IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OMOLO, TUNOI & O'KUBASU JJ A)

CRIMINAL APPEAL NO 164 OF 2001

BETWEEN

ANDRIANO OYUGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court at Mombasa, J Khaminwa CA, dated December 11, 2000

in

High Court Criminal Case No 13 of 1999)

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JUDGMENT OF THE COURT

In 1988 Andriano Oyugi, the appellant hereinafter, married Beatrice Moraa Gichamba. Ten years later ie by 1998, they had brought into this world three children namely Brenda Nyangarisa, Leroy Stone Nyakundi and Theresa Namataka. Brenda Nyangarisa was the first born. The marriage between the appellant and Beatrice was clearly a stormy one, and it appears from the recorded evidence that by August 1998, the appellant and Beatrice were living apart; at any rate that is what Beatrice alleged in her evidence. On 10th August 1998, the appellant came home and found Beatrice was away. Beatrice was in fact in the house of her friends Hellen Msachi and her husband Philemon Mafwaba. Those two gave evidence for the prosecution as PW3 and PW4 respectively. The latter couple were also with Abdi Juma (PW11); Abdi was a neighbour of Hellen and Philemon. It was the evidence of Beatrice (PW2), Hellen and Philemon that the appellant came to where they were and he was looking angry, and, according to Abdi, he also looked drunk. It was sometime after 9 p.m. The appellant demanded that Beatrice should go home with him to prepare his food. Beatrice refused and an altercation ensued. Hellen, Philemon and Abdi interceded and tried to bring peace between husband and wife. The appellant warned Philemon that if he (appellant) had carried an arrow, he would have shot Philemon. The appellant was wearing a jeans jacket and the witnesses thought he was carrying a *panga* under that jacket. As the altercation continued, the appellant is alleged to have told the witnesses that he would go home and kill their children. He left and Hellen, Philemon and Abdi followed him. Beatrice ran to the police station to report. At some stage before reaching his home the appellant turned upon the party which was following and they had to run back; the appellant was then openly brandishing a *panga*. He eventually reached his house and when Hellen and her party also reached there, apparently some time later, they met Brenda at the door carrying

a lamp. Brenda's throat had been deeply cut and she was bleeding profusely. The other two children were found hiding in the house, the boy Leroy Stone under the bed and Theresa in another place. The appellant was nowhere to be seen. Hellen and her party took the injured Brenda to the police station and then to the hospital where she died two or so days later. Dr. Mandalia, (PW1), carried out the post-mortem examination on the body of Brenda on 14th August, 1998. As a result of his examination, Dr. Mandalia was of the opinion that Brenda died due to respiratory failure caused by bilateral pneumonia due to cut wound to the trachea. The cut inflicted on Brenda had in fact severed the trachea.

Meanwhile, when Hellen and her party arrived at the police station, they found Beatrice there and shortly thereafter the appellant arrived. The appellant was received there by Constable Samuel Odara (PW 6). Odara and the appellant knew each other and as a result of what the appellant told him, Odara took the appellant to Constable John Kilonzo (PW 9) who was in the report office. It was to Constable Kilonzo that Beatrice and Hellen and her party had reported. The appellant was arrested and placed in custody.

It was, therefore, not surprising that when Brenda succumbed to her injuries the appellant was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of that charge being that on 10th day of August, 1998 at about 9 pm at Soweto Village in Likoni Location within Mombasa District of the Coast Province, the appellant murdered Brenda Nyangarisa.

The appellant was tried on that charge before a Commissioner of Assize, Mrs. Khaminwa, sitting at Mombasa High Court with the aid of assessors. The appellant told the Commissioner and the assessors that he had caused the death of his daughter in the manner alleged but his defence was that at the time he caused the injuries of which Brenda died, he had been groping in darkness in his house looking for his wife who had caused him unbearable provocation. In darkness, he had felt the hand of someone and thinking it was his wife, he had lashed out with a *panga* and was subsequently shocked to find that he had instead cut his daughter whom he loved very much. Upon discovering this, he ran to the police station where he reported his tragedy to Constable Odara.

And what was the unbearable provocation which Beatrice had caused to the appellant? The appellant agrees that he followed his wife to the house of Hellen and Philemon. He found the couple with some two other people drinking "*changaa*" and they invited him and he joined them. Hellen brought to him two "*fanta*" bottles of "*changaa*" and as he was drinking he suddenly saw a door opening some five metres away and he saw Beatrice and another man come out. He concluded that the wife had been sleeping with the other man and when he confronted them over the matter, Hellen told him he was not the only man around. Beatrice ran towards their house and he followed her. Apparently, Beatrice got into the house and started talking to Brenda, and the other children. The other "relatives" of Beatrice, apparently Hellen and her party followed them into the house.

They were armed and to protect himself from them, he picked a *panga* from some place in the house and a fight ensued. He fought his way out of the house but at some stage ran back into the house which was then dark. He thought Beatrice was still in the house and that was how he came to lash out with the *panga* thinking he was cutting the wife, only to find out later that he had cut his daughter. The appellant denied that when he went to look for his wife, he had carried a panga and he also denied the evidence of his wife, Hellen Philemon and Abdi that he had threatened that he was going home to kill the children.

The learned Commissioner of Assize and the assessors did not really care much for the appellant's story and they rejected it and accepted the evidence of the prosecution. Having done so, they inevitably found the appellant guilty of the charge of murder; the Commissioner convicted him of that charge and sentenced him to death as is provided by the law. The appellant now comes to us by way of the appeal and as it is a first appeal, it is clearly our duty to re-evaluate the evidence and make our own conclusions thereon, of course bearing in mind that we did not, unlike the Commissioner and the assessors, see and hear the witnesses testify.

Frankly speaking, we have a lot of sympathy for the conclusions reached by the learned Commissioner and the assessors. But we are a court of law, not sympathy or any such like laudable inclinations. Right

from the very beginning, the appellant had raised the defence of provocation and we have already set out what the appellant alleged constituted the provocation. Having heard the evidence and the submissions made thereon by counsel on either side of the divide, the learned Commissioner had to sum-up the case for the assessors. Her summing up to the assessors runs from page 65 to page 68 of the record of appeal. In that summing-up the Commissioner of Assize did not mention to the assessors the issue of provocation. It may be that that defence was patently false; we suspect it was. But it was nevertheless a defence put up by the appellant; it was sworn and the appellant was cross-examined on it. It was clearly the duty of the Commissioner to address the assessors on the defence of provocation, to point out to them that if they believed the story of the appellant that he saw Beatrice come out of a room with another man, that would probably constitute a provocation as currently understood in our law. As we have said, it may well be that the defence was utterly false. But false or not, the assessors had to be addressed on it, and left to make their own decision on it. The Commissioner did not do so at all and we do not know what the assessors thought of it.

Nor do we know what the learned Commissioner of Assize herself thought of the issue. She wrote a fairly short judgment consisting of six pages. She does not mention that defence anywhere in her judgment. We accordingly do not know what she thought of it. Of course, we can assume that because she convicted the appellant, she must have rejected his defence but as we have said, she had to explain the defence to the assessors and let them decide it as best they thought.

Again the prosecution, for some reason which is not clear to us, introduced into its evidence the fact that the appellant had recently been convicted of the offence of assaulting his wife and sentenced to two and a half years imprisonment. We do not understand how that evidence was accommodated within the provisions of section 57 of the Evidence Act which deals with that issue. That section provides:-

> "57 (1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless– (aa) such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or
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> (a) the proof that he has committed or been convicted of such other offence is admissible under section 14 or section 15 to show that he is guilty of the offence with which he is then charged; or
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> (b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or
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> (c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or
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> (d) he has given evidence against any other person charged with the same offence: Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial. (2) ....."

Paragraph (aa) of section 57(1) incorporates the principle of *"res gestae"*.

That principle was explained in the case of *Geoffey Nguku v Rep* (1982 – 88) 1 KAR 818. In that case, Nguku, who was a police officer, had on 19th January, solicited for a bribe which was eventually handed over to him on the 21st January. He was charged only with receipt of the bribe on 21st January and not the soliciting of the bribe on 19th January. At his trial, the prosecution sought to prove the soliciting of the bribe on 19th January and that evidence was strenuously objected to on the ground that the prosecution was trying to adduce evidence of the commission of another offence with which Nguku was not charged. Rejecting that evidence the Court of Appeal consisting of Hancox JA as he then was, Platt & Gachuhi Ag JJ A stated as follows:

> "In the instant case we take the view the events of 21st January could not be properly understood unless the antecedent events of the preceding two days were admitted into evidence. We agree with Mr. Bwonwonga, who appeared for the Republic, that events of 19th January, were sufficiently connected with the facts in issue, namely the events of the Wayside Bar on 21st January, as to form part of the same transaction. It would be wholly artificial in circumstances of this case to separate the soliciting stage from the receiving stage, so as to create two distinct offences, instead of that which was in reality a chain of events leading up to and constituting the offence of which the appellant was charged .....".

This passage explains well the concept of "*res gestae*" and we need add nothing to it. Mrs. Mwangi, who represented the Republic before us and in the High Court, did not contend that the previous conviction against the appellant was part of the *res gestae* of the events of 10th August, 1998 which resulted in Brenda's death. That left the prosecution with paragraph (a) of Section 57(1) of the Evidence Act, namely that the previous conviction constituted facts showing the mind of the appellant such as intention, knowledge, good faith, negligence, rashness, ill-will etc (section 14 of the Evidence Act) or that they were facts showing a system (section 15). Mrs. Mwangi made opening remarks before the Commissioner and the assessors. Nowhere in those remarks did she say that the Republic would seek to prove any of the matters set out in sections 14 and 15 of the Evidence Act.

The learned Commissioner of Assize did not address the assessors on any of these facts and she does not say anything about them in her judgment. Instead she simply said in her judgment, without any effort at an explanation:-

> ".... Looking at the evidence as a whole the court notes that the appellant is a man of violent temper. He had assaulted his wife in 1997 for which he was jailed for 2 1/2 years".

That was undoubtedly so but that previous conviction had to be admitted only in conformity with the provisions we have set out and the Commissioner had to say why she was admitting it. She did not say so and it clearly influenced her decision.

We think these were serious enough errors on the part of the trial court to warrant out interfering with its decisions. There were several others but we do not think it is necessary to set them out in full except perhaps to point out that it is not the province of a trial judge to tell the assessors which version of the case looks more believable. That is a question of fact and once the evidence has been set out and the contradictions or whatever other deficiencies are pointed out, the trial court must then leave it to the assessors to choose what they believe or do not believe.

The appellant however admits he killed his daughter. There was evidence from Abdi and the two police officers who received the appellant at the police station. They all said that the appellant appeared to be drunk. Once again it may be that evidence was false but whether true of false, once again the Commissioner should have addressed the assessors on it and left it to them to decide whether the drunkenness was there and if it was there whether it was of such a nature as was capable of depriving the appellant of the capacity to form the specific intent necessary to kill. Once again, we do not know what the decision of the assessors on this point would have been.

In the circumstances, the option we are left with is to allow the appeal against the conviction on the charge of murder under section 203 as read with section 204 of the Penal Code, set aside that conviction and in place thereof, substitute a conviction for the offence of manslaughter under section 202 as read with section 205 of the Penal Code.

What sentence should we impose upon the appellant? We must agree with Mrs. Mwangi that the courts must do and must be seen to be doing their best to discourage domestic violence. We particularly deplore the tendency now evolving in the country where parents use their children as pawns in settling their matrimonial disputes. The appellant treated his three children in a very cruel manner and to show our disapproval of his conduct, we sentence the appellant to eighteen (18) years imprisonment to run from the date when he was sentenced to death by the High Court. Those shall be our orders in this appeal.

Dated and delivered at Mombasa this 26th day of July, 2002

R.S.C OMOLO

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

E.O O'KUBASU

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JUDGE OF APPEAL