



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI

Criminal Appeal 31 of 2003

J K M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Etyang, J) dated 18th November, 2002

in

H.C.CR.C. NO. 81 OF 1999)*****

JUDGMENT OF THE COURT

J K M, the appellant was after trial convicted by the High Court of Kenya at Nairobi (*Etyang J*) on 18th November, 2002, of the murder of his wife *R M K* at [*particulars withheld*] Village in Nairobi and sentenced to death. He has preferred this appeal on the ground that the learned trial Judge should have found that the appellant acted in self-defence or was acting under the stress of grave, sudden and extreme provocation and should have been either acquitted or convicted of manslaughter.

The appellant and the deceased were married under Kamba customary law in about 1992. At all material times they cohabited at several estates within Nairobi. They were blessed with three children born out of that union, *K M* born on 30th December, 1992, *N M* born on 22nd February, 1995, and *M K* born on 14th January, 1997.

The appellant is a University of Nairobi graduate in Statistics and Computer Science. Upon graduation in or about 1987 he briefly worked with the Government but at the time of this incident he had joined the private sector and was an Internet Service Provider in partnership with another person. Between 1992 and 1997 the deceased was unemployed but the marriage was pleasant and happy. Later in that year the deceased got a job as a clerk in the Bills Department of Kenya Commercial Bank Ltd., University Way Branch, Nairobi. Within the same branch was *C O (PW9)*, also an employee of same Bank but senior to the deceased.

At all times material to this case, *PW9* lived in Ngong and also owned a car registration number [*particulars withheld*], Toyota Corolla. He would drive to work every morning through Ngong Road via Dagoretti Corner and drive back home after work in the evening through the same route. He would, alternatively, drive to work through a longer route through Kikuyu Town and Waithaka Estate. During the period material to this case, the deceased and the appellant lived in Waithaka

Estate. They depended on matatu transport for their daily travel from their house in Waithaka to the City Centre where they worked.

PW9 testified that he came to know that the deceased lived in Waithaka Estate along Kikuyu Road because, whenever he used to drive to the office in the morning along that road, he would meet her with *L M (PW1)*, her sister and he would give them a lift to town in his car. On other occasions after work, whenever he decided to use the same Kikuyu Road to his home, PW9 would drop the deceased to her house. His testimony was to the effect that his relationship with the deceased was official and never became personal.

The appellant, however, saw a completely different relationship develop between the deceased and PW9. He said it was in the month of October, 1998 that he began to notice a man in a car frequently picking up the deceased from a matatu stage outside his house, and the same person dropping her home in the evenings or sometimes bringing her home late in the night, between 8 p.m. and 9 p.m.

The appellant recalled several other occasions when the deceased was given lifts by PW9 in his car and he started to get concerned and to investigate. He recalled one Saturday, vividly, but gave no date, because it was the day the deceased introduced the owner of the said car to him as Mr. "Patrick" who was her workmate at Kenya Commercial Bank. But the owner of the car protested at that introduction, saying that he did not work with the deceased at all in the said Bank. He said he only had an accounting business near the Anniversary Towers. Later that night the appellant said he cautioned his wife against being picked up and dropped home by that man, because they were a married couple, with three children and it was not possible for her to be explaining her innocence to neighbours. He said he expected the deceased to adhere to that caution, and he left the matter to rest there. Unfortunately the matter did not end there. To the utter disappointment of the appellant, two weeks later when he came home at 7.45 p.m. from work and when he was barely twenty metres from the entrance to the house, he noticed the deceased in PW9's vehicle. When the deceased noticed him, she quickly got out of the vehicle and dashed into the house. That night the appellant said he did not ask her anything about it. She, too, did not tell him anything or say anything about the incident. The appellant pretended as if he had not seen the deceased in PW9's vehicle. According to the appellant, he wanted to investigate this matter further before deciding what to do.

On another Saturday in December, 1998 the appellant hid himself behind a timber fence which surrounded his residence, to see if the deceased would come home in PW9's car. He took that position behind the fence at 7.30 p.m. and waited. After waiting for about 45 minutes, PW9 pulled up and sure enough, the deceased was in his car. He said he confronted them and told them that he now had concrete evidence that the deceased was cheating on him. Then specifically addressing PW9, he told him that if he wanted to be safe he should leave his wife (deceased) alone. The appellant testified that both the deceased and PW9 began to protest their innocence and tried to explain something, but he cut them short and told them that his word was final. He then ordered the deceased out of the car and told her to get back into the house, which the deceased did. There is no evidence, however, that the appellant and the deceased discussed that incident further in their house that night. The appellant also recalled that the deceased attended an induction course for one month at Kenya Commercial Bank Training Institute, Karen, from the 15th November, to 15th December, 1998. He said that the deceased opted to live in the Institute during the duration of the course. According to him, the deceased in fact never lived in the Institute at all. From his own investigation he learned that the deceased was spending most of her time with PW9, an allegation denied by PW9 in his evidence.

It is manifest therefore from the synopsis of the evidence so far narrated that the appellant was convinced beyond doubt that his wife was cheating on him and was having an adulterous affair with PW9 which affair began from the time the deceased was employed in the Bank in 1997. However, it is the prosecution case that the appellant formed an intention to kill the deceased and did indeed execute the evil design during the night of the 30th June, 1999.

The appellant gave a long and detailed defence in a form of a sworn statement. In it he traced the root of his relationship with the deceased, the details of their day to day lives, the cause of the constant quarrels and how they fought and how the deceased died. He testified that though he had established that the deceased had an adulterous association with PW9, this had been sorted out when he secured her a transfer to Kenya Commercial Bank Ltd Kitui Branch. He said that the killing of the deceased was purely an accidental act which occurred when both of them were struggling in their room.

The learned trial Judge correctly, in our view, thought that the issue for determination was whether the prosecution had proved on the required standard that, due to the adulterous association of the deceased and PW9, the accused planned and decided to kill his wife or whether the accused was acting under provocation or in self defence when he struck those fatal blows to her head.

The prosecution called two witnesses to testify as to what happened in the house during the night of the 30th January, 1999. They were PW1 and A M (PW2). The evidence of PW1 is that on the 30th January, 1999 at 7:00 a.m. the appellant went to her bedroom and asked her the name of the person who gives the deceased a lift in his car but the witness told him that he did not know. The appellant then told her to tell the deceased not to come back home that evening, that he did not want to get her at home, and that he will take care of his children. The appellant then took a bath, ate his breakfast and left the house.

PW1 and PW2 said that when the deceased returned home from work, they reported to her what the appellant had said but the deceased seemed not to have taken the warning seriously. However, the deceased became disturbed. She went to the shops and bought soap, returned home and started to wash her clothes. Then shortly the appellant returned home. He asked the deceased where she had been and the deceased replied that she had been at work. After she had cooked, the appellant refused to eat but went straight into the bedroom.

PW1, PW2 and the big children shared one room. After they had eaten, they went to bed but did not sleep because they were worried about the mood in which the appellant was in that night. What added more anxiety was the fact that the appellant had locked their bedroom from outside. The witnesses then heard the volume of the radio being raised, water taps in the bathroom turned on and a noise as if somebody was sharpening a knife in the kitchen. Within a short time she heard the deceased frantically knocking on their door saying “*Munywoki has stabbed me with his knife.*” As the deceased knocked their door with more force the witnesses PW1 and PW2 together with the children screamed. Shortly afterwards the knocking stopped. They heard the appellant asking the deceased: “*where had you gone to?*” There was no response from the deceased. They then peeped from under the door opening and saw the deceased’s legs. They saw blood flowing into their bedroom beneath the door. They intensified their screams and thereby attracted the security guards and neighbours. The appellant refused to open the door even though the neighbours threatened to break it. The police arrived shortly afterwards. The deceased was lying in a pool of blood. In the room were a panga, a kitchen knife and a Somali sword.

The body of the deceased was removed from the bedroom after initial investigations had been carried out, was taken to the City mortuary, from where it was moved to Chiromo Funeral Parlour of the University of Nairobi.

On the 2nd February, 1999 Dr. Alex Onzere Olumbe (PW8) performed a postmortem examination on it. The deceased had sustained:

- (a) bruises on the left temple extending to the hairline, fracture on the underlying skull;
- (b) defensive wound on the upper part of the right shoulder and right wrist;
- (c) palpable fractures on the right cheek;

(d) multiple incised wounds measuring 4cm – 6cm which were marked on the right temple and frontal region of the skull.

The cause of the deceased's death was head injuries due to blunt and sharp objects.

In his defence, the appellant gave a detailed account of the events of 30th January, 1999 leading to the death of the deceased. He testified that he had in the morning found six photographs in his house which appeared to have been taken at a Bank's official function. Three of such photographs were a group photograph in which the deceased stood next to PW9. Another photograph was of PW9 and the deceased eating together. In another photograph the deceased was sitting on PW9's lap, with her head leaning on PW9's chest and PW9's hand caressing her breasts. He said the latter photograph seemed to have been taken in a park. He found those photographs in the house during a search which he carried out after the deceased had left for work in PW9's car. The appellant further testified that on 30th January, 1999 he telephoned the deceased at 10.30 a.m. and that they agreed he picks her at 12.55 p.m. from her place of work so that they could go for shopping. He also intended to use the occasion to talk to her about her love affair with PW9, in view of the photographs he had found in the house that morning. When he went to the Bank at 12.55 p.m. as earlier agreed between them, he found that the deceased had already left. He inquired from the Bank staff where she had gone to and he was told that she had gone with her husband. When he retorted that he was the husband, he was told that she had gone with PW9. The testimony of the appellant so far as concerns this incident is truthful and we accept it in that PW9 in his evidence frankly admitted that he had left the Bank with the deceased before the appellant arrived at the deceased's request. She had requested him to take her away from the Bank as she did not want the appellant to humiliate her. They had gone to Uchumi along Ngong road for shopping and he dropped her off at Dagoretti Corner as PW9 drove himself to his home in Ngong.

In the meantime, when the appellant missed his wife he went to one or two places in town where he took some drinks but he decided to go home early, as he wanted to meet the deceased when he was sober. Upon his arrival home at 3.30 p.m. neither the deceased, his children, nor PW1 and PW2 were there. Since he had the keys, he got into the house. He checked round the house and he found everything was in order. After half-hour, PW1, PW2 and the children arrived. The appellant said he opened for them. PW1 went to the kitchen to prepare supper, while PW2 went to wash clothes outside. He said he remained with the children inside the master bedroom, playing with them up to 6 p.m. He decided to go to the shopping centre. By that time, he said, the deceased, who ought to have arrived at 2 p.m., had not come home.

While at the shopping center the appellant said he drunk three Tusker beers and returned home at 7.30 p.m. He found the deceased watching TV. He joined her in the sitting room and they watched the TV together. He questioned the deceased as to why she had not waited for her at the Bank and her response was that she had gone to Ngara to pick up her clothes.

While eventually in bed the appellant said that he brought up the love affair between the deceased and PW9. The appellant told the deceased that he now had conclusive information that she was cheating on him and that she was PW9's lover. The deceased became arrogant, agitated and told him on the face that she had better things to do than wasting time on matters which cannot have a solution. The appellant testified that he asked her what she meant by that, and she told him that "*such matters were hers alone, and his were his alone.*" He asked her about the children and she replied that when she got married to him, she had no children and therefore the matters of the children were his alone.

The quarrel between them escalated further and the deceased became wild and uncontrollable. It is the appellant's testimony that the next thing he saw was that she had dashed to the bottom side of their bed, next to the wall, and had picked up a panga and she had aimed it at him and before he could even ask her what was happening, she had reached at him and with his hands up he rolled from the bed and she cut him on the left thumb. While on the ground the appellant saw her charging towards him again. He said he kicked her off with his left leg and she cut his left toe. She

then lost balance, and he managed to get hold of a jembe which he used to keep on his side of the bed and while still lying on the ground he managed to block her panga swing. During the struggle the appellant knocked away the panga from her using minimal force with the jembe. He swung the jembe at her but unfortunately she had at that point in time stepped on some jerricans and basins which were there and lost balance. She met the blunt side of the jembe and was knocked on the cheek. She fell against the wall, and then fell on the floor. The appellant noticed that she was motionless.

The appellant maintained that throughout the struggle he had only tried to defend himself and that the deceased was accidentally and fatally knocked on the cheeks with a jembe. He thought that the cut wounds were caused by the jembe's sharp blade when the deceased fell on its sharp edges.

The record of the trial court shows that the entire evidence of the appellant is composed of a litany of events constituting an open adulterous association between the PW9 and his wife, the deceased, and in utter disregard of the knowledge of the cuckolded husband. When the appellant confirmed the adultery he did not spontaneously act but instead negotiated her transfer to Kitui. The appellant's counsel in the trial court put forward a defence of accumulative provocation contending that the appellant's provocation reached only a fever pitch on the material day but the appellant had been wronged and humiliated over a very long period of time.

The assessors unanimously found that there was a premeditated act on the part of the appellant and that he killed the deceased out of frustration and not from provocation.

Mr. Mutua for the appellant has argued that the learned trial Judge had erred in failing to appreciate the appellant's evidence of self-defence which was established by the injuries suffered by him and as shown by the P3 form exhibited before the trial court. The appellant was examined on 4th February, 1999. He had suffered a cut wound on the left thumb and haematoma below the nail of the left big toe. The injuries were classified as harm. On the other hand the deceased suffered multiple fractures, myriad deep and incised cut wounds as well as bruises covering the entire body. It is clear the deceased was under attack and was using her bare hands to defend herself. This is borne by the injuries on the wrist of the right hand. We respectfully agree with the learned Judge's conclusion that in the circumstances the plea of self-defence afforded no defence in law to the appellant.

It is trite that in a criminal case it is for the prosecution to prove that the accused is guilty, such proof being beyond all reasonable doubt. There is no onus whatsoever on the accused of establishing his innocence, and if in respect of any matter the evidence raises a reasonable doubt, then the benefit of that doubt must go to the accused. This applies also to matters of defence such as alibi, provocation, self-defence or accident.

In the case before us we are dealing with the issue of provocation. Did the deceased's action during the material night amount to provocation in law? Was the evidence tendered before the trial court sufficient to lead a reasonable person to do what the appellant did? It is for the prosecution to establish that the appellant was not provoked and it must discharge this burden beyond all reasonable doubt. The appellant raising this issue, of course, does not assume any onus in this respect, and if any reasonable doubt does arise then the prosecution has failed to discharge the burden.

It is manifest that the deceased's adulterous association with PW9 arose in the bedroom after 10 p.m. The appellant testified that he got rude and derogatory answers from the deceased. It was indeed logical that the subject would arise in the evening in view of the fact that there is evidence that the deceased chose not to be picked up from work by her husband but by PW9 with whom the appellant had already confirmed that he was having an illicit affair with his wife.

Being satisfied that the appellant's averment of killing under provocation would be a valid one if true, we are of the opinion that that issue having been raised during trial and not having been

demolished by the prosecution, we are of the view that in the circumstances the conviction for murder cannot be sustained.

The appeal is therefore allowed, the conviction of murder is quashed and sentence of death is set aside. We substitute a conviction for manslaughter contrary to *section 202* of the Penal code.

As this was a very brutal killing, we sentence the appellant to fifteen (15) years imprisonment to take effect from the date of his conviction. We so order.

DATED and DELIVERED at NAIROBI this 28th day April, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR