant's defence of self defence.

10. In an effort to persuade us that the sentence was excessive, counsel made reference to this Court's decision in ***Walter Marando vs R [1980] eKLR*** and ***Orwochi Arani vs R [1980] eKLR*** which he deemed were comparable to the circumstances of this case. He submitted that the appellant was a first offender and urged us to reduce the sentence.

11. Mr. Isaboke, Senior Prosecution Counsel, opposed the appeal and contended that there was overwhelming evidence to support the appellant's conviction for manslaughter. Elaborating further, he asserted that the learned Judge considered the appellant's defence and besides, the appellant hit the deceased twice which act was excessive thus unlawful.

12. On sentence, Mr. Isaboke's view was that it was lenient taking into account that the prescribed maximum penalty for manslaughter was life imprisonment. In conclusion, he urged us to dismiss the appeal.

13. We have considered the record, submissions by counsel and the law. It is not in dispute that the appellant hit the deceased on the head with a piece of wood. Equally, the postmortem report produced by Dr. Muramba (PW6) disclosed that the deceased died as a result of the injuries inflicted by the blows to her head.

14. Did the evidence establish the offence of manslaughter? We understood the appellant's argument to be that he hit the deceased in self defence hence his actions could not constitute an unlawful act to warrant a conviction for manslaughter.

15. Self defence goes to establish the degree of criminal responsibility to be attached to a person who applies force in the defence of person or property. See ***Section 17*** of the ***Penal Code***. This Court in ***Victor Nthiga Kiruthu & Another vs. R [2017] eKLR*** had the opportunity to evaluate a long line of decisions relating to self defence and surmised the relevant principles 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.***

See also ***Lucy Mueni Mutava vs R [2019] eKLR***.

16. Applying the above principles to the facts of this case, we like the trial court find that there was a confrontation between the appellant and the deceased which began with exchange of insults and escalated to a physical brawl. It is also clear to us that the circumstances were such that the appellant's reaction could have reasonably been motivated by the apprehension of the need for self-preservation. More so, taking into account that during the scuffle he was hit on the head with a bottle and sustained injuries.

17. Nonetheless, we do not think the appellant's act of hitting the deceased twice on the head was reasonable. This is because from the evidence on record, and in particular that of Fatuma and Jerusha Adhiambo Shiondi (PW4), members of the public had separated the appellant and the deceased before he picked up the piece of wood and struck the deceased. Furthermore, there was no evidence that the deceased was armed at the time.

18. As a result, we find that despite the appellant's claim to have been acting in self defence the force he used was excessive hence his actions were unlawful. All in all, the offence of manslaughter had been established as against the appellant. Our position is fortified by ***Selemani vs R*** ***[1963] EA*** wherein the predecessor of this Court at page 446 held:

> ***"In either case if force used is excessive, but if the other elements of self defence are present there may be a conviction for manslaughter."***

Our reading of the impugned judgment reveals that the learned Judge appreciated as much. Perhaps the expression that ***'his act of hitting the deceased could be said to have been lawful'*** in the impugned judgment was a typographical error. More so, taking into account the context of the portion of the judgment we set out in the preceding paragraphs.

19. Last but not least, as regards the sentence that was imposed, we reiterate that sentencing entails exercise of discretion by the trial court and this Court is slow to interfere with the exercise of that discretion, unless it is satisfied that it was not exercised judiciously. See this Court's decision in ***I. P. Veronica Gitahi*** & ***Another vs Republic*** ***[2017] eKLR***. On our part we cannot discern any error in the exercise of the learned Judge's discretion in issuing the sentence in question which is within the confines of the law.

20. Ultimately, we find that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

....

JUDGE OF APPEAL

M. K. KOOME

....

JUDGE OF APPEAL

A. K. MURGOR

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR