REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: OMOLO, AKIWUMI & O'KUBASU, JJ.A.)
CRIMINAL APPEAL NO. 75 OF 2000

BETWEEN

KAINGU MWAGANDI MUMBA ..... APPELLANT
AND
REPUBLIC ..... RESPONDENT

(Appeal from a Conviction & Sentence of the High Court of Kenya at Mombasa (Lady Justice Ang'awa) dated 21st August, 1998
in
H.C.CR.C. NO. 8 OF 1996)
****

JUDGMENT OF THE COURT

The appellant, Kaingu Mwagandi Mumba, was convicted of the murder of his wife, Sidi Kahindi Bade, on the 16th day of August 1994 at Majivuni Village, in Sabaki Sub-location, Malindi Location within Kilifi District of the Coast Province. He was in the event sentenced to death.

In arguing this appeal, Mr. Mungatana for the appellant raised two main grounds, namely the fact that, the defence of provocation was raised but was never considered and, secondly, the fact that the summing up by the learned trial Judge (Ang'awa J) was not properly done and hence this occasioned failure of justice.

On our own part we would say that it has not been a pleasant exercise going through the record as the evidence was recorded in a rather haphazard manner and hence it was a question of trying to

put together all that was said by the witnesses in order to understand what went on during the trial. From our own careful assessment of the recorded evidence, we find that the appellant's conviction was mainly based on his own confession which appears in his own charge and cautionary statement. The statement was produced after the learned Judge had conducted a trial within a trial. In that charge and cautionary statement the appellant stated:-

> ***"My wife left home to go and see her father. I too left so that we can meet at the Malind i Hospital where he had been admitted. After seeing him, I told my wife to go back home and I was to talk to the doctor. Afterwards, I left for my working place and I passed through the market place. I saw my wife and another man at the entrance of SALA MA LODGE. The man ran away. I asked my wife who that man was and she refused to tell me. I told her that we should go home. On the way home just near our home I realised that I had killed her. I went out of my mind. I cut her neck unintentionally. I have a mental problem and I am under medication. I have got four children."***

The trial proceeded on the basis that the appellant had confessed in his charge and cautionary statement. All the other evidence was considered as corroboration of what the appellant said in that statement. We would only point out that this must have been considered in the light of what was said in **TUWAMOI V. UGANDA [1967] E.A. 84** as follows:-

> ***"The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is danger ous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true."***

We have considered the evidence before the learned trial Judge and making our own evaluation of the evidence as we are required to do, we are satisfied that the confession by the appellant must be true. Having so found we must now consider the appellant's defence of provocation. It was argued that this point was never considered by the trial court. We think Mr. Mungatana was right in his submission to the effect that the appellant's defence of provocation was not considered. It is rather interesting to note that the three assessors appear to have taken that defence into consideration and hence each of them returned a verdict of guilty on a lesser charge of manslaughter. But the learned trial judge did not even comment on the assessors' opinion and went on to convict the appellant of murder.

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 e stablished 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** this Court stated:-

> ***"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 th e act constituted grave provocation on his part as it appeared that the sad killing of his sister was still weighing heavily on his heart."***

In the present appeal the learned trial judge did not misdirect herself on the defence of provocation but totally ignored it. It was in the appellant's own confession that he found his wife (the deceased) standing with another man at the entrance of "Salama Lodge" and that when the other man saw the appellant he ran away. That running away of the stranger was an indication that the two (the stranger and the deceased) were up to something immoral outside the lodge. Otherwise, why should the man run away on seeing the husband of the deceased? And to make the matters worse, when the appellant inquired from the deceased who the stranger was, the deceased did not give any answer. Taking all these facts into account we are satisfied that there was reasonable suspicion in the mind of the appellant that the deceased and the stranger were in an illicit relationship. That was sufficient to provoke an ordinary man in that community. We are therefore not surprised that the three assessors who are members of that community came to the conclusion that the appellant was guilty, not of murder but, manslaughter and this must have been on account of provocation. The 1st Assessor Zipporah Wafula put it thus to the judge:

> ***"In my opinion I find the accused be charged with manslaughter. The accused on seeing his beloved wife standing with a strange man was provoked."***

With respect, we agree.

The other issue which was raised in this appeal was the trial judge's summing up. In our view that was not the summing up as envisaged by section 322(1) of the Criminal Procedure Code which provides, as far as is material, as follows:-

> ***"..... the judge may sum -up evidence of the prosecution and the defence and shall then require each of the assessors to state his opinion orally and shall record that opinion."***

Whilst it is true that a judge may not be required to sum up to the assessors good sense and indeed, the authorities have laid down not only, that this must be done but also, how it should be done. In the case of **JOHN KIPKURUI ARAP LELEI V. REPUBLIC - Criminal Appeal No. 45 of 1994** (unreported) this court made the following pertinent observation:-

> ***"The words of the section do not appear to impose a mandatory duty on the learned judge to sum -up to the assessors. However, in view of the fact that the judge shall then require the assessors to give their opinion implies that the summing up should have taken place then. In any case, good sense dictates that laymen who act as assessors require the guidance of the judge on legal issues particularly where the charge before the assessors is one of murder. The fail ure of the learned judge to sum -up to the assessors in our view makes the proceedings fatally defective."***

In the present appeal the learned trial judge did not fail to sum up but her summing up fell short of the requirement of section 322(1) of the Criminal Procedure Code. From the foregoing, it is obvious that this appeal is to be allowed. We would only point out that a trial of any case and especially in which the person charged is facing a serious consequence as the death sentence, a court ought to proceed with the seriousness that administration of justice demands. In the present case the learned trial judge exhibited elementary legal errors which, we are sorry to note, have been mentioned in earlier decisions of this court.

Mr. Gumo for the respondent had difficulties in supporting the conviction on a charge of murder and in the end he, too, thought that the appellant ought to have been convicted on a lesser charge of manslaughter.

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 eight (8) years imprisonment. The sentence is to run from the date the appellant was sentenced by the superior court.

Dated and delivered at Mombasa this 28th day of July, 2000.

R.S.C. OMOLO
.....

JUDGE OF APPEAL

A.M. AKIWUMI
.....

JUDGE OF APPEAL

E.O. O'KUBASU
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR