



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL DIVISION**

**CRIMINAL APPEAL 63 OF 2006**

**EUGENE LUBANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Khaminwa, J) dated 18<sup>th</sup> January, 2006**

**in**

**H.C. Cr. Case No. 4 of 2003)**

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**JUDGMENT OF THE COURT**

The appellant, **Eugene Lubangi Mposhi**, was, in an information for committal proceedings dated 11<sup>th</sup> February, 2003 charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code. The particulars of the offence were that on 21<sup>st</sup> October, 2002 at about 2.00 a.m. at Bamburi area in Mombasa District of the Coast Province, he murdered Athanas Kilonda. He pleaded not guilty before the superior court but after full trial, the court (Khaminwa, J) found him guilty as charged and condemned him to death as provided by law. He was not satisfied with the conviction and sentence and has now come to this Court on appeal. He filed five grounds of appeal in person but after that he had acquired the services of an advocate and the advocate has filed and argued supplementary memorandum of appeal which raises only one ground of appeal namely:

“The learned Honourable Judge of the superior court erred in law and fact by failing to adequately consider the defence case that the appellant had acted in self defence and/or acted under extreme provocation by the deceased which defence(s) if considered would have entitled the appellant to an acquittal on the offence charged or a conviction on a reduced or lesser offence of manslaughter.”

The record shows that the appellant and the deceased were both members of a band of musicians mainly from Congo called Amutei Musica owned by Crispin Tambwe (Crispin in this judgment). At the relevant time the band was playing at different places in Mombasa. The appellant was a singer. Sometime before the incident which is the subject of the charge, he fell sick as his throat was infected. He could not report for duty. As he did not report on duty, he was not paid any money by the band leader although he was promised that he would be paid. On 21<sup>st</sup> October, 2004 at night, he went to Zaituni Bar

where his band was playing but he did not join them. He was seated there with other friends one of whom was from Nairobi. Crispin was with him also. The appellant started complaining about the deceased, saying the deceased could not take him anywhere and that he could even kill the deceased. At that time, the deceased was around and there were allegations that it was the deceased who had “locked up” the appellant’s voice by “*uchawi*”. The appellant then left the venue for his house. The deceased went to Crispin and told him that the appellant had said that after three days the deceased would be buried here in Kenya. The deceased then said he was going to the appellant’s house but Crispin told him not to go. Crispin told the deceased to go away and the deceased left. That was the last time Crispin saw the deceased alive. Earlier on 19<sup>th</sup> October, 2002, the appellant had a discussion with David Pamba (PW 2) (David), another colleague in the same band. The appellant was complaining against the deceased, Mark Kaukau (PW 4) (Mark) and one Kasikasi. He (the appellant) told David that he heard the deceased was singing his (appellant’s) composition and was taking his place at the band during the time he (the appellant) was sick. He then told David that he had great powers of black magic and could use it against anyone who was giving him trouble. He further told David that the deceased was his great enemy and he had given the deceased three days and one of them would die. David and others were to meet to discuss the matter on 20<sup>th</sup> October, 2002 but that did not materialize as the deceased could not attend. Mark told the court that on 21<sup>st</sup> October, 2002 at 12.00 midnight, he was at Zaituni Bar with the appellant and the deceased waiting for their payments. The appellant told him he had given the deceased three days after which he would die and be buried. Mark told the deceased what the appellant had said and the deceased was unhappy as he did not know what he had done to the appellant to deserve the same remarks from the appellant. Crispin, Mark and Susan Kutaba (PW 8) (Susan), all stated that after the appellant had gone to his house, the deceased, though told by Crispin not to go to the appellant’s house that night, went to the appellant’s house. The prosecution case is not clear as to exactly what took place in the appellant’s house save that the deceased was stabbed once with a knife and he was next seen outside the house where he called Susan and told her in Kiswahili language “*Semeji njoo uone wamemudunga (sic) kisu.*” He was at that time lying down and when Susan approached him she was shocked as she saw the deceased had been badly injured. Susan told Mark to go for a vehicle to take the deceased to hospital. As Mark went for a vehicle, the appellant was still holding the knife and was still threatening more harm to the deceased. Mark returned with a vehicle and the deceased was taken to hospital. Later that morning the deceased died. Dr. K. Mandalya (PW 5), a pathologist at the Coast General Hospital who carried out an autopsy on the body of the deceased on 30<sup>th</sup> October, 2002 stated in evidence that the cause of death was due to haemorrhage, shock due to bleeding in the liver and that the same injuries were caused by a sharp weapon. The knife allegedly used by the appellant in stabbing the deceased was recovered and together with the deceased’s clothes and a sample of his blood in a bottle were taken to Mr. Gakweli (PW 6), the government analyst. The blood on the knife matched the blood group of the deceased and that on the deceased’s clothes.

The appellant was arrested and charged with the offence as we have stated hereinabove. In his defence, he gave a sworn statement in which he denied killing the deceased. He stated that when he was at Zaituni Bar, his colleagues in the band were playing on the stage and one of them sang a song composed by him in vernacular saying that if the train cuts some tail, it still moves. Apparently, he was not amused, but he sat throughout the show. As he sat at the bar, one Kasongo started speaking to him but as he was to talk to Kasongo, the deceased interfered and called him deceased. He went home and slept in his house. At 2.00 a.m., he heard his wife arguing with a person at the door. That person broke the door and entered into the room where he was. That person was the deceased. The deceased had a nylon cloth in his hand. The deceased hit him. A struggle ensued. They fell down and the deceased took a knife from among the utensils. As the struggle continued, he saw the deceased bleeding. He snatched the knife from the deceased, then the deceased held his stomach and left the house through the door. Mark and others came and found the appellant still holding the knife.

The above is the brief summary of the facts in the entire case that was before the superior court, upon which the appellant was convicted of murder. Mr. Oguk, the learned counsel for the appellant, in his address to us, contended that even if the facts were as found by the superior court that the appellant killed the deceased (and he was prepared to accept the superior court’s findings on facts), still, the facts as accepted by the court would not lead to a conviction for murder. In his submission, the facts would demonstrate self defence which would lead to the appellant’s outright acquittal or they would lead to

proof of provocation and that would lead to a finding of manslaughter. Mrs. Mwangi, the learned Assistant Director of Public Prosecutions, while disagreeing with Mr. Oguk that the facts could lead to self defence, did agree that provocation was proved and thus the offence of manslaughter was proved. She proceeded to ask us to allow the appeal against the offence for murder and to substitute the same with that of manslaughter.

The evidence that was before the court left no doubt that the deceased died as a result of stab wound which was only one wound. Though the appellant, in his defence, does not state who inflicted the same wound, saying only that after the deceased had broken into his room, the deceased hit him and he got hold of the deceased, a struggle ensued with the deceased taking a knife from among the utensils and later during the struggle the deceased walked out with the injury, we, like the superior court, having carefully perused and considered the evidence that was before the court, do agree that the deceased died as a result of stab wound inflicted by the appellant. Susan who was there immediately after the incident stated that the deceased told her that they had stabbed him with a knife. The learned counsel for the appellant did not dispute that fact and in fact he accepted it.

Other than what the appellant stated in his defence in court, no evidence was adduced as to what really took place in the appellant's house once the deceased had entered the same house. However, there is no evidence that the deceased went to the appellant's house with any weapon to suggest that the appellant's life was in danger so as to warrant the defence of self defence. In the case of **Selemani vs. Republic (1963) E.A at page 446**, the predecessor of this Court stated:

**“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. ....**

**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 force used is excessive, but if the other elements of self defence are present there may be a conviction for manslaughter.”**

In our view, the superior court was plainly right, in the circumstances of this case, to reject the defence of self defence as there was nothing to suggest that the appellant was facing violent felony nor is there evidence that he was assaulted. Dr. Charles Mwangome (PW 3), a consultant psychiatrist at Coast General Hospital, stated in evidence that when the appellant appeared before him for examination, his (appellant's) appearance and behaviour were normal.

However, having rejected the defence of self defence, the learned Judge proceeded to find the appellant guilty of the offence of murder after stating in passing that there was no provocation. The record does not show that she considered the question of whether or not the circumstances as appeared that night could have resulted into a charge of manslaughter and not murder. She apparently put a lot of weight on the appellant's statement that the deceased could be dead within three days without considering that such a statement could have been prompted by belief in magic and not necessarily a reflection of what the appellant intended to do.

There is undisputed evidence on record that the appellant was not happy with the song he composed being sang by a person in the band in a way he felt was mocking him. There was evidence that, on the deceased hearing threats by the appellant against his life, he went to the appellant's house in the wee hours of the night despite Crispin and others telling him not to do so. The appellant was at that time asleep with his family that included a young baby in his house. Under these circumstances, one cannot rule out the appellant feeling provoked. Unfortunately, the learned Judge did not in her summing up to the assessors direct them on the availability of the verdict of manslaughter in case self defence and

murder were not proved. As we have stated, in her judgment, she did not direct herself to the same. She stated, no doubt that there was no provocation, but she did not state any reason why she thought there was no provocation. Further, it would appear she did not consider the altercations at the Zaituni Bar that preceded the visit at night to the appellant's house by the deceased and their effect on the appellant. **Section 207** of the Penal Code 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.”

In this case, as we have stated, the appellant was asleep in his house. At about 2.00 a.m., the deceased with whom he had had misunderstanding a few minutes back forced himself into his house. We cannot say that those circumstances did not amount to provocation. At the very least the Judge should have put them to the assessors and considered them herself.

We do agree with the learned counsel for both the appellant and the State that the defence of provocation was available to the appellant in this case. In the circumstances, we allow the appeal against the offence of murder and set aside the conviction and the sentence of death. We substitute in its place conviction for manslaughter under **section 207** of the Penal Code. The appellant is sentenced to **seven (7)** years imprisonment with effect from the date of the judgment and sentence in the superior court i.e. with effect from **18<sup>th</sup> January, 2006**. Judgment accordingly.

**Dated and delivered at Mombasa this 28<sup>th</sup> day of July, 2005.**

R.S.C OMOLO

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**