IN THE COURT OF APPEAL

AT ELDORET

CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 101 OF 2016

BETWEEN

ELIAS CHEPKIEG KIPKEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court at Eldoret, (G. K. Kimondo, J.) dated 26th April, 2016

in

CRIMINAL CASE NO. 42 OF 2014)

****

JUDGMENT OF THE COURT

[1] The appellant was convicted by the High Court (Kimondo, J.) of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and sentenced to death.

The charge alleged that on the night of 31st May, 2014, the appellant murdered Timothy Kibet Kipkemoi, (deceased).

[2] The appellant was a primary school teacher aged about 56 years at the time of the alleged offence.

The deceased who was aged about 30 years was his son. The appellant was living on his land with his wife Elizabeth. The deceased and his wife of three (3) months, Gladys Chepkosgei, Gladys (PW2), were living on the appellant's land and their house was about 200 metres from the house of the appellant. The deceased and his wife used to milk the appellant's cows and would take meals in the house of the appellant.

[3] On 31st May, 2014, at 7 p.m., Hilary Kipkemboi Kipkoech, (Hilary), a secondary school teacher was at Kaptabut shopping centre when he received a call from the appellant who is his father informing him that he had killed Kibet. He went home and found the appellant inside his house. The body of the deceased was lying on the floor in the bedroom with injuries on the head. He screamed and neighbours went to the scene. The incident was reported to John Kiplangat (PW5), the Assistant Chief of the area who went to the scene. He found the body of the deceased lying in the bedroom. It had a cut would on the back of the head. The appellant was not there.

He called the police but as it was raining and the condition of the road was not good the police could not come. He closed the door and remained in the neighbourhood. On the following day, William Ekiru, (PW6), a police officer from Kapsowar police station went to the scene. He found the body of the deceased in the house of the appellant lying in a pool of blood next to a bed.

He recovered a panga in the kitchen and was informed by Hillary, (PW1), that the panga belonged to the appellant. He took the body to the mortuary. The appellant was arrested by the Assistant Chief from a neighbour's house and taken to the police station. The wife of the appellant, Elizabeth, went to the scene when the police arrived. She had been beaten by members of public and blood was oozing from her head. Police also took her to the hospital.

[4] On 4th June, 2014, Dr. Wilfred Kimosop, (PW4), of Kapsowar Hospital performed a post mortem on the body of the deceased. The deceased had a deep cut wound on the head temporal area measuring 15 cm long and 5 cm deep. He had also a deep cut wound in the occipital area measuring 20 cm long and 6 cm deep.

The brain tissue had spilled out. The bones of the skull had broken into several pieces and the deceased had suffered severe brain larceration. The deceased had massive bleeding between the skull and the brain.

In his opinion, the cause of death was from severe brain injury as a result of cuts. The Doctor also examined the appellant. He had a healed bruise on the face and nose caused by a blunt object.

[5] The appellant testified that on the material day he returned to his home from the shopping centre at about 6 p.m. and rested on his bed. He continued:

> ***"At about 7 p.m. I heard some noise. I woke up. I heard the door being banged. Someone came in and said "today is your day." He hit the bedroom door. He said "Leo ni leo". I pushed him. He had a panga. When I pushed him, he fell. It was my son. He lives half a kilometre from my house. I ran outside. I think he must have fallen on the panga. He was drunk… I did not kill him. All I did was push him in self defence."***

In his evidence in cross-examination he testified further;

> ***"I pushed him to save myself. I am not sure whether it is him or a panga which fell first. The panga belongs to the household."***

[6] After considering and evaluating the evidence the learned trial Judge made a finding at para 25 of the judgment thus:

> ***"I have reached the inescapable conclusion that the accused cut the deceased twice with a panga and the claim that the deceased fell on a panga is a poor deception. The amount of force used against the deceased, who was drunk was excessive and could not amount to self defence in the circumstances."***

Later at para 29, the learned Judge said in part:

> ***…there was no credible evidence of provocation or that he acted in self defence. Mental examination by PW4 confirmed that the accused had a sound mind. He cut the deceased twice on the head with so much force that his skull bones disintegrated into several pieces. The cut wounds are consistent with trauma from a panga. In a synopsis, there was no legal justification to the attack upon the deceased."***

[7] In the third and fourth grounds of appeal, the appellant states that the Judge erred in law and in fact in relying on purely circumstantial evidence to convict the appellant and also in attributing the death of the deceased to the appellant when the High Court was in a blind spot.

In support of the two grounds of appeal, Dr. Chebii the learned counsel for the appellant submitted that no witness saw the circumstances under which the killing occurred and that the statement of the appellant to Hillary was denied by the appellant was also not corroborated. On the other hand, B. A. Oduor the Prosecution Counsel submitted that the circumstantial evidence irrestibly pointed at the appellant as the one who killed the deceased.

The learned Judge considered this aspect of the case, appreciated that the prosecution case was dependent on circumstantial evidence and made a finding that the entire corpus of circumstantial evidence pointed irrestitably and exclusively to the culpability of the appellant.

[8] The body of the deceased was found in the bedroom of the house of the appellant. The appellant's defence was that he was resting on the bed when the deceased, hit the bedroom door and entered in the bedroom armed with a panga. He also said that he pushed the deceased in self-defence and that he thought that the deceased must have fallen on the panga.

He did not say that his wife Elizabeth was present or took any part. Hillary testified that when he went to the appellant's house he found the appellant there and the body of the deceased was lying in the bedroom with cuts on the head. According to him, there was no one else. In addition, the appellant testified that he was alone in the bedroom. The evidence leaves no reasonable doubt that the appellant is the only person who had an encounter with the deceased.

In addition, there was ample evidence that deceased had a cut wound on the head. Doctor Wilfred Kimosop described the full extent of the injury. The deceased sustained two deep cut wounds on the head causing severe brain larceration, shuttering the bones of the skull and spillage of the brain tissue. There was massive bleeding between the skull and the brain. The Doctor formed the opinion that the cause of death was severe brain injury as a result of the cuts. The trial Judge came to the conclusion that the appellant cut the deceased twice with a panga and that the claim by the appellant that the deceased fell on a panga was a poor deception.

We have re-considered and re-evaluated the evidence and are satisfied, like the trial Judge, that the circumstantial evidence was strong, incompatible with the innocence of the appellant and incapable of explanation upon any other hypothesis other than that it is the appellant who killed the deceased by cutting him on the head with a panga causing his instant death.

[9] The appellant also faults the conviction for murder on the ground that the prosecution did not prove the existence of *mens rea*. Dr. Chebii submitted that Hillary testified that appellant had no prior plan to kill the deceased, that appellant had a good relationship with the deceased and that previous disagreements were minor and normal family differences.

The trial Judge relied on the provisions of section 206 of the Penal Code which provides that malice aforethought is deemed to be established by evidence proving, among other things, an intention to cause the death of or to do grievous harm to any person or knowledge

that the act or omission causing death will probably cause death or grievous harm to some person. The learned Judge made a finding that cutting the deceased twice with a panga shuttering his skull was an unlawful act. Section 206 of the Penal Code should be read together with section 207 of the Penal Code which 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 his sudden provocation as herein defined, and before there is time for his passion to cool, he is guilty of manslaughter only."**

So, the fact that the appellant is deemed in law to have intended to cause grievous harm to the deceased or had knowledge that his act would cause grievous harm to the deceased did not deprive him of the defence of provocation if established.

The trial judge made a finding of fact that there was no love lost between the deceased and the appellant and that there was no evidence of provocation. There was evidence particularly from John Kiplagat - the Assistant Chief, that the deceased had been a nuisance to the appellant on several occasions.

The appellant however, denied making any complaint to the Assistant Chief against the deceased and added that he disagreed with the deceased when the deceased abandoned school. Hillary testified that the deceased used to make minor complaints against the appellant.

[10] The prosecution did not prove that there was any recent disagreement or confrontation between the deceased and the appellant or that the killing was premeditated. On the contrary, the evidence proved that the deceased and the appellant were at the material time in good terms. The appellant had allocated land to the deceased. The deceased and his wife were living on a portion of the appellant's land and used to take meals in the house of the appellant. The deceased's wife also used to help the appellant to milk his cows. The deceased's wife Gladys, testified that they all had good relations. The evidence of the appellant that the deceased was drunk at the material time was supported by Gladys and Chebitok Maiyo (PW 3).

The deceased was killed in the bedroom of the appellant.

By section 119 of the Evidence Act, the court may presume the existence of any fact which it thinks likely to have happened regard being had amongst others to the common course of natural events, human conduct in their application to the facts of a particular case. It is not natural that a father would kill his own child in the normal course of things.

The only evidence to explain the behaviour of the appellant is from the appellant himself, which we find credible, that the deceased confronted him in his house and threatened to cause harm to him which in the circumstances amount to provocation thereby reducing the offence of murder to manslaughter.

[11] Lastly, the appellant states that the learned judge erred in not finding that he acted in self defence. It is submitted that the appellant was attacked in his own house and that he was entitled to defend himself. It is further submitted that the essential element of self-defence is that an accused believed that he was being attacked or in imminent danger of being attacked but that his belief should be based on reasonable grounds.

However, it is also an essential element of the defence of self-defence that it must be shown by an accused or by evidence from the prosecution that what he did was no more than was necessary for his own defence in the circumstances as he believed them to exist.

In **DPP v Morgan [1975] 2 ALL ER 347** cited by the appellant's counsel, Lord Simon Glaisdale of the House of Lords, said in part at page 366 party c – d in relation to common law doctrine of self-defence:

> **"Once the prosecution has discharged the burden of proving an *actus reus* of assault and *(by inference therefrom or extrinsically)* the necessary *mens rea,* the evidential burden shifts to the accused. He can discharge it by raising a case for the consideration of the jury that he believed in a state of affairs whereby the actus proved by the prosecution would not be *reus*. He may do this by showing that his conduct towards the victim was prompted by his belief that the victim was about to attack him and that what he did was no more than was necessary for his own defence in the circumstances as he believed them to exist.**
>
> **But it is clear law that, in order to establish a defence in such circumstances, his belief must be based on reasonable grounds".**

That principle is entrenched in Sections 10 (1) of the Penal Code and Section 111 of the Evidence Act.

Section 10(1) of the Penal Code provides:

> **"A person who does or omits to do any act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist".**

Further **section 111** of the **Evidence Act** casts evidential burden on an accused person in certain cases subject to the provisos thereto. That section applies to the defences raised by the appellant.

[12] In this case, although the circumstances described by the appellant, which is the only evidence, may have honestly and reasonably led

him to believe that the deceased was about to attack him, the evidence of the appellant that the deceased was armed with a panga is not supported by the circumstantial evidence as there was no evidence that a panga was found where the deceased was lying.

Moreover, having regard to the circumstances of the case including that the deceased was drunk, that the appellant sustained minor injuries, that the appellant used a panga, the severity of the injuries, we agree with the finding of the trial judge that the force used by the appellant was excessive and disentitled the appellant to a defence of self defence.

[13] As regards sentence, the appellant was in custody for about one year before he was released on bail. He was sentenced on 20th April, 2016 and has been in custody for nearly 2 years. The total period of incarceration is about three years. The appellant was a teacher in a public school and a responsible parent who has educated his children.

This is family tragedy which no doubt has caused psychological trauma to the appellant. He has also suffered or likely to suffer stigma for his unfortunate action. All these circumstances are relevant in assessing the appropriate sentence.

[14] For the foregoing reasons, the appeal is allowed. The conviction for murder is quashed and the sentence of death is set aside. In substitution therefore, a conviction for manslaughter contrary to section 201(1) as read with section 205 of the Penal Code is entered.

The appellant is sentenced to 7 years imprisonment for manslaughter, the sentence to take effect from the date of conviction.

DATED and Delivered at Eldoret this 1st day of March, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR