



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SHAH, O'KUBASU & KEIWUA, JJ.A

CRIMINAL APPEAL NO. 50 OF 1991

BETWEEN

STEPHEN KIPKEROR CHEBOI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court at Nairobi, Mango J, dated May 20, 1991

in

High Court Criminal Case No 29 of 1989)

JUDGMENT OF THE COURT

The appellant, Stephen Kipkeror Cheboi, was found guilty and convicted by the High Court (Mango, J) at Nairobi upon an information which charged him with murdering Elizabeth Komen on 7th October, 1988, at the Customs Quarters in Langata contrary to Section 203 of the Penal Code as read with Section 204 of the said Code and was duly sentenced to death. The two assessors returned a verdict of guilty. The third assessor was excused from attending at some stage in the trial.

On the night of 7th October, 1988, at about 8.00 p.m. the appellant and Elizabeth Komen (*hereinafter referred to as "the deceased"*) who was his wife arrived at the appellant's Customs Quarters house in Langata. They carried with them some luggage. Both entered the appellant's bedroom in the said house and after what appeared to be some argument between them, the appellant killed the deceased. The fact that the appellant killed the deceased is not in dispute.

The facts leading to the fatality can be simply stated. The appellant and the deceased were married during the year 1976. The marital life between them was clearly not a bed of roses. During the years 1985, 1986 and 1987, the appellant and the deceased resided, mainly, in a house in Nairobi South 'B'. That was a house allocated to the deceased who was a police officer attached to the Presidential Escort Service. The deceased received a salary increase in July, 1988. It appears that the increase triggered off more problems.

The deceased told the appellant that he was too insignificant a man for her to live with and that she had another person who she wanted to live with. That person is one Inspector Timto (PW14). On 15th August, 1988 the deceased came to the appellant's place of work in the company of Inspector Timto.

Inspector Timto told the appellant to leave the police lines (presumably the House in South 'B') and look for accommodation elsewhere because the deceased had made some report of beating and being chased from the house. That is Inspector Timto's version of what happened on 15th August, 1988. The appellant's version of events of that day is similar but not quite the same.

The appellant in his statement under inquiry, which statement was not challenged, stated that on that day at about 10.00 a.m. when he was on duty at Embakasi the deceased accompanied by Inspector Timto and a lady arrived there and advised him to vacate the South 'B' house as he had disturbed the deceased for too long. He threatened him with arrest unless he vacated the house. The appellant was then ordered to get into the police vehicle and taken to south B. He was told to take his belongings and vacate the house. The deceased then boasted that the inspector was her man. The appellant remained calm. The deceased insisted that the appellant must vacate the house soon after returning from their Mombasa trip. The appellant went on to say further in his inquiry statement that on Saturday, 1st October, 1988 at 10.00 O'clock the deceased stood at the window facing Inspector Timto's place and taunted him saying: "can't you see? I told you TIMTO is my man and you can see he is calling me." The appellant on being asked to leave promised to leave but otherwise kept quiet. The deceased went away to return at midnight when yet again she pointed to Inspector Timto and said:

"That is my husband who has come to see whether you will beat me."

Although the appellant got very annoyed he kept quiet. The next day the deceased left for Kiganjo warning the appellant that he must vacate the house by the time she returned. This fact annoyed the appellant.

We come now to the fateful day, that is, 7th October, 1988. What happened that evening in the bedroom between the appellant and the deceased is known primarily through the appellant's inquiry statement and the unsworn statement made by the appellant during the trial. In the trial court he said:

"I admit I killed my wife. s he provoked me a lot, abused me and despised me a lot. She said she would go making love with IP Timto till I will decide to leave her. She evicted me from her house at South B with help of IP Timto. I got extremely annoyed till I killed. That is all ."

Edward Kibet Kimeto (PW1) in his evidence, so far as material said:

"All the curtains in the house had been pushed (sic) open. No lights. I opened door, came in and found accused washing his hand in the washbasin in the toilet. Police asked him what he had done here. Accused said in Swahili "I have killed my wife." He was asked why and he said in Swahili 'she has troubled me too much.'"

In his inquiry statement, the appellant after narrating the previous troubled history of the marriage between him and the deceased stated that upon her return from Kiganjo on 7th October, 1988 the deceased started quarrelling with him asking him why he had not vacated the house ordering him to 'get out' never to return. She helped him pack his baggage. Once they reached their destination, the house in Langata, and whilst they were inside the bedroom, the appellant sought to know from the deceased how she fell in love with IP TIMTO. Her response was: "that is not your problem. I loved him with my heart ----. We cannot part". That answer annoyed him. He removed the knife from the handbag and killed her after overpowering her. The learned Judge considered all that was before him and concluded as follows:

"There is no doubt that the accused must have been undergoing extreme physical torture for a long period but that is not the same thing as provocation. For the defence of provocation to succeed the basic question is this:

'Was the act done in the heat of passion caused by sudden provocation as define d in section 297 of the Penal Code and before was there time for the passion to cool? If the answer is yes - it is manslaughter and if no - it is murder. See Sungura Son of Ngolilo V.R. (1946) 13 EACA 110. A decision gratefully given to me by defence c ounsel'"

Provocation is actually defined in Section 208 of the Penal Code as follows:

"208 (1) The term "provocation" means and includes, 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 and 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".

In other words if in the heat of the moment or passion a person strikes another person when insulted to a degree which would deprive an ordinary person of the power of self-control an act of killing resulting from such striking could amount to manslaughter rather than murder.

The learned Judge went on to say in his judgment:

"I cannot help feeling extreme sympathy for the accused over the heart -rending treatment he underwent before this tragedy unfolded."

Let us reconsider the whole scenario. The marriage between the appellant and the respondent was not a happy one. They had trouble over the years. The deceased was better placed in society than the appellant. She was a police officer attached to Presidential Escort Service whereas the appellant was a lowly messenger. There were acts of insults hurled at the appellant by the deceased over a period of time. She made him feel unloved. She made him feel that he was not good enough for her. She made it clear that IP Timto was her man, although Timto denied it. His denial does not stand scrutiny. Why would he get involved in their marital problems when it was not part of his duties to get involved. The proverbial last straw which broke the camel's back was the insult the deceased hurled at the appellant inside the bedroom when his temper must have snapped as to cause him to carry out the ghastly crime. But is it murder? Could it be said that if the learned Judge and the assessors would have given sufficient consideration to the appellant's subjective state of mind when the deceased finally told him to get out of her life they would have come to the conclusion that the appellant was provoked enough as to render the crime to be manslaughter rather than murder? We pose this question as it appears that the Judge and the assessors did not consider the appellant's subjective state of mind at that crucial moment. Had they done so it is probable that they would have found sufficient provocation.

Miss Nyamosi who appeared for the respondent urged that as the appellant had packed a knife in a piece of his luggage with the ultimate intention of killing the deceased there was clear mens rea to inflict an injury and that the manner in which the deceased was killed disclosed an offence of murder as opposed to manslaughter. The learned Judge also based the conviction for murder on those factors. It must however be remembered that the appellant had not armed himself with the knife on his person. It was in a piece of his baggage and it is not unusual to pack a knife when moving house. What is material is how the knife came to be used. According to the learned Judge the answers which the appellant got from the deceased when he asked her about her final intentions were such as could be expected. Yes to a man who is normally placid such answers may not be provocative but we must look at the whole scenario from the point of view of an ordinary person and not necessarily a reasonable person. The appellant had been subjected to humiliations over a number of years and it is quite probable that whilst he tolerated the situation for a long time it is also probable that, as earlier pointed out, the rude and derogatory answers he got finally amounted to the proverbial last straw which broke the camel's back.

Mr. Kiage has urged that we look at the matter from the angle of an ordinary person who has been subjected to insults by his wife for years. We have done so. We have related the manner in which the deceased treated the appellant. It was also urged, on behalf of the appellant, in the superior court by Miss Omamo who appeared for him, that whilst an isolated incident would not amount to sudden provocation all the incidents considered together including all the insults hurled at the appellant and also threats made on previous occasions through Inspector Timto and otherwise being in mind of the appellant when the final showdown occurred on 7th October, 1988 could have amounted to sufficient provocation to reduce the offence to that of manslaughter. It was further argued that in Kenyan society it is demeaning for a man

when he is told by his wife that he is useless for her and that she is more interested in another person, more so when the wife is the mother of his five children.

It has been urged, as pointed out earlier, that the fact of packing a knife showed the intention to kill. That may be so, but in this particular case, it must be remembered that the knife was used only after the final insults were hurled at the appellant.

We have already pointed out how the learned Judge felt about the appellant, that is, that he must have been undergoing extreme psychological torture for a long time and that the Judge felt sympathetic to the appellant for the heart-rending treatment he underwent.

The history of disagreements between the appellant and the deceased, as narrated by the appellant amounts to what could be termed as "cumulative provocation". It is stated in *Archbold 1999* at para 19-58 (page 1574) as follows:

"A general approach can, however, be discerned from the authorities, namely that Evidence of previous provocative acts or past conduct, particularly in cases of domestic violence, is admissible in order to place in its appropriate context the reaction of the accused to the alleged provocation on the occasion of the killing."

It is clear to us that the superior court did not properly consider the question of cumulative provocation when arriving at the conclusion that the appellant had sufficient cooling time as not to lose the control of his temper.

For instance in the case of *R.V. Humphreys* [1995] 4 All E.R. 1008 it was held, by the Court of Appeal in England, that in a case where the provocative circumstances comprised a complex history with several distinct and cumulative strands of potentially provocative conduct which had built up over time until the final encounter, the Judge ought to give guidance to the jury in the form of careful analysis of those strands so as to enable them to understand their potential significance.

In the case before us whilst the learned Judge considered the history of the several distinct and cumulative strands of potentially provocative conduct built up over a long time he misdirected himself and the assessors in stating, during his summing up to the assessors, that although the appellant said all along that he had been told on a number of occasions by his wife that she had a lover they were never found out (presumably in flagrante delicto). That part of the summing up led the learned Judge to say that there was a cooling off period. However, the Judge did not consider the cumulative effect of the problems between the appellant and the deceased which led to the eventual quarrel in the bedroom and the killing. There we think the learned Judge erred.

We are of the view that in the particular and peculiar circumstances of this case there was sufficient provocation within the definition thereof in Section 208(1) of the Penal Code. We allow this appeal, quash the conviction, set aside the sentence of death and substitute therefor a conviction for manslaughter under Section 205 of the Penal Code. The appellant has been incarcerated since 7th October, 1988, that is for a period of over 13 years. That period is sufficient to say that the appellant has repaid his debt to the society as a criminal. He is hereby ordered to be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 7th day of June, 2002.

A.B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR