



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 86 OF 2014

BETWEEN

HENRY OKELLO DAMBE APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu, (H. K. Chemitei, J.) dated 26th March, 2014

in

H.C.CR. C. NO. 14 OF 2010)

JUDGMENT OF THE COURT

1. The appellant, Henry Okello Dambe, a senior citizen born in 1935, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 10th April 2010 at Omia Diere sub-Location, East Asembo Location, Rarieda District of the then Nyanza Province, he murdered Gordon Okiri Ondiso. He was tried by the High Court of Kenya at Kisumu and convicted in a judgment delivered on 26th March 2014 and sentenced to death.
2. He has appealed against the conviction and sentence on the grounds that the offence of murder was not proved to the required standard and that there was evidence of provocation, which the trial court failed to take into consideration.
3. Learned counsel Mr. K. O. K'owinoh submitted that the appellant should not have been convicted for the offence of murder as there was sufficient evidence of provocation; that the deceased insulted the appellant by referring to him as a dog; that a fight then ensued between the deceased and the appellant; that the deceased died from an injury to the chest; that there was no evidence the appellant had a knife and an inference should be drawn that the deceased was in possession of the knife; that the only weapon used by the appellant was his walking stick and the prosecution did not establish malice aforethought; and that the appellant should at the worst have been convicted of the offence of manslaughter.
4. Mr. E. Ketoo, learned Prosecution Counsel, conceded that there was evidence of provocation and that

the appellant should therefore have been convicted of the offence of manslaughter and not for murder.

5. We have considered the appeal and the submissions by learned counsel. The only issue for consideration is whether there was evidence of provocation and if so, whether the trial court failed to have regard to the same in convicting the appellant.

6. Section 207 of the Penal Code provides 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. ”

7. Section 208(1) defines provocation in the following terms:

“The term 'provocation' means and includes, except 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 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 ...”

8. Interpreting those provisions, this Court in Peter King'ori Mwangi & 2 others v Republic [2014] eKLR stated that:

“...Provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. ”

9. The Court cited the case of Duffy [1949] 1 ALL ER 932, and went on to say that two conditions should be satisfied for provocation to be established. The first condition that is "subjective" is that the accused was actually provoked so as to lose his self-control; and the second condition, which is "objective" is that a reasonable man would have done so; and that whether the accused was provoked to lose his self- control is a question of fact which the trial court has to determine based on the evidence.

10. What then was the evidence before the trial court?

11. Beth Atieno Bori, (PW1), stated that the deceased was her brother in law and that he inherited her after her husband died; that the appellant is also her brother in law as he is a brother to the deceased. She recalled that on 10th April 2010 at about 8.00pm, she was with the deceased at the homestead of her co-wife, Roselyne Aketch Oloo, (PW2), when a dog started barking; that the deceased remarked that the dog was backing because the appellant had arrived; that the appellant had in the meanwhile entered the house and enquired who was calling his name; that the appellant then attacked the deceased, struck him twice on the head with his “*Bokora* ” (walking stick) remarking that the deceased did not respect him; that the deceased picked a stick to hit the appellant, tripped and fell into a ditch where a fight ensued.

12. As the fighting went on, PW1 and PW2 screamed for help. Collins Onyango Oloo, (PW3), a son of PW2 who was also present went into the ditch and emerged a few minutes later shouting that the appellant had killed the deceased. After confirming the deceased was dead, PW1 screamed; the appellant confronted her, held her and pushed her to the ground; that she then felt a stab on her left side and could not remember what happened thereafter as she found herself in Bondo District Hospital where she was admitted as an inpatient for one week for treatment.

13. The evidence of PW2, Roselyne Aketch Oloo, substantially corroborated that of PW1. She stated that

she was at her homestead on 10th April 2010 at about 8.00pm with PW1 and the deceased conversing outside on her verandah; that shortly after the appellant arrived and a dog started barking; that the deceased called out the name of the appellant who then claimed that the deceased had called him a dog; that the appellant then hit the deceased twice on the head with his walking stick; that the deceased then rose, picked up a stick with which, in retaliation, he hit the appellant; and that the appellant and the deceased then retreated to the back of the house and PW2 assumed they had both left the scene.

14. Later at about 10.00 pm, PW2 went on to say; the appellant returned and started beating PW1; Collins Onyango Oloo, (PW3), then intervened and pulled the appellant away from PW1; PW2 then screamed for help and neighbours came to the scene after which the appellant fled from the scene; that after the neighbours arrived, the body of the deceased was found behind the house. A neighbour then went to fetch the appellant in his house; and the police were called in. According to PW2, she did not know what caused the death of the deceased but suspected the appellant killed him.

15. Collins Onyango Oloo, (PW3), a son of PW2 and a nephew to the deceased, stated that on 10th April 2010 at about 8.30 pm he was at home in the company of his mother PW2 and PW1. They were sitting outside the house when the appellant arrived and a dog barked; that the deceased then called out the appellant's name; that the appellant then remarked: "*why are you calling me a dog?*" and attacked the deceased and hit him twice on the head with his walking stick; that the deceased then stood up, picked a stick to hit the appellant; that the appellant and the deceased went to the back of the house near the kitchen; that PW3 followed them to the back of the house and there, he found the appellant on top of the deceased. To separate them, he pulled the appellant away from the deceased. The deceased was bleeding profusely. He did not see the appellant with a sharp object.

16. PW3 stated further that after separating the appellant from the deceased, he had assumed the appellant had left the scene only to find that the appellant had gone to confront PW1; that PW3 then picked up a stick and hit the appellant to restrain him after which the appellant released PW1 who "cried that she had been stabbed." PW3 then went to the house and found the deceased lying there bleeding and "in his last breathe;" that by the time neighbours arrived the deceased was dead; that PW3 was one of those who went to report to the chief and found the police had already been informed.

17. Willis Onyango Mbori, PW4, was in his house with his wife on 10th April 2010 at about 11.00 pm when he heard screams. A few minutes later, his brother arrived with the news that the appellant had killed the deceased. PW4 rushed to the scene where he found the deceased lying down. He also found PW1 lying down unconscious. He telephoned the police and thereafter fetched the appellant from his house and took him back to the scene from where the police took him away.

18. Elly Oloo Oyoo, PW5, a cousin to the deceased, identified the deceased's body at the mortuary for purposes of post mortem. Joram Okumu Ondiso, PW7, also identified the deceased's body for purposes of the post mortem and was present when the post mortem was conducted.

19. Enock Misula, PW6, a village elder was present on 10th April 2010 at about 11pm when the police searched the scene of crime and recovered a twisted metallic walking stick and when the appellant led the police to his house where a knife was found.

20. PW9 was Chief Inspector John Otikri, the officer commanding station Aram Police Station. Whilst at the police station on 10th April 2010, he received a call that somebody had been murdered. He mobilized his officers including Corporal Eliud Ngane, PW8, and went to the scene where the alleged murder had taken place and found the deceased lying dead. The body was outside the home of PW2 behind the house. They observed the deceased had injuries to the head and blood was oozing out of the deceased's mouth and nose. Beside the deceased "was his wife lying down in great pain she had an injury on her right rib." They also found the appellant under arrest and in the custody of a village elder.

21. Enquiries by PW9 revealed that a quarrel had taken place between the appellant and the deceased after the appellant apparently enquired from the deceased why he had called him a dog; that he

interrogated the appellant; that the appellant led them to his house where he said he recovered a kitchen knife that had been wrapped in a cloth; that he also recovered a blood stained shirt; and that he then arrested the appellant. They took the body of the deceased to the mortuary while the wife was taken to Lwak Mission Hospital. PW8 produced the appellant's walking stick, the kitchen knife that was recovered from the appellant's house, and the blood stained shirt as exhibits.

22. The last prosecution witness was Dr. Joan Ahero Agilo, a medical officer at Bondo District Hospital. She produced a postmortem report dated 19th April 2010 in respect of the deceased on behalf of the maker, Dr. Peter Oyiro. In that report, Dr. Oyiro indicated that the body of the deceased had a superficial cut on the left shoulder; cut on the occipital area; deep cut on the left chest in between the ribs and was oozing blood. In Dr. Oyiro's opinion, the deceased died of severe chest/lung injury stab. The witness opined that a sharp and blunt object caused the injury.

23. In his defence, the appellant in his sworn testimony stated that he was born in 1935 and was aged 78 years; that he knew the deceased as his cousin and a neighbour; that on 10th April 2010 at about midnight he was asleep at his home when his neighbour, Willis Onyango Mbori, (PW4), to whom he referred by the name Omwande Mbori, knocked on his door and entered his house and informed him that the deceased had died; that PW4 asked him to accompany him to the homestead; that he took his walking stick and PW4 held his hand as he, the appellant, does not see properly, and together they went to the deceased's homestead where they found a crowd including the police; that he was introduced to the police as an elder; that he was escorted back to his house where a search was conducted and a knife pulled out of his cutlery and taken away.

24. The appellant testified further that that he was taken to the police station where he was asked to remove his clothes; that he stayed at the police station for 10 days where the police assaulted him, before subsequently being charged with an offence he knew nothing about. He added that he was being framed on account of "fitina" (grudge) by reason of having reported the sale and consumption of alcohol and bhang at the home of PW2.

25. After reviewing the evidence, the trial court was satisfied that the prosecution had "established that indeed it is the [appellant] and not anybody else who assaulted the deceased" and that the deceased died from the injuries sustained in that attack. In the Judge's words:

"The prosecution witnesses were consistent in their evidence that it was the accused who came and assaulted the deceased.

From the evidence on record it appears that the deceased was attacked when he said that the dog was barking since the accused had arrived. From this remark the accused thought that the deceased had called him a dog.

I do not find anywhere (sic) to suggest that the witnesses were mistaken in identifying the attacker. All of them saw the accused attacking the deceased with a walking stick. No one, saw the accused with a knife. However, the attack on PW1 which was not disputed by the accused was by a knife or a sharp object. "

26. In the Judge's view, the appellant's defence "dwelt on the fact that he was absent from the scene" but was displaced by the prosecution evidence and neither did the appellant "establish any provocation."

27. Against that backdrop, the appellant lodged the present appeal.

Analysis and determination

28. As already indicated, the appellant has challenged his conviction on the principal ground that the learned Judge failed to consider that he was provoked.

29. Although, the appellant did not, in his defence, assert that he was provoked, it was nonetheless

incumbent upon the trial court to consider the matter in light of the evidence tendered by the prosecution. See **Gunga Baya & Another v Republic [2015] eKLR**.

30. Having regard to the circumstances of the present case, it seems to us that the appellant apprehended or perceived, albeit mistakenly, that the deceased had insulted him by calling him a dog and in the heat of the moment immediately reacted by striking the deceased with his walking stick on the head. A fight ensued and the two retreated to the back of PW2's house where they continued to fight until PW3's pulled the appellant from the top of the deceased. Based on the evidence it seems to us that the appellant killed the deceased unintentionally. 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, required for a conviction of murder. The words of this Court in **Mugoma & Another v Republic [2003] eKLR** that "*the burden was on the prosecution to prove malice aforethought and that burden was not discharged*" ring true in this case.

31. 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. We sentence the appellant to imprisonment for a term of 5 years from 26th March 2014.

Orders accordingly.

Dated and delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR