IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO.90 OF 1999

BETWEEN

KAHINDI DAVID KENGA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a conviction, sentence) of the High Court of Kenya at Mombasa (Justice Waki) dated 4th September 1998

in

H.C.CR.C. No.40 of 1995)
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JUDGMENT OF THE COURT

The appellant, Kahindi David Kenga, was convicted of the murder of his brother-in-law, John Yaa Elisha, on the 20th day of November, 1993, at Kanani village, Jimba sub-location, Gede, within Kilifi District. He was in the event sentenced to deTahteh .only question in issue in this appeal is whether in the circumstances of this case the appellant in unlawfully killing the deceased did the act which caused death in the heat of passion induced by sudden provocation, as defined in section 208 of the Penal Code and before there was time for his passion to cool.

The material facts giving rise to this appeal are sad. The deceased had been arraigned at Malindi court on a charge of the manslaughter of his wife who was the appellant's sister. Not much is known about that case save that the deceased, Elisha, was soon freed. However, one thing was apparent. The appellant was not pleased with the manner in which the case was handled and was so incensed against the deceased that he warned him to keep off his home. There is ample evidence that this warning was severally communicated to the deceased by neighbours.

On the fateful day the deceased had gone to the appellant's home at about 4.30 p.m. to look for his son. The appellant was then in his shamba. Yusuf Mwarabu PW2 who is his neighbour saw the deceased there and warned him to go away because of the bad blood between him and the appellant. The deceased refused to heed the warning and stayed put. Presently, the appellant returned home and found the deceased standing there. He could not explain the purpose of his visit. The deceased then left. The appellant then went into his house, took out a paper bag, put it on his bicycle and peddled away after the

deceased. About 1.5 Km away Fadhili Kombo PWI and Gibson Ngoa PW4 saw the appellant fighting with the deceased.The appellant was holding a panga. He cut the deceased on the hand and the panga fell by the side. Both struggled to reach it but the appellant was fast enough and reached it first. He lifted it and landed a heavy blow on the side of the neck. The deceased rose up and ran towards the house of one Kazungu where he entered through an open door. The appellant tried to force his way in at the same time shouting that he wanted to sever the deceased's head and take it to the Police.

A post-mortem examination was performed on the following day at Malindi Hospital. There was an extensive cut wound behind the head and several other minor ones all over the body. The cause of death was severe bleeding that led to massiTvhee haepapretl lfaanitl uirne .a charge and caution statement which was tendered in evidence without any objection said:- "It is true I killed John Yaa Elisha. I killed him because he looked for chance to kill me. He had looked for me many times. Even I reported the matter to Watamu Police and the police warned him not to come to my home. On that day he came at my home, that is when I started chasing him and then I killed him with a panga on the head and on the stomach."

It is manifestly clear that the defence of the appellant is two pronged: Self-defence and provocation. The learned Judge (Waki, J.) correctly directed the assessors on the relevant law. They gave unusually detailed and well-reasoned grounds for their opinions. One of the assessors advised that the killing of the deceased must have been done in the heat of passion which was caused by provocation in the nature of the insulting visit by the deceased the suspected killer of his wife, to the home of his brother-in-law.

The learned Judge in convicting the appellant of murder, gave his reasons for differing from this assessor. He dismissed the suggestion which was also canvassed by Mr. Kiume Kioko, counsel for the appellant in this appeal, that the deceased ought not to have visited the appellant's home before the performance of a reconciliation and cleansing ceremony by the clan elders and that to have done otherwise amounted to a wrongful act or insult of a such a nature so grave, as was likely to deprive an ordinary rural folk at Gede in Kilifi of the power of self-control and to induce him to attack the person doing the act or offering the insult. With respect, we have to differ from the learned Judge's carefully reasoned judgment. The conviction for murder in this case cannot safely be allowed to stand.

It is a settled principle of law that the accused 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 sad killing of his sister was still weighing heavily on his heart.

Moreover, we see no reason to disbelieve the appellant's version of the quarrel, which not only is not controverted by the prosecution eye-witnesses of the assault but also is supported by his evidence as far as it goes.

The sum total of the evidence adduced during the trial is that the attack on the deceased by the appellant was immediate before there was time for his passion to cool. We think that in the particular circumstances of this case the doctrine of provocation should, as advised by one of the assessors, enure to the benefit of the appellant and that the charge of murder should be reduced to manslaughter.

There is another aspect of the trial we would like to comment on. During the trial and when the appellant had given his sworn testimony, one of the three assessors was severely reprimanded for previous non attendance at the hearing, and was expelled from participation in the proceedings by the learned Judge.

He was further ordered not to serve as an assessor for a period of two years. We would express a grave doubt as to whether or not the learned Judge had power under sections 297, 298 and 299 of the Criminal Procedure Code to expel a sitting assessor or bar his participation once a trial had began with the prescribed number of assessors. Section 298(1) aforesaid casts on the trial court a duty of inquiring as to

the whereabouts of an absent assessor. If he is not found in the precincts of the court and his exact whereabouts are not known, and the court cannot immediately enforce his attendance, the trial shall proceed with the aid of the other assessors. See Muthemba s/o Ngombe v R. (1954)21 EACA 234. But this was not the case here. If we had not already decided that the charge of murder be reduced to manslaughter, we would have considered ordering a retrial.

Consequently, we allow the appeal. We alter the conviction to one for manslaughter and set aside the sentence of death. We substitute therefor a sentence of seven (7) years imprisonment.

Dated and delivered at Mombasa this 21st day of January, 2000.

A.M. AKIWUMI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR