



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 181 OF 2005

DAVID LENTIYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya at Nakuru (Lessit J) dated 30th April, 2004

in

H.C.CR.C NO. 8 of 2003)

JUDGMENT OF THE COURT

The appellant, **David Lentiyo**, was charged with murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 22nd day of May, 1999 at Lodikeyek reserve in Samburu District of the Rift Valley Province, the appellant murdered Lititiyan Letunta. The appellant was arraigned before the High Court (Lessit J.) on 3rd April, 2003 when the learned State Counsel, Mr Onderi, indicated the willingness of the State to accept a plea of guilty on a lesser charge of manslaughter. The appellant, according to the record, indicated his willingness to plead guilty to manslaughter but when the charge of manslaughter was read and explained to him he denied it. The learned Judge then recorded that the charge reverted to murder. It was read and explained once again to the appellant who pleaded "Not Guilty." The murder trial commenced before Lessit J with the aid of three assessors on 4th November, 2003. After a full trial, the learned Judge convicted the appellant on a lesser charge of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. The learned Judge considered the fact that the appellant had been in custody for five years which, in her view, was sufficient punishment. She therefore discharged the appellant under **section 35(1)** of the Penal Code on the condition that the appellant does not commit any offence for a period of one year from the date of conviction i.e. 30th April, 2004.

The appellant was dissatisfied with the superior court's conviction and, through his counsel, filed this appeal citing the following six grounds of appeal:-

- 1. That the learned Judge erred in law by failing to uphold the appellant's defence of provocation**

and self defence which defence were justified and sustainable in the circumstances of the case herein.

2. That the learned Judge erred in law by finding for the appellant in her analysis of the evidence on record in regard to his defences of provocation and self defence only to turn around and find a conviction against him.

3. That the learned Judge erred in law in failing to appreciate that in the circumstances of the case herein wherein the life of the appellant was in grave danger a conviction on the charge of manslaughter could not suffice.

4. That the learned Judge erred in law by failing to appreciate that in the circumstances of this case the appellant acted in the only way available to him.

5. That the learned Judge erred in law by failing to appreciate that the ingredients requisite for a conviction on the charge of manslaughter were not established or at all.

6. That by this errors of law the conviction of the appellant on the offence of manslaughter was unlawful and occasioned a miscarriage of justice.”

When the appeal came up for hearing, Mr. Ndegwa Wahome, the learned counsel for the appellant, decided to argue all the six grounds together. It was Mr. Wahome’s submission that the appellant had put forth provocation and self defence in his defence before the learned Judge and that the defence of provocation was dismissed. Mr Wahome reminded us that the appellant hit the deceased only once and that although the appellant had a gun and a sword, he never used these two lethal weapons. Mr Wahome went on to argue that the learned Judge having accepted the appellant’s version, the conclusion ought to have been an acquittal rather than a conviction on the lesser charge of manslaughter.

In supporting the conviction, the learned Assistant Deputy Public Prosecutor, Mr Gumo submitted that the appellant used excessive force against the deceased and that the attack was unprovoked. He contended that **section 17** of the Penal Code was not available to the appellant as it was the appellant who inflicted fatal injuries on the deceased. Mr Gumo asked us to uphold the appellant’s conviction by the superior court.

In this appeal, the main issue was whether the defence of self-defence was available to the appellant. We say so because the fact that the appellant hit the deceased causing him injuries which led to his death was not denied. In the course of her judgment, the learned Judge stated:

“I have considered entire evidence adduced by both sides and have regarded submissions by both sides. The accused has not denied hitting the deceased causing him the injuries that led to his death. He has however raised two possible defences which are provocation and self defence.”

The facts of the case were simple and straightforward. The appellant met the deceased and his brother. The appellant who was an Assistant Chief was lawfully armed with a rifle and a sword. The appellant was indeed on his way to address a public function when he met the deceased. For some reasons known to both sides of this feud, the deceased pounced on the appellant who in turn hit the deceased on the head splitting his skull. As a result of that injury the deceased succumbed to death.

The learned Judge who had the advantage of seeing and listening to the witnesses considered all the evidence before her and stated thus:-

“I do find however that the accused applied excessive force. Joseph had merely grabbed at his rifle but had not succeeded in taking it. The deceased merely drew his sword but at no time used it. As I observed earlier, I do believe that the accused was paranoid. The force he used was excessive and in the circumstances he is only entitled to a reduction of the charge from murder to manslaughter and not to an acquittal as the defence suggested.”

We have considered the circumstances in which the deceased met his death at the hands of the appellant and in our view, we are in agreement with the learned Judge that the appellant indeed used excessive force in the circumstances of this case. In Manzi Mengi v. Republic [1964] E.A. 289 at P. 292 the predecessor of this Court in dealing with the issue of self defence stated:-

“On all of these findings we find it difficult to conceive a clearer case of killing in self defence, subject only to consideration of the learned Judge’s finding that excessive force was used. On that question the learned judge did not go into detail but stated that the assessors’ view that the appellant acted in self defence was right up to a point but, “ I do not think the accused should be acquitted because of the degree of force used by him.”

The law to be applied in relation to self defence is the common law of England (see S. 17 of the Penal Code, Cap. 63 of the Laws of Kenya). Dealing with a similar provision in the law of Tanganyika, this court said in Selemani v Republic (1) [1963] E.A at p. 446):

“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 so doing 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 of 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 break off the fight or avoid the assault, he may use such force, including deadly force, as is 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: R. v. Biggin (2), R. v. Howe (3), Robi v. R. (4) (in relation to defence of property)”.

It is to be emphasized that in a case of self defence, if an accused finds he is in evident danger from his opponent, he must retreat from the danger but, if he finds that he cannot retreat further, then he can use force to defend himself. That was what was held in the recent decision of this Court in Musyoka and Others v Republic [2003] 1 E.A in which the decision of Mengi v Republic (supra) was followed.

In our view, this was a case that needed very careful consideration and we are satisfied that the learned trial judge fully and properly directed herself on all issues. We, on our part, having given most anxious consideration to the material before the Court, are of the view that, it would be safe to confirm the conviction to stand, and we therefore dismiss the appeal against conviction.

As to sentence, we are satisfied that the sentence imposed is not in any way illegal. We are also satisfied that having regard to all the circumstances, there is no reason to interfere with the sentence.

The upshot of the foregoing is that this appeal is dismissed in its entirety.

Dated and delivered at Nakuru this 3rd day of March, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. OKUBASU

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR