IN THE COURT OF APPEAL

AT MOMBASA

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

Criminal Appeal No. 118 Of 2014

Between

V M K……..……..……APPELLANT

And

Republic ………..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero,J.) dated 27th November, 2012 in H.C. *CR.A. No. 1 of 2011)*

JUDGMENT OF THE COURT

On the morning of 3rd January, 2011, in Kwale County, the appellant came home from a journey to news that his wife had been raped and robbed of a suitcase full of clothes the previous night. She had identified the culprit as one **Andrew Masai Mongo** alias **Andrea** (deceased); a neighbour. The appellant promptly reported the matter to **Rashid Hamisi Mwanyikezi** (PW4) who was the village chairman and later to **APC Bosco Mulwa** (PW5) of Jengo Patrol Base, who advised him to avail his wife and pay Kshs.200/- for purposes of having a P3 form processed. He thus decided to go back home to get the funds and fetch his wife.

On arrival however, he found the deceased ensconced in his homestead with a friend, **Mugandi Kombo Mwamosa** (PW2). He ordered them to leave but when they failed to heed his request, a fight ensued between him and the deceased, in the course of which the deceased was stabbed to death. The appellant then fled from the scene on his bicycle telling PW2 that he was going to report to the police what had just transpired. He never did so. Instead he was traced to Kwa Njuguna near the Tanzania border where he was arrested by **Mwinyiheri Rashid** (PW3) a local Assistant Chief and handed over to **CPL Henry Gituma** (PW8) of Lunga Lunga Police Station. With investigations concluded, the appellant was thereafter charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code.

The appellant denied the information and the case proceeded to full trial before **Odero, J.,** who upon hearing the prosecution's eight witnesses, ruled that the appellant had a case to answer and placed him on his defence. In an unsworn statement of defence, the appellant denied ever having stabbed the deceased. To the contrary, the appellant contended that when he returned home from the police station, he found the deceased laying in wait for him, having got wind of the report the appellant had lodged against him with the police; whereupon the deceased attacked him and in the course of the ensuing struggle, was stabbed to death.

Unconvinced by the appellant’s version of events, the learned Judge found him guilty of murder and sentenced him to 30 years imprisonment. It is in respect of that conviction and sentence that the appellant now appeals to this Court. He contends that no evidence was adduced to show that he had the *mens rea* or guilty mind to kill the deceased and that as a result, his conviction for murder cannot stand and urged us to reduce the information of murder to one of manslaughter, convict and sentence him as appropriate.

In response to the appeal, the prosecution lodged a notice of cross appeal, seeking the imposition of the sentence of death as provided by the law, in lieu of the 30 year sentence meted out by the learned judge as aforesaid. However, this cross appeal was abandoned by the respondent at the hearing as we shall see shortly.

At the hearing of the appeal, the appellant through his learned counsel **Ms. Otieno**, submitted that not only was *mens rea* never proved, but that the same was in any event negated by the appellant’s provocation by the deceased, that the rape and robbery committed on the appellant’s wife by the deceased constituted provocation and that the learned judge erred in failing to find as much.

In a departure from the cross appeal, **Mr. Musyoki,** Senior Principal Prosecution Counsel conceded the appeal on conviction of the appellant for the offence of murder. He however urged us to substitute it with a conviction for manslaughter, while maintaining however, that the 30 year prison sentence imposed was proper and ought not to be interfered with. He submitted further that there existed no mitigating circumstances that would call for leniency towards the appellant; particularly given that he had run after the deceased and stabbed him in the back despite the fact that the deceased had agreed to leave.

This being a first appeal, this court is tasked with a duty of looking at the facts afresh in a bid to reach its own independent conclusions and findings (see. **Okeno v. Republic [1972] E.A 32)**. It matters not that the State has conceded to the appeal in respect of the conviction for the offence charged and that the appellant is willing to take that bait.

From the aforesaid rival submissions, the appellant and respondent both agree on one thing- that the facts of the case supported a case for manslaughter and not murder**. Mr. Musyoki** for the State indeed conceded that the conviction for murder was erroneous and sought to have the same substituted for manslaughter.

Similarly, the appellant has no quarrel with the conviction, save to state that it ought to have been for manslaughter as opposed to murder. So was this case of murder or manslaughter?

To sustain an information of murder, however, the prosecution’s case must satisfy the twin requirements of *actus reus* or guilty act and *mens rea* and or malice aforethought. Whereas there is no dispute that the deceased died at the appellant’s hands, the question is what was the appellant’s state of mind at the time? According to the appellant, the deceased had raped his wife and robbed her of a suit case of clothes the previous night. Accordingly, it is the appellant’s case that this served to provoke him into killing the deceased.

Provocation was 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 …”***

As deduced by this Court in **Peter King’ori Mwangi & 2 others v Republic [2014] eKLR**, the above definition requires that two conditions be satisfied for the defence to be made out, namely:-

a. ***The “subjective” condition that the accused was actually provoked so as to lose his self-control;*** *and*
b. ***The “objective” condition that a reasonable man would have been so provoked.***

Indeed, **Section 209(1)** of the Penal Code also defines "provocation" to mean *and include '…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 …'* 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 presented. See **Criminal Law by J.C. Smith** and **Brian Hogan, 7th Edn. Pg.352.**

*Looking at the facts of this case, **PW1, PW3, PW4** & **PW5** attested to the appellant having reported a theft and the rape of his wife, one **CN**, with a P3 Form being issued to that effect. The P3 report confirmed sexual assault having been committed on the said CN. While producing the report in evidence, **PW1** appeared to be ill informed about the circumstances surrounding the rape. Nonetheless, **PW4** confirmed that it is not the first time such allegations of '…..petty theft and moving with other mens' wives' were being levelled against the deceased. Coupled with this, is the testimony of **PW2,** the sole eye witness to the crime, who stated that he and the deceased had gone to the appellant's home and that when he saw them, the appellant was incensed and repeatedly ordered the deceased to leave his homestead. On his part, the appellant alleged that his wife had identified the deceased as the rapist. The arrival of the deceased and **PW2** at the scene came barely an hour after the deceased had learnt of the theft from and rape of his wife. This evidence, albeit circumstantial, points to the provocation of the appellant by the deceased. Suffice it to say, that the mind of an ordinary man in such circumstances would be saddled with anger as to interfere with his logic and or thinking and enure sudden and temporary loss of self control. Worth noting as well, is that no other motive was established by the prosecution as to why the appellant would want the deceased dead, though motive perse is not a legal requirement. In view of the foregoing,* once evidence is laid capable of supporting a finding that the accused was provoked, the burden is shifted to the prosecution to prove beyond reasonable doubt that the case was not one of provocation. See **R v Cascoe [1970] 2 ALL ER 833** and **Doto s/o Mataki v R [1959] E.A. 860. Given the foregoing, we find that** *the learned Judge erred when she disregarded the prosecution's self damning evidence on provocation and instead held in part that:-*

> ***"…..Suffice it to say that PW7 Dr. Allan Cherop who produced the P3 form allegedly filled in respect of this 'rape' cast some doubt on both the P3 form as well as the supporting medical notes. In my view, nothing would have been easier to persuade this court that such a rape did actually occur (or even prove that the accused had reasonable cause to believe that his wife had been raped), than for the accused to call his wife as a defense witness on his behalf. It is curious that accused chose not to call the one person who could have supported his defence. Failure to call his wife leads to legitimate doubts as to whether this alleged rape actually occurred…"***

This statement has serious flaws and or misdirections. An accused person is under no duty to prove his innocence nor is he required to call evidence to spruce up his defence. Indeed, as established in the **Doto case** (supra), the burden of proof never shifts to an accused person to establish the defence of provocation. The appellant did not have any duty to prove provocation. It is for the prosecution nonetheless to prove malice aforethought. This is a position that was also captured by this court in the case of **Benson Mbugua Kariuki v. Republic [1979] eKLR** thus:

> **"The correct direction which a judge should give himself and the assessors in a criminal case is that it is for the prosecution to prove that the accused is guilty, such proof being beyond reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence; and if in respect of any matter; the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self defence or accident. It is for the prosecution to establish that an accused was present when the crime was committed, or that he was not provoked, or that he was not acting in self defence, or that whatever happened was not accidental; and the prosecution must discharge this burden beyond all reasonable doubt. An accused, whether challenging the case put forward by the prosecution or raising matters in his own defence, assumes no onus in these respects; and if any reasonable doubt arises in respect of any matter, the prosecution**

has failed to discharge the burden which it must discharge."

Once the facts pointed to the provocation of the accused person, the onus lay upon the prosecution to rebut that provocation. Having failed to do so, the defence should have thus succeeded and the charge of murder reduced to manslaughter. In other words, we think that in the particular circumstances of this case the defence of provocation enure to the benefit of the appellant and that the information of murder should be reduced to manslaughter. As stated earlier in this judgement, there can be no doubt that the circumstances prevailing at the material time would have provoked a reasonable person. Barely an hour after learning of his wife's alleged rape and robbery by the deceased, the appellant found the deceased seated comfortably in his compound. This was more than sufficient to cause the appellant's temper to flare up. To add insult to injury, the deceased appears to have been reluctant to leave the premises despite having been ordered by the appellant to do so. The altercation that followed left no time for the appellant's temper to cool off. Such is the essence of provocation, and the learned trial Judge erred in failing to hold as much.

This leaves sentence as the sole issue for determination. It is trite law that save for crimes with mandatory prescribed penalties, sentencing is left solely to the discretion of the court. Such is the case with manslaughter. The respondent had sought that this Court upholds the sentence of 30 years as passed by the trial court. However, considering the circumstances of the case, a sentence of 10 years would in our view suffice.

Accordingly, we allow the appeal to the extent that we set aside the conviction for murder under **Section 203** as read with **Section 204** of the Penal Code and we substitute therefor with a conviction for manslaughter under **Section 202** as read with **Section 205** of the Penal Code. We also set aside the sentence of thirty (30) years imprisonment and substitute that sentence with one of ten (10) years imprisonment under **Section 205** of the Penal Code. The sentence of imprisonment shall run from the date on which the Judge imposed the sentence of death. Those shall be our final orders in this appeal.

Dated and delivered at Mombasa this 16th day of October, 2015

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