IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, OKWENGU & AZANGALALA JJ.A)

CRIMINAL APPEAL NO. 3 OF 2015

BETWEEN

S K N……...……APPELLANT

AND

REPUBLIC ……RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Garissa (Mutuku, J) dated 20th November, 2014 in

H.C.CR.C. 28 OF 2012)

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JUDGMENT OF THE COURT

This appeal has been brought from the judgment of the High Court **(S.N. Mutuku J)** dated 28th October, 2014 whereby the appellant, **S K N**, was convicted of murder contrary to **Section 203** as read with **Section 204** of the Penal Code and sentenced to death. She now comes to this Court appealing against that conviction and sentence. There were originally four grounds of appeal but when the appeal came up for hearing before us on 21st September, 2015 both **Mr. Kariu**, learned counsel for the appellant and **Mr. O'mirera,** learned Senior Assistant Deputy Director of

Public Prosecutions for the **Republic**, agreed that the evidence which was adduced before the learned Judge disclosed the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** and not murder.

The facts of this appeal were not really in dispute since the appellant herself gave a detailed statement in her defence before the High Court in which statement she admitted striking the deceased. The prosecution case was substantially based on the evidence of **M M** (PW 1) and **L N** (PW 2) who, on the material day (28th August, 2012) responded to the deceased's screams and found him being beaten by the appellant with a stick. The deceased was seriously injured and was pronounced dead on arrival at Noo Sub-district hospital where PW 1, PW 2 and others had taken him for treatment. There is no dispute that the deceased died as a result of the injuries inflicted by the appellant.

In conceding the appeal, **Mr. O'mirera** submitted that prior to the fateful evening it was the appellant who used to take care of the deceased who was sickly. The deceased was on daily medication which was

administered by, among others, the appellant's daughter **N D** (PW5). On the fateful evening, the appellant was informed that the deceased had slept with PW 5 which, in learned counsel's view, was grave provocation thereby suggesting that the killing of the deceased was not premeditated. Counsel further submitted, on sentence, that the learned Judge misdirected herself when she stated that she was bound to impose the death sentence which, in learned counsel's view, is not mandatory.

Mr. Kariu, submitted that the defence of provocation was not adequately considered by the learned Judge of the High Court. In his view, the appellant was provoked more than once. Firstly, when she was informed of the deceased's attempt to defile her daughter, **N** and secondly when the deceased insulted her when she went to enquire about the attempted defilement.

With regard to sentence, learned counsel submitted that given the age of the appellant and her children and the trauma she will suffer for the rest of her life, a non-custodial sentence would be appropriate.

We have considered the facts of this appeal and the submissions of learned counsel. It is clear to us that the main issue here is provocation which is defined in **Section 208(1)** of the **Penal Code** as follows:-

> ***"The term „provocation? means and includes except as hereinafter stated any wrongful act of insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person for another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation or in the 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."***

The facts in this appeal show that the appellant was informed first by her step daughter, **A M N** (PW 6) and then her own daughter,

N, that the deceased was found in bed with **N.** On receiving this information, the appellant proceeded to where the deceased was after talking to her co-wife **L N** (PW 2). She confronted him with the defilement report she had received from the two girls. The only evidence as to what initially transpired between the deceased and the appellant was furnished by the appellant. She testified that she wanted to find out whether what her daughters had told her was true. According to her, instead of responding to the enquiry, the deceased insulted her and ordered her out of the house and take her "foolishness" with her. He then pushed her outside, took a stick lying nearby and fearing that he would use it against her she also held onto the stick. They struggled over it and she overpowered the deceased and struck him with the same. The appellant testified that all these shocked her: the insults; the attacks and her reaction after the attack. She appeared to attribute her reaction to her pregnancy and medical condition: hypertension.

The issue now is whether in view of these circumstances the defence of provocation was available to the appellant. Guidence may be found in the English decision of **Bullard v R [1961] 3 ALL ER 470.** There, **Lord Tucker** stated:-

> ***"It has long been settled law that if on the evidence, whether of the prosecution or of the defence there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt the killing was unprovoked."***

Close home is the case of **Dato s/o Mtaki -v- R [1959] EA 860** in which the court stated, *inter alia*, as follows:-

> *i. ……*
>
> ***ii. the Judge had himself wrongly considered the question whether the probability of legal provocation had been established and it was not the law in East Africa that for the defence***

of provocation to succeed, it must appear that the accused was so provoked as to be incapable of forming an intent to kill or cause dangerous harm".

The case of **Kenga -v- Republic [1999] 969 (CAK)** is also relevant. There, this Court stated:-

> ***"It is a settled principle of law that the accused does not have to prove provocation but only to raise a reasonable doubt as to its existence. There is positive and unrebutted evidence that the Appellant went wild and lost his power of self-control soon as he saw the deceased on his homestead. The visit despite constant warning was totally uncalled for and was at most meant to annoy the Appellant. In our view the act constituted grave provocation on his part as it appeared that the killing of his sister was still weighing heavily on his heart."***

In this appeal, it is not in dispute that the appellant was informed by her daughter and step daughter that the appellant had been found in bed with her daughter. There is no dispute that the incident occurred the previous night. There is, moreover, also no dispute that the appellant was only informed of the incident just a few moments before she confronted the deceased. In our view, the fact that the defilement incident took place the previous night did not lessen its gravity because for the appellant the incident was fresh in her mind. And the deceased instead of explaining his side of the defilement accusation, insulted the appellant and attacked her. The reaction of the deceased to the defilement accusation could not cool down the appellant but incensed her more. In all the circumstances of this case, we think that the learned Judge placed undue emphasis on the evidence of the appellant's co-wife, **L N** (PW 2), that the appellant threatened to kill the deceased before she met him. Much emphasis was also placed on the appellant's decision to leave the scene after the fight with the deceased; and the number of times the deceased was hit. The learned Judge, in our view, did not seem to appreciate the burden the appellant had in her defence of provocation. We say so, because of some observations made by the learned Judge in her judgment. She wondered "*Whether the appellant meant she was provoked because of alleged defilement of her daughter by the deceased or by the alleged verbal insults when she went to the deceased's house"*.

She resolved the issue as follows:

> ***"Therefore, the alleged defilement, though if true is capable of provoking a mother to act in the manner the accused acted cannot be termed as sudden as to cause the accused act in the heat of passion. She was not present and there is no evidence that her daughter was actually sexually molested by the grandfather".***

With regard to alleged verbal insults, the learned Judge stated:

> ***"If the provocation is a result of the alleged verbal insults by the deceased, <u>this has not been proved</u> given that it is the accused [who] invaded the deceased in his house and found him resting in bed. I have also stated above that <u>there was no evidence of physical injuries or anything else to show that the deceased physically confronted the accused by pushing her out and struggling with her as alleged.</u>"***
>
> (Underlining ours).

With all due respect to the learned Judge, we find two misdirections in her observations. The first misdirection relates to the observation that the appellant was not present when the alleged defilement or attempt thereof occurred and could not, therefore, rely on the defence of provocation. The learned Judge obviously did not appreciate that whereas the appellant was not present when the defilement or the attempt happened, she received the information of the same just moments before she confronted the deceased. As we have already observed the fact that the offending incident happened the previous night did not lessen its impact upon the appellant when she received the report which was just moments before she confronted the deceased.

The second misdirection relates to the burden the learned Judge appeared to place upon the appellant to

demonstrate the provocation. The learned Judge seemed to suggest that the appellant had to prove the provocation to some extent. That was notwithstanding that the testimony of the appellant with regard to insults allegedly made by the deceased was unrebutted and so was her testimony that the deceased was the first to attack her with a stick. There was also no basis to doubt the appellant's evidence that after the incident, she intended to report to the relevant authorities nor did the appellant's medical condition require documentary proof as, in our view, the same was unchallenged.

The law is that an accused person, except where he puts forth a plea of insanity, assumes no burden to establish his defence. It is the court to consider whether, on a consideration of all the material evidence, the prosecution has established the guilt of the accused beyond all reasonable doubt. In this appeal, it was a gross misdirection for the learned Judge to seek proof of provocation by the appellant. It was, in our view, enough that from the evidence as a whole, a reasonable doubt as to the existence of provocation had been raised.

Taking all these facts into account and in view of what has been stated in decided cases on the principle of law relating to the defence of provocation, we are of the view that the appellant's defence ought to have been considered in better light. It follows that had the learned Judge considered the entire evidence of the prosecution and the defence carefully, we doubt if she would have convicted the appellant on the charge of murder. We are, therefore, not surprised that the learned Senior Assistant Deputy Director of Public Prosecutions, conceded the appeal. In view of all that we have said, this appeal is allowed. We quash the appellant's conviction for murder and set aside the sentence of death passed by the learned Judge. We substitute it with conviction for manslaughter contrary to ***Section 202***, as read with ***Section 205*** of the ***Penal Code***.

Given the appellant's antecedent relationship with the deceased and the mitigating circumstances narrated by the appellant at the trial, we sentence the appellant to imprisonment for the term already served, with the result that the appellant shall be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR