



IN THE COURT OF APPEAL

AT ELDORET

CORAM: OMOLO, GITHINJI & WAKI J.J.A

CRIMINAL APPEAL 199 OF 2004

BETWEEN

RC.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from conviction and sentence of the High Court of Kenya at Eldoret (Nambuye, J) dated 26th November, 2001

in H C CR. C NO. 50 OF 2000

JUDGMENT OF THE COURT

The sole issue raised and argued in this appeal is whether the defence of provocation is available to the appellant in the circumstances of this case.

“**Provocation**” is defined under **Section 208** of the Penal Code, **Cap 63** to mean and

include:

“.....except 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 person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the 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.”

An unlawful killing in circumstances which would constitute murder would thus be reduced to manslaughter, but only if the act which causes death is done in the heat of passion caused by sudden provocation. That is the language of **Section 207** of the Penal Code. It is a question of fact whether the accused in all the circumstances of the particular case, was acting in the heat of passion caused by grave and sudden provocation when the killing was done- See **Wero v Republic [1983] E. A 549**. There is a chain of authorities dealing with issues of provocation since the codification of our Criminal Law in 1948. None however was cited before us, and we have not found one, that suits the circumstances of this case. What are the circumstances?

On the 23rd of June 1999, three young children of E R (PW1) and J K R (PW2) returned home from school. Both parents were away at the time but they had employed a househelp who had worked for them for a period of one month and one week. The househelp was RC (hereinafter “the appellant”). Among the children was L C R, a standard 1 pupil aged 7 years, (hereinafter “the deceased”). Her brothers were R K R (PW9) and I K R (PW3) aged 9 and 5 years respectively. On arrival at home, R and I had their lunch and thereafter took out the family cow with its calf for watering at a nearby river. They also went to look for and eat wild fruits. They left the deceased with the appellant. Upon their return they did not find the deceased and so asked the appellant where she was. The appellant told them the deceased had gone to see her friends at the shamba. They went looking for her but did not see her. They asked the appellant again about her whereabouts and she told them the deceased was sleeping in the kitchen. They went there and found her sleeping under a blanket. R uncovered her but found that she was not breathing. He rushed out to call his uncle. In the meantime the appellant went to a nearby road where P R (PW4) was herding some cattle. She told P that the child was not breathing. P immediately went into the house and confirmed it. Other neighbours also arrived and others went to inform the parents who also arrived. The information given by the appellant was that the child was sick, probably with malaria. The appellant just stood-by all the time, worried but not crying. It was the father of the deceased (PW2) and his sister A S (PW8) who closely examined the deceased after removing her clothes and noticed that she had the marks of a rope round her neck, one blood-stained eye, and a dislocated hand. They confronted the appellant and she admitted that she had strangled the deceased using a sisal string which she had thrown into a dam some 100 metres from the house. She took them to the dam and the string was fished out. The Police had earlier been informed and were also present and they arrested the appellant while the body of the deceased was taken for post-mortem. It was then confirmed that the deceased died of strangulation. The Pathologist (PW12) found “*ligature mark very narrow 0.1x0.2(sic) very narrow horizontal line around the middle part of the neck*”. He also found abrasions all over the body and a superficial wound on the right arm.

The appellant was charged with the offence of murder before the High Court in Eldoret, the particulars of which were that she;

“On the 23rd day of June, 1999 at [Particulars withheld] village in Uasin Gishu District of the Rift Valley Province, murdered L R”.

The unsworn defence given by the appellant was that she was washing some clothes at the home when the deceased went to her and asked her why she was not washing plates. The deceased said she would report her despite the appellant assuring her that she would wash the plates after finishing the clothes. The deceased then went into the house and fetched a hot iron rod which she intended to hit the appellant with. The appellant snatched it away and beat her up. The deceased started crying and abused her. That is when the appellant took a sisal string, followed the deceased into the house and tied it around her neck. She pulled it three times until the deceased stopped breathing. She then went out to inform PW4 that the child was not breathing.

In summing up the case for the assessors, the learned trial Judge, Nambuye J, gave this direction on provocation and self-defence:

“She alleges provocation and self defence. It is for you to determine whether the acts of the deceased from what the subject stated were such that (sic) could have made the subject to lose self control and do what she did also considering the age of the deceased. Could the public(sic) have been dealt with otherwise than what the subject did.(sic) The defence have (sic) urged the contend (sic) they state that there was no intent and killing. Looking at all the circumstances surrounding the case as revealed by the testimony of the subject was she just disciplining the deceased not to disturb her or did she intend to kill her?”.

In their opinion the assessors found the appellant guilty of manslaughter. In her judgment however the learned Judge disagreed with that opinion and found the appellant guilty of murder as charged, reasoning as follows:

“the case rests on circumstantial evidence that subject was left with the children and PW3 and 9

left the deceased at home when they went to water the animals. When they came back they found the child dead. There is no mention that any intruder came in to cause trouble. From her evidence the child disturbed her and she took a string and strangled the child. There was nobody around and the subject was older than the deceased and so the subject had an opportunity to do what she did. Her going to call neighbours and cheat them that the child had suddenly fallen sick was evidence of guilt conscience. It shows the subject knew what she was doing. This is further confirmed by the fact that she disposed off (sic) the string used to strangle the deceased in a dam in order to conceal the fact of strangling the deceased. The defence submission was to the effect that the subject was provoked to an extent (sic) that she lost her self-control and did what she did, she says so in her evidence. However, considering the age of the victim the reaction was excessive and it goes beyond the limits allowed when a plea of provocation can be accepted to mitigate the gravity of the offence.”

It is the same plea of provocation that learned counsel for the appellant Mrs Nyaundi re-agitates before us. Relying on the House of Lords decision in ***Director of Public Prosecutions vs Camplin [1978] 2 All ER***, Mrs Nyaundi submitted that the age of the appellant was a relevant factor in considering whether the defence of provocation applies. The appellant was only 13. On the other hand, it did not matter what the age of the victim was so long as what she said or did to the 13 year- old was provocative. She was aged 7 in this case.

In the ***Camplin case*** the appellant, a 15 year-old boy, went to the house of a 50 year- old man who forcibly sodomized him and laughed at him. The boy took a chapati frying pan and split the man’s skull, killing him instantly. He was convicted of murder upon a direction to the jury by the trial court that the test was:

“whether the provocation was sufficient to make a reasonable man in like circumstances act as the defendant did. Not a reasonable boy or a reasonable lad; it was an objective test – a reasonable man”

On appeal to the Court of Appeal the conviction was overturned and substituted for manslaughter, on the ground that the proper direction should have been:

“ Whether the provocation was enough to have made a reasonable person of the same age as the appellant in the same circumstances do as he did”

The issue that went to the House of Lords was thus whether the direction to the jury ought to be directed at a **“reasonable adult”** or a **“ reasonable boy of 15”**. Lord Diplock, with whom the other Law Lords agreed, analyzed at length the history of the doctrine of “provocation in crimes of homicide” and came to the conclusion that the Court of Appeal was right. It was held:

“For the purposes of the law of provocation the “reasonable man” was not confined to the adult male; the expression meant an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone was entitled to expect that his fellow citizens would exercise in society as it was today.”

It is of course significant to point out that the English Common Law on provocation has changed since the enactment of the **Homicide Act** in 1957.

Section 3 of that Act provides:

“where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.”

That is the section considered and interpreted by the House of Lords and it is the interpretation we are now urged to adopt by Mrs Nyaundi, since it is in *pari materia* with **section 208** of the Penal Code; **Cap 63**.

As stated earlier, our law was codified in 1948 and has not changed since. The standard used in **section 208** of the Penal Code is that of “ an ordinary person” while under section 3 (supra) the standard is that of “the reasonable man”. On careful consideration however, we think the difference in terminology is without distinction. The reasonable man is necessarily the ordinary person of either gender. It is the “person on the Kibera or Eldoret Bus”, so to speak. It stands to reason, and we therefore agree with Mrs Nyaundi and the decision in the **Camplin Case**, that the age of the appellant is a relevant and unusual characteristic for consideration when a plea of provocation is made. What exercised our minds is whether a 7 year-old as the victim in this case was, is capable of provocation. That is because **Section 14(1)** and **(2)** of the Penal Code provide:

“14. (1) A person under the age of eight years is not criminally responsible for any act or omission.

(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission

The philosophy behind the provisions, we think, is that such a person is incapable of forming any intent or *mens rea* which in many crimes is a necessary ingredient. So that, if the roles were reversed and the deceased killed the appellant, she would go scotfree. If that be so, we cannot see how the same person can lawfully form an intention to say or do an act which any other person can latch on to escape liability for a criminal act. It was strongly argued by Learned State Counsel, Ms Oundo, that the deceased merely said she would report the appellant to her mother but the reaction to the threat was out of all proportions. The appellant had the presence of mind to tighten the strangling string three times until the deceased stopped breathing; she had the presence of mind to walk to the dam where she threw the offending string; and she had the presence of mind to put others off the scent by lying about the whereabouts and state of health of the deceased. She only admitted the crime when she was cornered. We agree with these observations as they are borne out by the evidence on record. From all indications, and despite her age, cognizance of which we take, the appellant fully intended the consequences of her actions. There is no argument that she can be held criminally liable for them. The plea of provocation is not available to the appellant in the circumstances of this case and, in our view, the trial Court was right to convict for the offence charged and to make the consequential orders for the detention of the appellant during the President’s pleasure.

The appeal is dismissed.

DATED and delivered at Eldoret this 23rd day of September, 2005

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR