IN THE COURT OF APPEAL

AT KISUMU

(Coram: Tunoi, O'Kubasu JJ A & Onyango-Otieno Ag JA)

CRIMINAL APPEAL NO 150 OF 2003

JULIUS MWITA RANGE …….APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

(Appeal from a conviction and sentence of the High Court at

Kisii (Wambilyanga J) dated 27th July 2002)

JUDGMENT

The appellant in this appeal, Julius Mwita Range, was charged with the offence of murder contrary to section 203 of the Penal Code as read with section 204 of the same Code. The particulars of the offence were that on 6th February, 1999 at Kiandege village Nyaitara sub location in Kuria

District of the Nyanza Province, he murdered Musa Chacha Mwita. He pleaded not guilty. After a full trial, he was found guilty as charged and sentenced to death. In his appeal he has preferred two grounds and these are that:-

"1. The learned judge erred in law and fact by refusing to take evidence from the estranged wife of the Appellant Elizabeth Nyaitoto (who was the apparent eye witness) when no objection about her competence was raised by the appellant.

2. The learned judge having admitted the retracted cautionary statement of the appellant erred in law and fact by giving more weight to the incriminating aspects of the statement and down playing the provocative aspects of the same statement on which the assessors based their opinion."

According to the evidence of Paul Nyangi Nyamuhanga (PW4) and No 21834, Inspector Albert Wepukhulu (PW8), the deceased was killed on a foot path going to Kehancha and he had multiple injuries. None of the witnesses who gave evidence before the Superior Court witnessed the incident, but, on the day the deceased was killed and to be precise, immediately after the deceased was killed on the same day, the evidence shows that the appellant attempted to commit suicide by taking insecticide and as he was being rushed to the hospital, he is alleged to have told Matiku Marwa (PW3), that he had killed a person because he had found that person with his wife and had taken poison out of fear of being arrested.

Joseph Nyamuhanga (PW5) who reported the matter to OCS at Kehancha also gave evidence that after the appellant had been released from hospital, he (the appellant) led him and policemen to various places where the appellant's shoes were hidden in the bush; and lastly, the appellant also made a cautionary statement to the police which was admitted after trial within the trial and stated as follows:

"Hayo ni kweli lakini kuna sababu yake. Alikuwa na mke wangu Elizabeth Nyaitoto".

Translated into English as follows:-

"It is true but there is a reason. He was with my wife Elizabeth Nyaitoto".

The totality of this evidence from various witnesses is that the deceased was killed by the appellant. However, apart from the appellant's admission that he killed the deceased because the deceased was with his wife, there was no other evidence as to what actually happened at the time the murder took place.

The appellant's first ground of appeal seems to us to have been based on that aspect of the case. The appellant's contention, as we understand it, is that the learned Judge should have allowed the wife of the appellant, Elizabeth Nyaitoto, to give evidence so as to resolve that question as to what actually happened at the time the deceased met his death. We agree that this is a novel point. The appellant's wife was called as the first witness in the case. After she was called, the following transpired:

"PW1 Elizabeth Nyaitoto Nyamuhanga - adult/sworn *Kikuria*: I am not married to the accused. I got married to the accused in 1995. I had two children with him. He had paid dowry and which has not been returned to him although we live apart".

I C C Wambilyanga

Judge

Court: She is not competent to testify against her

husband. She is discharged.

I C C Wambilyanga

Judge".

The learned counsel for the appellant's complaint is against the order made by the learned judge discharging the same witness. We think, we need to say here at first that from the evidence which was before the superior court, Elizabeth Nyaitoto was married to the appellant and as at the time the deceased met his death, the appellant was still the lawful husband of the same Elizabeth Nyaitoto although admittedly they were separated. Her father PW5 confirmed that position in evidence as follows:

"I have not returned to the accused his 4 cattle he paid to me as dowry and according to Kuria custom she is still legally married to him".

The law in Kenya as to the capacity of a spouse as a witness in criminal proceedings is well stated in section 127(2)(ii) of the Evidence Act.

"(2) In criminal proceedings every person charged with an offence, and the wife or husband of the person charged, shall be a competent witness of the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person:

Provided that:

(i) .....

(ii) Save as provided in subsection (3), the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged";

Sub section (3) of the same section is not applicable in this case.

However section 127(4) defines "husband and wife" and it states:

"(4) In this section "husband" and "wife" mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom."

We are certain in our minds that the marriage between the appellant and

Elizabeth Nyaitoto was a marriage covered under Section 127 (4) and thus Elizabeth Nyaitoto was in law still the wife of the appellant notwithstanding that they were living separately. She was a competent witness but could only be called as a witness upon the application of the appellant who was the person charged. She was called by the prosecution and this was not proper as that was making her a compellable witness.

The defence did not apply for her to be called nor did the defence apply for her to proceed with her evidence now that she had been called and was thus made available. We do feel the learned judge was plainly right in not allowing her to testify for the prosecution and we cannot fault the judge in his well-considered decision on that aspect.

On the second ground of appeal, the learned Judge disagreed with the assessors verdict. He stated *inter alia* as follows:-

"The accused in his charge and caution and his other admissions to PW3 and PW7 said that he killed the deceased because he found him walking with his estranged wife. Was he suddenly provoked and became deprived of self-control within the ambit of section 207 of the Penal Code? Did he act in the heat of passion?

This seems to be the view taken by the assessors when they were of a unanimous opinion that the accused was guilty of manslaughter. But one has to consider the entire scenario and put a thing in its proper perspective. In the first place, there was no doubt that the accused and his wife were no longer living together. They were separated and for all intents and purposes the marriage had totally failed and broken down. Even the accused's mother knew that the marriage had failed and she had gone back to her parents ..... I find that Nyaitoto was no longer the accused's wife and what was left was for her to receive back the dowry. Suddenly when the accused left the house of PW4 in the fateful day, he deliberately went to station himself in the path which would be followed by the deceased."

We find this holding rather disturbing for two reasons. First, the learned judge rightly reflects the evidence that was before him when he stated that in the charge and caution statement, the appellant said he had killed the deceased because he found him walking with his estranged wife. What is disturbing is the weight he attached to that statement for at the end, he seems to have put too much emphasis on the marriage having broken down at the expense of what was the effect on the appellant in his finding his wife walking with the deceased on the material day. In our mind, as the woman was still in law the appellant's wife, the appellant could be provoked in his finding the deceased walking with her. There was no other evidence in what actually happened at the time the deceased met his death at the hands of the appellant except the appellant's statement under charge and caution. That statement had been admitted by the learned judge.

That in effect meant that it was evidence like any other evidence and the Court had a duty to treat it as such. It does not appear to us that the court gave that statement the same treatment as any other evidence. We do, with respect, agree with the learned defence counsel and the learned state counsel that the learned judge misdirected himself on this aspect. If he had properly directed himself on the effect of this evidence

then he would not have come to any other conclusion other than that the appellant found the deceased with his wife and this did provoke him. Further, and also of equal importance, the learned judge found that there was actually no marriage as such existing between the appellant and his wife and so the appellant could not be provoked even if the deceased was with her.

However, we note that the two got married in 1995 and had two children. Joseph Nyamohanga Magibai (PW5), stated in evidence that the marriage between his daughter and appellant broke down in 1999. He did not give the exact date but the deceased was killed on 6th February, 1999. Even if one were to accept for purposes of argument that the marriage broke down early in January, 1999, one cannot say with conviction that a period of separation between a husband and a wife of almost one month is long enough for one to conclude that such a marriage has broken down irretrievably. We feel that was still a period of testing the marriage and we are not surprised that the appellant was still apparently interested in his wife and had gone to her brother (PW4)'s house. Finally on that, we note that within that one month, the deceased had also gone to the house of the woman's father probably to seek her hand in marriage and the appellant met him there. We do feel that there was provocation. Secondly, the learned judge's findings are disturbing because we cannot find anything in evidence that was before the learned judge that could lead to the finding that when the appellant left the home of PW4 on that fateful day, he "deliberately went to station himself on the path which would be followed by the deceased." In the well known case of *Okethi Okale and Others v Republic* [1965] EA 555, it was held *inter alia* as follows:-

"(1) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches."

We feel it was not open to the learned judge to find that the appellant "deliberately stationed himself on the path which was to be followed by the deceased" as there was no evidence adduced to that effect. In our humble opinion, such a finding may very well have led him to conclude that the appellant did not act in the heat of passion.

This is a first appeal. We have analysed the evidence before us as we must do, and the law applicable. We are of the opinion that there was evidence of provocation and we thus allow the appeal, quash the conviction for murder, set aside the death sentence and substitute thereof a conviction for the offence of manslaughter contrary to section 205 of the Penal Code.

The appellant was a first offender. According to medical examination report (P3), he was 22 years when he committed the offence of manslaughter in 1999. However, the post mortem report shows that the deceased suffered several serious cut injuries. The appellant was brutal and deserved no mercy for taking away the life of the deceased. We have considered all the mitigating factors and the nature of the injuries inflicted upon the deceased and the effect thereof. We sentence the appellant to a term of ten (10) years imprisonment. Orders accordingly.

Dated and delivered at Kisumu this 28th day of November, 2003

P.K.TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

…….

Ag JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR