REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

(CORAM: CHUNGA, C.J., SHAH & O'KUBASU, JJ.A.)

CRIMINAL APPEAL NO. 153 OF 2000

BETWEEN

PAUL KOKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Conviction and Sentence of the High Court of Kenya at Nakuru (Justice S.C. Ondeyo) dated 3rd August, 2000 in H.C.CR.C. NO. 2 OF 2000)

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JUDGMENT OF THE COURT

The appellant Paul Kokwony was convicted of murder contrary to **section 203** as read with **section 204** of the Penal Code and sentenced to death, such sentence being the only mandatory punishment provided under the law. He now comes to this Court appealing against that conviction and sentence by High Court (Ondeyo, J.). There were originally three grounds of appeal but when the appeal came up for hearing before us on 19th February, 2001, Mr. Mbugua for the appellant decided to argue only the first ground of appeal which stated as follows:

> "(1)The trial Judge erred in law in finding that there was sufficient evidence to convict the accused in view of the defence of provocation which was raised by the appellant."

The facts of this appeal were not in dispute since the appellant himself gave a detailed confessionary statement which was admitted in evidence in the superior court without objection. Indeed, prosecution case was based mainly on the evidence of Jennifer Kokwony (PW2) a young girl then aged 15 years and the statement by the appellant. On the material day (23rd April, 1999) at about 3:00 p.m. the young girl Jenniffer (PW2) was at home with her brother Musa Kokwony when the deceased came to complain that Musa Kokwony's goats had grazed in his maize farm. The deceased had a panga. Musa Kokwony pleaded that he would pay for destroyed maize but the deceased cut Musa Kokwony on the head with the panga. PW2 then ran to the house and helped Musa Kokwony to disarm the deceased.As this struggle continued the children in that home raised alarm and that is when the appellant came to the scene only to find his brother (Musa Kokwony) having been injured by the deceased. The appellant asked the deceased why he was quarrelling with Musa Kokwony but the deceased, instead of answering the question, started throwing stones at the appellant. Musa Kokwony then entered the house, came out with a bow and arrow, and shot at the deceased but missed him. The appellant then picked the bow and arrow and shot at the deceased hitting him in the ribs. The deceased died as a result of this injury inflicted by the arrow.

Mr. Mbugua for the appellant submitted that the defence of provocation was not considered as it was not even mentioned in the judgment of the learned trial judge.

The learned Principal State Counsel Mr. Oriri Onyango supported the conviction of the appellant and went on to argue that failure by the learned trial judge to explain provocation to assessors did not prejudice the appellant's case. He relied on the authority of **Abdullahi Ali H.Y. Ogad Omer v. R [1958] E.A. 725** to support his submission in which it was stated:-

> *"With respect we thought that it was not correct to remove the question of sufficient prov ocation or no sufficient provocation from the assessors. However, since the learned judge in the next sentence of his judgment found as a fact, as he was entitled to do, that the story that the woman refused to go home at that time and in that situation, was not credible, it is clear that he would have overridden the assessors whatever their opinions on the question of provocation might have been. Accordingly his omission to mention provocation in the summing -up did not affect the result."*

We have considered the facts of this appeal and the submissions by counsel appearing and it is now clear to us that the main issue here is provocation. **Section 208(1)** of the Penal Code provides:-

> *"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 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 o r insult is done or offered."*

The facts in this appeal show that the appellant answered the alarm raised by the children who were at the home of his brother Musa Kokwony and on proceeding to that home found the deceased having cut and injured his brother Musa Kokwony. The deceased was asked why he was quarrelling with Musa Kokwony. Instead of answering that question the deceased resorted to throwing stones at the appellant. It was during the fracas that the appellant picked up the bow and arrows and shot at the deceased and as a result the deceased died. The issue now is, whether in view of these circumstances, the defence of provocation was available to the appellant. In **Bullard v. R. [1961] 3 ALL E.R. 470** the reasons of the Judicial Committee were delivered by Lord Tucker and the material passage of his opinion was as follows:-

> *"It has long been settled law that if on the evidence, whether of the prosecution or of the defence there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."*

And coming back home we would like to refer to the second holding in **Dato s /o Mtaki v. R. [1959] E.A. 860** which is as follows:-

> "(i) (ii)the judge had himself wrongly considered the question whether the probability of legal provocation had been established and it was not the law in East Africa that for the defence of provocation to succeed, it must appear that the accused was so provoked as to be incapable of forming an intent to kill or cause dangerous harm".

And in a recent decision in **Kahindi David Kenga v. Republic - Criminal Appeal (Mombasa) No. 90 of 1999 (unreported**) this Court stated:-

> *"It is a settled principle of law that the ac cused does not have to prove provocation but only to raise a reasonable doubt as to its existence. There is positive and unrebutted evidence that the appellant went wild and lost his power of self -control so soon as he saw the deceased on his homestead. The visit despite constant warning was totally uncalled for and was at most*

meant to annoy the appellant. In our view the act constituted grave provocation on his part as it appeared that the killing of his sister was still weighing heavily on his heart".

In this appeal we find that the deceased was initially the aggressor who came to complain about the goats of Musa Kokwony having destroyed his maize. The deceased was armed with a panga which he used in cutting Musa Kokwony. The appellant being Musa's brother rushed to that home where he found that the deceased had already injured Musa Kokwony. It was during these disturbances that the appellant took a bow and arrow and shot the deceased to death. In concluding her judgment the learned trial judge stated:-

"Although initially the deceased was the aggressor, having gone to Musa's homestead to attack Musa because Musa's goats had grazed on his maize, the accused who went to that home to find out what was happening acted irrespons ibly when he shot and injured a man who paused no danger to him or to anyone else in the home".

In our view this incident ought to be looked at right from the time the deceased came to the home of Musa Kokwony up to the time he was shot by the appellant.The deceased, as correctly stated by the learned trial judge, was the aggressor. He came ready to cause harm to Musa Kokwony and he demonstrated his determination by cutting Musa Kokwony on the head. He did this despite being told that the damage caused to his maize would be paid for. When the appellant came to the scene he inquired as to why the deceased and Musa Kokwony were quarrelling. The appellant was still showing violent tendencies as he started throwing stones at the appellant and his brother Musa Kokwony. It is probable that the appellant took the deceased's threat to return to harm Musa or the appellant seriously and that therefore he shot the arrow whilst the deceased was running away. It is also probable that the appellant's temper did not cool down immediately upon seeing the deceased run away. In all the circumstances of this case we think that the learned judge placed so much emphasis on the fact of the deceased's flight when he was shot at by the appellant so as to omit proper consideration of the defence of provocation.

Taking all these facts into account, and in view of what has been stated in decided cases on the principle of law relating to the defence of provocation, we are of the view that the appellant's defence of provocation ought to have been considered. It follows that had the learned trial judge considered that defence carefully we doubt if she would have convicted the appellant on a charge of murder

. In view of all that we have said, we now allow this appeal, set aside the conviction for murder and substitute it with one of manslaughter contrary to **section 202** as read with **section 205** of the Penal Code. We impose a sentence of five (5) years imprisonment . The sentence is to run f**ro**m the date the appellant was sentenced by the superior court.

Dated and delivered at Nakuru this 21st day of February, 2001.

B. CHUNGA

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CHIEF JUSTICE

A.B. SHAH

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR