



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, J.J.A.)
CRIMINAL APPEAL NO. 13 OF 2009**

BETWEEN

SAMUEL KIPNGENO BIRIR APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from a conviction and sentence of the High Court of Kenya at Kericho (Ang'awa J) dated
26th January, 2009*

in

H. C. C.R.C. NO. 8 OF 2008)

JUDGMENT OF THE COURT

In this matter the trial court was the High Court sitting in Kericho. The appellant **Samuel Kipngeno Birir** 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 as contained in the charge sheet were that on the 21st day of February, 2008 at Kaptegat Village in the then Bomet District within the Rift Valley Province he murdered Richard Kiprotich Ngeno.

The alleged murder arose from a quarrel between the deceased and the appellant who was the deceased's father. The deceased wanted to demolish a store and retrieve iron sheets which he intended to use elsewhere but the appellant did not like the idea and as a result the deceased abandoned the idea for a short while only to come back later in the company of another person, when he again tried to forcibly remove the iron sheets whereupon the appellant apparently in a fit of anger, cut the deceased on the neck which action resulted in the deceased's death.

After a full trial the trial judge (Ang'awa, J) in a seven page judgment which made reference to a possibility of the defence of provocation being available to the appellant but, with respect, failed to consider the factual or evidentiary basis for the defence went ahead to convict the appellant for the offence of murder and to sentence the appellant to death.

In the appeal the appellant was represented by Mr. Simiyu advocate whereas the State was represented by Mr. Nyakundi, State Counsel. In his submissions, Mr. Simiyu stated that taking the evidence adduced into account the defence of provocation was in his view, available to the appellant and therefore the trial court disallowed it in error. According to the medical evidence of Dr. Bungei (PW 6) the medical officer at Sotik, the appellant had a scar which was caused by a sharp object and during the examination the appellant had informed the doctor that he had no intention of killing his son. The appellant's counsel

therefore urged the court to note that the judgment of the High Court does not reflect a proper evaluation as required under the relevant law and that if evaluation of the evidence had been properly done the defence of provocation should have become apparent to the High Court. He further submitted that in considering whether or not the defence of provocation was available, the court should have taken into account the fact that tradition demands that a son should respect his father at all times whereas in this matter the son was openly and without a sense of shame defying his father's order concerning the iron sheets and this should have given rise to the defence of provocation and in addition, the appellant was also injured by his son.

On his part, Mr. Nyakundi submitted that the defence of provocation could not arise in the circumstances since the deceased was not armed. He added that even if there was provocation it was out of proportion in the circumstances, since the deceased was not armed. He concluded by submitting that the injuries sustained by the deceased were on their own in the nature of grievous harm and as a result this was on its own indicative that the deceased did the act killing of malice aforethought.

We have carefully considered the circumstances in which the alleged offence happened and have also given weight to the submissions of counsel appearing before us.

Firstly we note that the cutting of the trachea of the deceased was done in the heat of moment concerning a quarrel between father and son and we are also of the view that the acts which led to its commission are fully embraced by the statutory definition of **"provocation"** and in the circumstances we consider that the appellant's father was sufficiently provoked. In his defence, the appellant had requested the court to consider that as a father he had for many years since his son's birth brought up the deceased without any incident at all up to the date of the incident and for this reason the act of killing was instantaneous and not predetermined. As the first appeal court and perhaps the last we are entitled to reevaluate the evidence on record and reach our own independent conclusions on it subject to the usual caveat that it is the trial court which saw and listened to the witnesses.

Concerning the alleged lack of evaluation we could not agree more with the appellant counsel's submissions. Indeed, with respect, there was no attempt to evaluate the evidence at all by the High Court as required otherwise, the evidence touching on provocation would have become apparent. All in all, we find that both the facts and the evidence point to the existence of what the marginal note of **section 207** of the Penal Code describes as *"killing on provocation"*.

The section itself states:-

"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, he is guilty of manslaughter only."

Section 208 of the Penal Code defines **"provocation"** as follows:-

"(1) The term "provocation" means and includes, 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 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.

(1) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault."

From the above provisions it is clear to us on the issue of provocation both the relationship between the parties involved and we dare say the customs of our people generally are relevant considerations in that

even under the relevant customary law what the deceased did in the circumstances constitutes provocation because of the father/son relationship. This conclusion becomes irresistible when we take into account the fact that the appellant's defence was not considered by the trial court. In the result, we hereby quash the conviction for murder and set aside the sentence of death and substitute a conviction for the lesser offence of manslaughter. We accordingly sentence the appellant to imprisonment for 10 years to run from 17th December, 2008 which was the date of the judgment in the superior court.

It is so ordered.

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

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

J. G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR