



**IN THE COURT OF APPEAL**

**AT NAKURU**

**(CORAM: CHUNGA, C.J, SHAH & BOSIRE JJ.A)**

**CRIMINAL APPEAL NO.183 OF 2000**

**BETWEEN**

**JOSEPH CHERUIYOT LANGAT.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**An appeal from the judgment and sentence of the High Court of Kenya at Kericho (Lady Justice S.C. Ondeyo J. dated 27th October 2000**

**in**

**H.C.C.C. NO.22 OF 1998)**

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**JUDGMENT OF THE COURT**

At about 5 p.m. on 15th February, 1998, at Kakibai Village in Kericho District, Joseph Cheruiyot Langat, the appellant, inflicted three severe cut wounds on the head, neck and left wrist of Kiplangat Arap Boit, the deceased, using a panga, as a result of which the latter died. A post mortem examination on the body established the cause of death as cardio-pulmonary arrest due to severe haemorrhage. Following the deceased's death the appellant was arrested and was thereafter arraigned in court on an information charging him with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code respectively. Eventually the appellant was tried for the offence with the aid of assessors.

In his defence, the appellant stated that the deceased was his father. The appellant's mother had been estranged from his father since 1969, and that he, the deceased, did not approve of the appellant coming into contact with her. It was the appellant's case that on the material date of the alleged offence he was returning from his mother's home when he met the deceased along a path. On learning that the appellant was returning from his mother's home the deceased became infuriated, and called the appellant "a prostitute like my mother". And as the appellant tried to pass him, the deceased hit him on the head with his walking stick. The appellant tried to run away. He however stumbled and fell down. As he lay down on his back, the deceased hit him a second time. The blow landed on his left eye. A third blow met him on his right hand. The appellant said that he cut the deceased's hand by mistake as he tried to defend himself with a panga he had in his hand. The appellant did not however, say anything concerning the other two cut wounds which the doctor who performed the post mortem examination found on the deceased's body. The trial Judge (Ondeyo, J.) after analysing and evaluating the prosecution and defence cases rejected the defence case on two main grounds. First, that it was unthinkable that the deceased who was

armed with only a walking stick, would attack the appellant who visibly was armed with a panga. Second, that the nature, number and severity of the injuries the deceased sustained were inconsistent with the appellant's defence that he cut the deceased by mistake; and that if anything they showed that the appellant had the necessary malice aforethought to support the charge of murder. She came to the conclusion, agreeing with one of two assessors who participated in the trial fully, that the appellant was guilty as charged. The second assessor returned a finding of not guilty. Later in this judgment we will say something about the third assessor, who, according to the record, was excluded from the proceeding when he, either failed to attend one sitting of the court or was late to arrive in court for the hearing of the appellant's case. In the present appeal, the appellant put forward six grounds of appeal. However at the hearing of the appeal, his counsel, Mr. D.G. Kisila, abandoned five of those grounds and declared that he would only argue, ground 4 which reads as follows:

"4). That the Judge erred both in law and fact in convicting me and failed to consider that I was only defending myself and I had no ill motive in the present case."

Section 9(3) of the Penal Code is clear, that unless expressly declared by a provision of the law creating an offence, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility. In view of that provision we do not think that the appellant's motive for cutting his father was a matter the trial Judge could properly consider in coming to a decision as to his guilt or innocence. But considering that the appellant's memorandum of appeal is home made, it is possible he wanted to say that he lacked the necessary mens rea for the offence charged. We think that it would be prudent to infer and to proceed on the basis that the appellant is complaining that the prosecution did not establish that when he cut his father he had the necessary mens rea.

In his submissions before us, Mr. Kisila for the appellant raised three points. First, that because medical evidence showed that the appellant had an eye injury, his defence that he cut his father in self-defence excluded mens rea, with the result that the evidence fell short of that required in proving either murder or any lesser offence. Second, that even if the appellant had used disproportionate force against the deceased in self-defence, he could only have been guilty of the lesser charge of manslaughter. For that proposition he cited this Court's decision in the case of Robert Kinuthia Mungai v. R. [1982 - 88] 1 KAR 611.

Mr. E.O. Onderi, State Counsel, did not think a situation for self defence arose in this case. In his view, considering the events which preceded the deceased's killing, neither provocation nor self-defence could inure to the appellant's benefit.

This is a first appeal. We are therefore duty bound to analyse and evaluate all the evidence which was presented to the trial court, draw our own conclusions on it without of course overlooking or ignoring the conclusions of the trial Judge. We have also to appreciate that, unlike the trial Judge, we did not have the benefit of seeing and hearing witnesses testify as to be able to assess their credibility. Having said that it is now opportune to consider the evidence on record.

Problems between the appellant and the deceased started when the deceased leased out part of his land to one Ezekiel Birir (Birir). The appellant was opposed to it and therefore prevented Birir from tilling the portion which was leased to him. The deceased and Birir in turn, called a clan meeting which met on the morning of 15th February, 1998. Both the deceased and the appellant attended the meeting. John Kiplangat Kirui (PW1), Joel Kipkoech Arap Siget (PW2), Samuel Kipsang Kimeto (PW3) and Daniel Kiprono Keter (PW7) are among the clan members who attended that meeting. It was their testimony that the meeting resolved that the appellant would refund to Ezekiel Birir, his money, but the appellant did not agree with that decision. According to PW1 the appellant retorted that he "... will not refund the money and Ezekiel will not plough the land and if he dared do so, it will be a matter of death."

The deceased was killed later the same day. PW2 and David Kibet Koros (PW4) gave evidence that they saw the appellant cut the deceased three times. Both said they were about 100 metres away when they witnessed the assault. Each testified that he saw the appellant raise his panga three times and cut the deceased on each occasion. Neither of them saw the deceased raising his walking stick. The testimony of Joel Kibet Kalya (PW5) in a way supports their testimony. Kalya testified that when he met the appellant

soon after he had cut the deceased, the appellant asked him to take him to the police station saying that he had killed his father. But by then his father had not died. According to Kalya, the deceased died as he was being taken to hospital. The appellant must have believed he had already killed his father. The severity of the injuries must have led him to believe that he had already killed the deceased.

Dr. Timona Obura (PW10) carried out a post mortem examination of the deceased's body, and as we stated earlier he found that the deceased died due to cardio-pulmonary arrest due to severe haemorrhage. He also examined the appellant as [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) 7 to his mental fitness to stand trial. His findings on the latter examination were that the appellant was mentally fit to stand trial. He also observed an injury on his left eye. It was the only injury he noted on him. The examinations were done two days after the deceased's death. But in his defence the appellant stated that the deceased hit him thrice, first on the head, then on his left eye, and lastly, on his right hand. Had that been so, one would have expected that some evidence of the assault would still be visible on the appellant's body on all the parts where the deceased's blows landed.

It was largely on the basis of the evidence as set out above and the statement of the appellant, which we adumbrated earlier, that the trial Judge came to the conclusion that the appellant had the necessary mens rea for the offence he faced.

This Court, in Robert Kinuthia Mungai's case, earlier on cited, held that decided cases on the use of excessive force in defence of the person will frequently result in a conviction of manslaughter rather than of murder; and that the element of self defence will frequently merge into provocation. On the basis of that authority, it was urged on behalf of the appellant that the deceased's conduct in calling the appellant a prostitute, and later attacking him with his walking stick, deprived him of self-control and at the spur of the moment he cut the deceased several times in self-defence. But the appellant's defence at his trial was not provocation. Rather it was that he cut the deceased accidentally. Even assuming that the appellant had raised provocation in his defence the facts of this case and the conduct of the appellant himself took his case outside the defence of provocation under Section 207 of the Penal Code. That section provides:

207 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."

Section 208 of the same code defines what constitutes provocation in the legal sense. But it is not every act of provocation which will reduce the charge of murder to manslaughter. The Court of Appeal for East Africa, in the case of Tei s/o Kabaya v. R. [1961]EA, authoritatively stated circumstances which a court should consider in deciding whether certain provocation is sufficient for purposes of Section 207 above, to reduce a charge of murder to manslaughter. The Court there said: "In considering whether the provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used."

As we stated earlier the learned trial Judge in the case before us considered the two aspects, and also the respective ages of the appellant and the deceased, and ruled out provocation. We cannot but agree.

It is well established that, except where the accused raises a plea of insanity, no burden rests on him to establish his defence. It is upon the prosecution to adduce evidence to establish the accused's guilt and to negate any defence he has put forward. (see Doto s/o Mtaki v. R. [1959]EA 860). Bearing that in mind we are of the view that on the evidence which was before the trial Judge neither provocation nor selfdefence were disclosed by the evidence. The evidence of PW2 and PW4 is clear that the appellant, unprovoked, approached the deceased and cut him three times using a panga. As we stated earlier, one blow severed off the deceased's hand at the wrist. The other caused a severe cut on the deceased's head. The third blow affected the neck muscles and vertebrae. All these injuries were on the left side, suggesting that the deceased did not change his position, because had he done so at least one of the blows would have landed on either the front, the back side or the right side of his body. That, in a way, would have been consistent with someone who was in combat. Eye witnesses were categorical that they did not

see the deceased raise his walking stick. The position of the cut wounds on his body clearly support their evidence.

The attack on the deceased was vicious and the injuries he sustained were severe. A lethal weapon was used. The injury on the deceased's eye was isolated and considering what he said happened to him vis-a-vis the injuries on the deceased's body and himself, this was a case of a premeditated attack, and it matters not what test, subjective or objective, one employs to consider the appellant's conduct. He had earlier the same day threatened to kill Birir if he dared to cultivate the land the deceased had leased to him. The appellant was clearly unhappy with his father and was prepared to go any length to stop Birir from working on the said land.

Before we wind up this judgment there is an issue, consideration of which we deferred. It is the issue of assessors. The trial started and proceeded up to the end of the defence case with the aid of three assessors. But at the resumed hearing of the case when counsel were to offer their final submissions, one of the three assessors, Richard Rono, was not present at the time the case was called. When the fact of the absence of one of the assessors was brought to the trial Judge's attention she immediately made the following order:

"Court Assessor Richard Rono being absent he is excluded from the rest of the proceedings to enable the court proceed with the case to its conclusion without undue delay."

Counsel then made their submissions, and thereafter the learned Judge summed up the case to the two remaining assessors. The two were not ad idem in their respective findings. As we stated earlier one found the appellant guilty of murder, while the other found him not guilty. That is not the issue which caused us concern. Rather it is the manner in which the third assessor was excluded from the proceedings. Section 298 of the Criminal Procedure Code (CPC) makes provision as to what should happen when an assessor absents himself from the trial. The section, as is material, reads thus:

"298(1) if, in the course of a trial with the aid of assessors, at any time before the finding, an assessor is from any

sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other assessors."

Sub-section (2) thereof is not material to this case. By dint of the provisions of Section 297 of the CPC, it is the court's prerogative to select assessors. Likewise, under Section 298, above, it is the court's prerogative to exclude an assessor from a trial but for sufficient cause. Section 298(1), above, presupposes that before a court excludes an assessor from a trial it must inquire as to the reasons for his non-attendance; or where it is not possible to enforce his immediate attendance, for reasons which must be recorded, then, and only then, can a court properly proceed with the trial in his absence.

The learned trial Judge neither conducted an inquiry as to the reasons for Richard Rono's non-attendance nor did she indicate in the court record that some steps had been taken, without success, to ensure his attendance before she decided to proceed with the hearing in his absence. This was clearly an error of law. But when the issue was drawn to counsel's attention by us, learned state counsel Mr Onderi, did not think the error per se is fatal to the appellant's conviction. In his view the error is curable under Section 382 CPC. Mr. Kisila, for the appellant, did not express any view on the matter. While we agree with Mr. Onderi that the error is curable on the facts and circumstances of this case, in an appropriate case, it might be fatal to an otherwise sound conviction. It is not a light matter to exclude an assessor from proceedings. That is why, we think, there are clear provisions as to steps a court should first take before such a step is taken. We say no more on the matter.

The appellant's conviction of murder contrary to Section 203 as read with Section 204 of the Penal Code was based on overwhelming and acceptable evidence. In the result his appeal has no merit and is ordered dismissed.

Dated and delivered at Nakuru this 15th day of March, 2002.

**B. CHUNGA**

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**CHIEF JUSTICE**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR