IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, GITHINJI & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 126 OF 2006

BETWEEN

MUTUA MWAKO ……..…… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Machakos (Mwera, J.) dated 9th May, 2000

in

H.C.CR.C. NO. 17 OF 1999)

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JUDGMENT OF THE COURT

On 4th June, 1999, the appellant was committed by the Resident Magistrate, Machakos to the High Court for trial on a charge of murder according to the committal proceedings procedure prevailing at that time. The committal proceedings procedure has now been subrogated. The current procedure now requires that a person suspected of having committed the offence of murder be charged directly with the offence in the High Court.

The appellant was subsequently charged with the offence of murder contrary to **Section 202** as read with **Section 204** of the *Penal Code*. He was alleged to have murdered one **Mwaniki Kathali** on 6th October, 1998 at Ngungani sub-location, Mwingi District. He was tried by the superior court at Machakos (Mwera, J.) with the aid of assessors, convicted and sentenced to death. This is his first and final appeal. The deceased who was aged about 70 years was related to the appellant by marriage as the appellant's elder brother is married the deceased's younger sister.

On the evening of 6th October, 1998 the deceased was shot with arrows and subsequently died due to severe anaemia due to external bleeding from the wounds caused by the arrows. The circumstances under which the deceased was shot with arrows are described in the evidence of **Nzioki Mwaniki** (PW1) (Nzioki), the deceased's wife; **Peter Mulatya Mwithangya** (PW2) (Peter) and **James Mwaniki Ngungu**

(PW8) (Mwaniki). The evidence of the three witnesses was briefly as follows:

On 6th October, 1998, a child took out the deceased's four calves for grazing. At about 2 p.m. the child reported that the cattle had strayed into the appellant's neighbouring shamba. Nzioki went to the appellant's home to collect the cattle but the appellant told her to tell her husband (the deceased) to come for the cattle. At about 6 p.m. on the same day, the deceased asked Mwaniki (PW8) who was a neighbour to the appellant to accompany him to the appellant's home. Thereafter, the deceased, his wife Nzioki and Mwaniki went to the appellant's home. The appellant asked them to sit down in the compound which they did. The appellant then demanded Shs.1,500/= as compensation before he could release the deceased's cattle and said that without the money, he would neither release the cattle nor would the deceased leave the appellant's home. The deceased did not have the Shs.1,500/=. He asked Mwaniki to lend him the money but Mwaniki did not have the money. Mwaniki asked the appellant to lend him the money to be repaid later but Mwaniki also did not have the money. As deceased could not raise the money, Nzioki offered one calf from the detained cattle to the appellant. The appellant thereupon went to his granary – cum house and came back armed with bow and arrows and told the deceased that if he could not raise the money, he would settle the matter there and then. No sooner than later, the appellant shot three arrows at the deceased while the deceased was still seated on the ground. Thereafter, Mwaniki ran away and the deceased and Nzioki fled to their home. Peter who is a neighbour of the deceased went to the scene after hearing arrows whizzing and the voice of Nzioki. He found the appellant at the scene but did not find the deceased.

He followed the deceased towards his home and found the deceased on the way who told him that the appellant had shot him with arrows. The deceased had already removed one arrow from the left arm. One arrow was still stuck on the shoulder which Peter removed by making a cut with a sharp razor blade. The deceased shortly died after arriving at his home and before he was taken to hospital.

Meanwhile, the appellant went to the home of **Kalove Mwanzia Ngui** (PW3), the Chief of the area, and reported that he had a disagreement with deceased after the deceased's cattle strayed into his shamba and that he had shot the deceased with an arrow. The Chief detained the appellant. Thereafter a report was made to him that the victim had died. On the following day he took the appellant to Mwingi Police Station where he was detained. Thereafter, **Sgt. John Maina** (PW7) went to the home of the deceased. He found him lying dead in his house with a cut wound on his left arm, shoulder and abdomen. He was shown one arrow. They searched for others and recovered two more. On 14th October, 1998, the appellant made a confessionary statement before **IP. Askin Agisu** (PW10) confessing that he killed the deceased by shooting him with an arrow: *"because of his leaving his animals loose and destroying his maize"* on many occasions.

The appellant stated in his sworn testimony at the trial, among other things, that, on the material day, he had spread his maize in the compound to dry; that he went to the market to buy gunny bags; that he returned to his home at about 4 p.m. and found eighteen heads of cattle lying in his compound having eaten the maize; that he did not know the owner of the cattle; that he went to fetch firewood; that as he later approached his home carrying fire wood, the deceased who was armed with a panga pushed him from behind and he fell down; that the deceased demanded to know why appellant had locked his cattle in his (appellant's) compound; that he rose up and told the deceased to go and get a witness to see and thereafter drive the cattle away; that deceased followed him into his compound saying that he would do something nasty to the appellant and lastly, that the deceased chased the appellant thrice round the house. He continued:

"I opened the door to the granary where I used to sleep. I held it fast from inside. Mwaniki could not push it to enter. He hit the door until it broke my right hand finger.

I jumped out with bow and arrows, now that Mwaniki had injured me and he was still holding a panga. My life was in danger Mwaniki attempted to enter into the granary, where I was. I did not want to kill Mwaniki; I only wanted to scare him away.

I shot at his hand which stuck on entrance. It, was at night. Mwaniki jumped, released the panga

and he fell down. I had all along been in the granary. Then I jumped from the granary as Mwaniki was trying to pick the panga. We chased each other again very much.

As we ran Mwaniki was calling out. People were running our way. I shot again at Mwaniki but it was in the dark. I do not know where the arrow fell. I shot 2 arrows …….".

He testified further that deceased's cattle had trespassed on his land frequently. He denied that he had demanded Shs.1,500/= from the deceased and stated that he never intended to kill the deceased.

As the first appellate court, we have a duty to reconsider the evidence, re-evaluate it and make our own independent findings recognizing of course that the trial Judge had the advantage of, among other things, seeing and hearing the witnesses give evidence, and thus was in a better position to assess the credibility of the witnesses. It is trite law that the first appellate court does not normally interfere with those findings by the trial court which are based on the credibility of witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law (**Republic vs. Oyier** [1985] KLR 353).

In this case, there were two versions of the circumstances leading to the shooting of the deceased with arrows. On one hand, there is the prosecution version based on the evidence of Nzioki and Mwaniki. On the other hand, there is the appellant's version as disclosed in his evidence.

The trial Judge believed the evidence of Nzioki and Mwaniki regarding the circumstances under which the appellant was shot and rejected both the defence of self-defence and provocation. Regarding provocation the trial Judge said in part.

"The deceased's livestock had trespassed on the accused's land before or even on this occasion only. Probably they ate or trampled on the grass. It was during dry season and no crops were on the land. Indeed, the accused claimed that his maize produce put out to dry had been eaten by the animals. But still this court sees no basis to hinge provocation on. The parties sat down to discuss the release of the animals. This court believed that the accused wanted Shs.1,500/= first. It was not available. There were proposals to bring it later. No rows; no bitter changes; no insults exchanged. Nothing very special had happened to get the accused so infuriated as to go get his arrows and shoot the deceased while seated".

Regarding the defence of self-defence, the trial Judge said that he was not convinced that there arose a situation when the life of the appellant was in danger from the actions or reactions from the deceased.

The appellant relies on the two grounds of appeal in the supplementary memorandum. The first ground states that **Section 71 (1) (2)** of the Constitution as read with **Section 17** of the Penal Code and **Section 77 (1) (2) (a) (b) (c) (d) (e)** of the Constitution were violated to the prejudice of the appellant. The second ground of appeal states that the trial court erred in failing to consider the appellant's evidence of self defence.

Section 71 of the Constitution referred to has two subsections – **(1)** and **(2)**. It does not have ***"Section 71 (1) (2)".*** We think that the appellant's counsel intended to invoke **Section 71 (2) (a)** of the Constitution which states that a person shall not be regarded as having been deprived of his life, if he dies as a result of use of force to such an extent as is reasonably justifiable in the circumstances of the case for the defence of any person from violence or for the defence of property. Further, **Section 17** of the Penal Code referred to provides, among other things, that criminal responsibility for the use of force in defence of person or property shall be determined according to the principles of English Common Law.

In essence, the appellant is saying in the first limb of the first ground that he is not criminally liable for the death since the force he used was reasonably justifiable for the defence of his own person. That being so, then the ground is similar to the second ground – that is self defence.

Similarly, there is no **Section 77 (1) (2)** of the Constitution. Instead, there is **Section 77 (1)** and **Section 77 (2)** which stand independently of each other. There are other subsections. **Section 77 (1)** provides that where a person is charged with a criminal offence, the case should be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Miss. Arati, learned counsel for the appellant, submitted that the appellant was brought to court on 14th October, 1998 but plea was not taken until 13th July, 1999. We understand Miss. Arati to say that the case was not tried within a reasonable time as the appellant was detained in custody for about 9 months before the plea was taken.

However, the record of the *Resident Magistrate's Committal Proceedings Case No. 12 of 1998* the appellant was kept in custody from 14th October, 1998 awaiting the preparation and presentation of committal bundles by the police until 13th July, 1999 when he was committal to the High Court for trial. During that period the appellant could not be tried because he had not been charged with the offence of murder. True that there was delay in preparation of committal documents by police. That was an institutional delay. It has not been shown that the delay was unreasonable in the circumstances of the case or that the delay resulted in unfair trial. The delay occurred in the process of complying with the law. It is precisely because of these institutional delays in preparation of committal bundles that led to the repeal of the committal proceedings procedure.

The appellant's counsel did not address us on the breach of safeguards for a fair trial in **Section 77 (2) (a) – (e)** of the Constitution. It is not apparent from the proceedings that any of those safeguards were violated.

It remains to investigate whether the trial court failed to consider the defence of self-defence as alleged. Indeed, this is the main ground of appeal.

As **Section 71 (2) (a)** of the Constitution provides the appellant would not be criminally responsible for the death, if he caused the death in defence of himself or his property and in addition the force he used was reasonably justified in the circumstances. The principles of English common law relating to self defence referred to in **Section 17** of the Penal Code were succinctly restated in **Selemani vs. Republic** [1963] EA 442 at page 446 paragraph E – G where the predecessor of this Court said relating to identical provision in the Penal Code of former Tanganyika:

"Under English law, there is a broad distinction made where questions of self defence arise. If a person against whom a forcible and violent felony is being attempted repels force by force and in doing so kills the attacker the killing is justifiable, provided there was a reasonable necessity for the killing or an honest belief based on reasonable grounds that it was necessary and the violence attempted by or reasonably apprehended from the attacker is really serious. It would appear that in such a case there is no duty in law to retreat, though no doubt questions of opportunity of avoidance or disengagement would be relevant to the question of reasonable necessity for the killing. In other cases of self defence where no violent felony is attempted, a person is entitled to use reasonable force against an assault, and if he is reasonably in apprehension of serious injury, provided he does all that he is able in the circumstances, by retreat or otherwise to break off the fight or avoid the assault, he may use such force, including deadly force, as in reasonable in the circumstances. In either case, if the force used is excessive, but if the other elements of self defence are present there may be a conviction of manslaughter".

That passage was quoted with approval in **Manzi Mengi vs. R** [1964] EA 289 which was in turn applied in **Mokwa vs. The Republic** [1979] KLR 202. The onus is on the prosecution to show that an accused person was not acting in self defence (see **Manzi Mengi** (supra) page 293 paragraph I).

It is clear that the trial Judge considered both defences raised by the appellant and rejected them. The trial Judge specifically believed the evidence of Nzioki and Mwaniki that the parties sat down at the appellant's compound to discuss about the release of the deceased's animals; that appellant demanded Shs.1,500/= as compensation; that there was no rows; bitter exchanges or insults exchanged that deceased

had no panga and that the appellant shot the deceased while the latter was seated. The two assessors who remained throughout the trial were unanimous that the appellant was guilty of murder.

There was evidence from Nzioki and Mwaniki that appellant shot the deceased thrice – on the left arm, shoulder and abdomen and that the arrow on the abdomen went through. Sgt. John Maina also testified that he saw three wounds on the body of the deceased at the left arm, shoulder and abdomen. The appellant however, claimed that he shot two arrows. The Doctor who performed postmortem on the body of the deceased found two stab wounds on the body – one on the right shoulder, and, the second on the left forearm. He did not see any wound on the abdomen. The prosecution produced two arrows as an exhibit.

The evidence of the appellant that he shot two arrows and not three is supported by the medical evidence and the exhibits produced at the trial. We accept it.

However, the rest of the appellant's evidence relating to the circumstances in which he shot the deceased is not credible. Indeed, the evidence is not consistent in some material respects. For instance, the appellant stated that after the deceased chased him thrice round the house he entered into the granary and closed the door behind him, held the door fast and that the deceased could not push it to enter. He stated that it is at that stage when he jumped out holding bow and arrows and shot the deceased at the hand and the arrow stuck on the hand on entrance causing the deceased to jump, release the panga and fall down. He continued:

"I had all along been inside the granary. I jumped from the granary as Mwaniki (deceased) was trying to pick the panga. We chased each other again very much. As we ran Mwaniki was calling out. People were running our way. I shot again at Mwaniki but it was in the dark".

It is clear that the appellant stated at first that he jumped out of the granary armed with bow and arrows and shot the deceased on the arm. He later states that he shot the first arrow when he was inside the granary and that it is after he shot the first arrow that he jumped from the granary. This evidence is inconsistent. Furthermore, it is incredible that the deceased who had been already shot and had fallen down with an arrow stuck in his arm could be able to chase the appellant. It is probable that the reason why deceased was shouting and calling for help was because he was in great pain. There is evidence from **Philip Musili Mwaniki** (PW9) that the arrow had gone through the deceased's hand. The evidence from Nzioki and Mwaniki is that after the deceased was shot he left the appellant's home. This evidence was supported by evidence of Peter who went to the scene immediately and did not find the deceased at the appellant's home. If the appellant had closed himself inside the granary as he stated, and if the deceased could not be able to push the door open, then the appellant was safe inside and his life was not in danger. There could not have been any good reason for him to open the door to shoot the deceased. Nor was there any justifiable reason for shooting the second arrow which stuck on the deceased's shoulder. Furthermore, when the appellant reported to **Mwanzia Kaleve Ngui** – (Chief of the area) on the same day at 11 p.m. he told the Chief that he shot the deceased after a disagreement after the deceased's cattle trespassed onto his land. He did not tell the Chief that the deceased had chased him with a panga. Again, when the appellant made a confession before **IP. Askin Agisu** about a week after the incident, which confession was neither repudiated nor retracted, he did not say that the deceased had chased him with a panga and that he acted in self defence.

On our reconsideration of the entire evidence we are satisfied that the trial court arrived at the correct findings of fact and that there is no misdirection or any other reason to warrant the interference, with the trial Judge's findings of fact. We are further satisfied that neither self-defence nor defence of provocation was available to the appellant in the circumstances of the case. He was the aggressor throughout the incident.

For those reasons, we dismiss the appeal on conviction and sentence.

Dated and delivered at Nairobi this 28th day of May, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR