



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CRIMINAL APPEAL NO. 65 OF 2015**

**BETWEEN**

**HUDSON OKONDA OCHOLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 22<sup>nd</sup> April 2015***

***in***

***H.C.C.R.C. NO. 27 OF 2011)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The deceased, **Duncan Irungu Wambui** or **Ali Irungu** – following his conversion to Islam, also known by the nickname **“Chacha”** was part of the support team travelling with Congo United Football Club in the evening of 20<sup>th</sup> October 2011 to Nairobi to meet City Stars Football Club in a weekend league match. He met his death in the most unfortunate circumstances following a minor altercation, which degenerated into a fight and resulted in his death. The van hired to transport the players to Nairobi developed a mechanical problem and stalled at Makupa in Mombasa County, blocking the road. A bus christened **“Mash”** was among the vehicles blocked by the stalled van. Its loader, the appellant, **Hudson Okonda Ochola** also known as **“Kushi”** approached the driver of the van and those who were pushing it, including the deceased and, with supercilious contempt, demanded that the van be removed from the road forthwith for the bus to pass. He is reported to have demanded that the **“mkebe”** (a junk) be pushed out of the road and followed this with insults like **“k\*\*\*a mama zenu, masenge nyinyi, toeni hilo banda barabarani”**. A physical exchange then ensued. It is in evidence that the deceased, being infuriated by the insults, followed the appellant to the nearby bus offices where he had walked to still insulting the team, and both engaged each other in a physical fight. The deceased pushed the appellant, sending him sprawling to the ground. When he got up, the appellant who had in his hand, what is referred to in common parlance, and in the proceedings as key boot, a sharp pointed, T-shaped metal, used for opening the luggage compartment of a bus, directed the sharp end of the key to the deceased and stabbed him in the eye. That marked the end of the deceased person’s life on earth, as efforts by doctors in Tanza Clinic and the Coast General Hospital to stop the heavy bleeding from the injury, were in vain as he passed on

three hours later. The appellant who had in the meantime been arrested and booked at the police station with the offence of assault was, the next day charged with murder contrary to **section 203** as read with **section 204** of the Penal Code.

At the trial the appellant admitted that there was exchange of bitter words and insults and that he had the key boot but denied assaulting the deceased. Instead, he insisted, the deceased and four of his colleagues attacked him with kicks and fists.

The trial court (**Odero, J.**) found the offence of murder proved; that there was proof of death with direct evidence; that it was caused by the stabbing by the appellant who had the requisite intention to cause the death of the deceased or at the very least cause him grievous harm. Upon that conclusion the learned Judge convicted the appellant and sentenced him to death. That aggrieved the appellant who brings this appeal to challenge both the conviction and sentence.

Initially the appellant filed his own grounds of appeal before his family engaged **Opulu & Company Advocates** who in turn filed a memorandum of appeal. Thereafter, perhaps because this fact was unknown to the Deputy Registrar, **Miss Otieno** was appointed by the Court on a *pro bono* basis and filed supplementary grounds of appeal containing three grounds. The appellant elected to have **Miss Otieno** argue the appeal, as in any case **Mr. Opulu** did not turn up on the hearing day.

According to Miss Otieno, the circumstances leading to the attack and death of the deceased did not disclose proof beyond reasonable doubt of the offence of murder; that the learned trial Judge erred in rejecting the evidence of provocation; and that the sentence was extremely harsh, punitive and excessive. Counsel submitted that there was no intention to kill the deceased; that the key boot was already in the appellant's hand at the time the fight broke out; that it was the deceased who first pushed the appellant; that the deceased, who was burly and of large body build together with his colleagues overpowered the appellant who only acted in the heat of the moment; and that there was only a single blow to the deceased. Counsel urged us, on those grounds, to allow the appeal, substitute the conviction of murder with one of manslaughter and to set aside the death sentence and in place thereof impose an imprisonment term that would take into consideration the period the appellant has been incarcerated.

The appeal was conceded by **Mr. Monda**, learned counsel for the respondent who agreed with the submissions of Miss Otieno that malice aforethought was not proved beyond (any) reasonable doubt; that the appellant did not arm himself with the key boot for the purpose of attack, but had it in the course and in the nature of his work. He urged us in considering the appropriate sentence, to bear in mind the fact that an innocent life was lost.

The fact that the appeal is not opposed, this Court has stated in many decisions, does not preclude the court from itself being satisfied on the grounds upon which the appeal is conceded. See **Samuel Kimenju Mbuti & 2 others v R** Cr. Appeal No. 44 of 2014. We similarly bear in mind our primary role on a first appeal to re evaluate and reconsider the evidence on record in order to arrive at our own independent conclusion, making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See **Mwangi v R** (20040 2 KLR 28).

The offence of murder under section 203 of the Penal Code is committed when there is proof beyond reasonable doubt that a person, “... ***who of malice aforethought causes death of another person by an unlawful act or omission***” (our emphasis). In contrast, where a “... ***person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter***” (our emphasis). See **section 202** of the Penal Code. The distinction is that while in murder the requisite intention to cause death or do grievous harm to the victim or any other person must be established, no such intention need to be established for manslaughter. The act or omission leading to death is without deliberation or premeditation. Manslaughter will normally be available in cases where the accused person relies on the defence of insanity, provocation or self-defence (or defence of property), respectively under **sections 12, 208 and 17** of Penal Code. Miss Otieno relied on the defence of provocation and **Mr. Monda** took the cue, both submitting that the appellant acted in the heat of the moment.

An act will qualify to be provocative if it is:-

***“...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 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”.*** (our emphasis)

See **Section 208 (1)** of the Penal Code.

The appellant denied hitting back at the deceased or any of those who attacked him. From the surrounding circumstances we are not in doubt, that indeed the fatal blow was delivered by the appellant. Did the situation in which the appellant find himself justify the use of force of the kind he employed to repel it? In the ancient case of **Alipayo Lol S/o Acuda v R**, E.A.C.A. Crim. Appeal No. 121 of 1959, the Court stated the law on manslaughter as follows;

***“A killing may be manslaughter inspite of an intention to kill if the intention was formed and executed in the heat of passion. For the defence of provocation reduces to manslaughter what would otherwise be murder, that is to say, a killing with malice aforethought, one kind of malice aforethought being an intention to kill ...”***

It was explained that the appellant was a loader, receiving, loading and off-loading passengers’ luggage. For the discharge of this duty he had the use of a key boot. When the verbal and physical exchanges began he already had in his hand the key boot and some documents which he was delivering in their offices in Makupa area. There is evidence that the deceased pushed him and he fell down, prompting physical fight, in the process of which he stabbed the deceased. The deceased went down bleeding profusely from the right eye. Although the deceased had been subdued, the appellant did not add further insult to the single injury. He appeared surprised at the turn of events, according to witnesses. He did not flee and was arrested on the spot. Medical evidence pointed to a single puncture wound below the right eye penetrating through interior part of the eye ball.

Had the learned Judge analysed the evidence before her it would have been clear to her that this was not a premeditated action and that the offence committed was not murder but manslaughter. We are persuaded that this appeal, for the reasons explained hereinabove, has substance. We allow it with the orders that the appellant’s conviction for the offence of murder is quashed and replaced with one of manslaughter and death sentence imposed is set aside and in place thereof the appellant is sentenced to 12 years imprisonment to run from the date of conviction by the trial court. We so order.

***Dated and delivered at Malindi this 29<sup>th</sup> day of July, 2016***

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**