



**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: OMOLO, O'KUBASU & VISRAM, JJA)

CRIMINAL APPEAL NO. 148 OF 2009

BETWEEN

JOSEPH KIPKORIR SANG APPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a sentence and conviction of the High Court of Kenya at Kericho (Ang'awa, J) dated
21st July, 2009*

In

H.C. Cr. C. No. 28 of 2008)

JUDGMENT OF THE COURT

The High Court (Mary Ang'awa, J) tried and convicted Joseph Kipkoech Sang, the appellant herein, on an Information that had charged him with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars contained in the Information filed by the Hon. the Attorney-General on behalf of the Republic had been that on the 6th day of July, 2008 at Nyapire Village, Seretut Location of Kericho District, Rift Valley Province, the appellant murdered Edna Chepkoech Sang, hereinafter "*the deceased*".

The deceased was the wife of the appellant. In her judgment the learned Judge described the appellant as "an elderly male." The appellant, the deceased and the appellant's sister-in-law Ann Sang (PW1) lived in one area. Ann had two sons, Hillary Koech (PW3) and Peter Koech (PW2). According to Ann and her two sons, on the 6th July, 2008, the appellant came to her with her two sons. The appellant told the three that he had killed somebody; he did not specify whom he had killed but he later on told them that the deceased had come home drunk and started to insult him. He took a knife and stabbed her on the chest. When Ann and her two sons went to the appellant's home, they found the deceased lying down with a stab wound on her chest. The witnesses appeared to agree with the appellant the deceased was a violent woman, particularly when drunk. In his sworn defence before the trial Judge, the appellant asserted as much but went on to say that the deceased had snatched the knife from him and stabbed herself. The learned Judge, because of this stance by the appellant, thought the issue of provocation which had been raised before her did not arise, as the appellant was claiming that he did not stab the deceased. The learned Judge convicted the appellant on the charge of murder and sentenced him to death. The appellant appeals to the Court against the conviction and sentence.

Mr. Karanja, learned counsel, argued the appellant's appeal before us. He submitted that despite what the appellant had told the trial Judge in his defence, the evidence before the Court clearly showed that the deceased had provoked the appellant. The deceased was said to be a violent woman when drunk. She came home drunk and started to insult the appellant. Mr. Karanja submitted that the appellant ought to

have been convicted of the lesser offence of manslaughter. Mr. Omutelema, the Senior Principal State Counsel, agreed with Mr. Karanja that the appellant should have been convicted of the lesser offence of manslaughter rather than that of murder.

For our part, we agree. The story given by the appellant about the deceased taking a knife from him and stabbing herself was clearly false. It was the appellant himself who went to the home of Ann and told Ann and her sons that he had killed someone. The chief of the area Joseph Kipyegon (PW3) was called to the scene and arrived there at around 1.00 p.m. He found the appellant and arrested him. The appellant had a knife. It was never suggested to Kipyegon that the appellant had told him that the deceased had grabbed the knife from him and stabbed herself. The chief said on behalf of the appellant that the appellant was not a violent person. In the circumstances of the case, there would have been no reason why Ann and her two sons would say the appellant told them that he had killed the deceased. The appellant's story about the deceased grabbing a knife from him and stabbing herself was clearly false as it was not supported by the evidence on record. It is clear from that evidence that the deceased came home drunk that day and in her drunkenness, she provoked the appellant by her insults. In the heat of the moment the appellant took a knife and stabbed her on the chest. She succumbed to the injury after sometime. **Section 208 (1)** states:-

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

The learned trial Judge merely restricted herself to considering the question of whether it was the appellant who stabbed the deceased as the prosecution had stated or whether the deceased had grabbed a knife from the appellant and then stabbed herself as was stated by the appellant. Once the Judge rejected the version given by the appellant as false, and we have found it was false, the Judge did not proceed to consider the issue of provocation arising from the drunken insults upon the appellant by the deceased and that the deceased was generally a violent woman. We respectfully agree with Mr. Karanja and Mr. Omutelema that the actions of the deceased could and in fact did provoke the appellant into assaulting his late wife. But in assaulting her, he used excessive force by employing a knife. We agree that the appellant ought to have been convicted of the offence of manslaughter rather than murder. That being our view of the matter, we allow the appellant's appeal to the extent that we set aside the conviction for murder and the sentence of death imposed therefor and substitute them with a conviction for manslaughter under **section 202** of the Penal Code and a sentence of ten (10) years imprisonment to run from 21st July, 2009 when the appellant was sentenced by the learned trial Judge. Those shall be the orders of the Court in the appeal.

Dated and delivered at Nakuru this 23rd day of February, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.