



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. E011 OF 2020

CORAM: HON. R.E. ABURILL, J

STATE.....PROSECUTION

VERSUS

TRUPHENA NDONGA ASWANI.....ACCUSED

JUDGMENT

1. According to Amnesty International, a slap, a punch, a kick, a forceful shove. Intimidation, coercion and fear. Dominance, power and control. These elements constitute domestic violence. As the world marks the International Women’s Day, the question that this court poses is- what can a person of the accused person herein **Truphena Ndonga Aswani** be celebrated for and what will she be remembered for" There are only two things to remember her for, from the facts of this case. One, is that she was a butchered, battered, dehumanized and violated woman who had no voice. She persevered through the domestic violence meted on her by her late husband who is described as irresponsible and violent. Secondly, she will be remembered as a person who killed her husband in the process of defending her own life. She was however not willing to leave her matrimonial home because she loved her husband. She was ready to die under his cruel hand because she had borne him an only child and son and she thought that he would change for the better. This was even after his two other wives parted ways with him because of the violence meted out on them.

2. The accused person herein **Truphena Ndonga Aswani** a female adult of sound mind was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence as per Information dated 28th December 2020 are that on the 14th day of December, 2020 in Ugenya Sub County within Siaya County, she murdered **James Oyengo Obochi**. When the accused was arraigned for Plea taking on 27/1/2021 represented by Mr. Mshindi Advocate, the accused on being asked whether she admits or denies the truth of the charge as read to her in the Kiswahili language which she understood, she replied in Kiswahili:

“Ni ukweli Nilimuua lakini si kupanga kumuua marehemu”

English translation is:

“It is true I killed him but I did not plan to kill the deceased.”

3. This court then entered a plea of **Not guilty** as the supposed admission of the charge of Murder was equivocal. The court then granted the accused person bond of Kshs. 500,000/= plus one surety of similar amount or cash bail of Kshs. 50,000/= but to date, the accused person has not found any person to stand surety for her release on bond pending trial.

4. When the matter came up for mention on 5/2/2021, Mr. Ngetich Prosecution counsel intimated to court that the Prosecution was

amenable to accept Plea Bargaining and the court allowed the Plea Bargaining process to commence.

5. On 15/2/2021, the matter was mentioned in court and the accused person agreed to have signed a Plea Bargaining Agreement dated 12/2/2021 and the prosecution agreed to reduce the charge from Murder to the lesser offence of Manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

6. The above charge of Manslaughter was read over to the accused person in the Kiswahili language and she admitted the charge of manslaughter by unlawful killing of the deceased subject of the plea bargained charge of Manslaughter. Facts of the case were also read out and recorded by the court and interpreted to the accused in Kiswahili language and she admitted the facts to be correct. The court then entered an unequivocal Plea of guilty to the charge of Manslaughter and convicted her accordingly.

7. The facts as admitted by the accused person are that on the 14/12/2020, the deceased James Oyengo Obochi who was the husband to the accused returned home late after a drinking spree as was his norm and was served with dinner. After he had fed and while intoxicated, he picked a quarrel with the accused, demanding to be given possession of a title Deed to the land, which title Deed had been given to the accused person by her father in-law, the deceased's father, for reasons that the accused cared for him well and that because the deceased who was irresponsible could sell family land and render the family homeless.

8. That the accused was trusted by her father in-law to protect family land from the deceased predator, as the deceased had sold off his portion of land bequeathed to him by his late father.

9. In the process of demanding for the title deed from the accused, the deceased dashed into a corner of their bedroom, picked a panga and as he raised it to cut the accused, the accused held it and used it to cut the deceased severally, in self defence. The deceased died upon which, out of fear, the accused pulled the deceased's body and took it to a neighbour's farm which was 200 metres away and covered it with grass then she returned to her house. The following day, which was 15/12/2020, **one Ishmael Awuor Obwaka** who was taking his cattle to graze in the field, stumbled upon the deceased's body so he went to the accused's house to report to her of what he had found, as she was also the area village elder.

10. The accused person upon receiving the information, she accompanied Ishmael Awuor to the scene but pretended not to know what had transpired to the deceased. The accused and Ishmael Awuor then went and reported the discovery of the deceased's body to Luanda Konyango Police Patrol Base and the Police Officers visited the scene and handed over investigations to Ugenya DCI.

11. The body of the deceased was removed for postmortem and on 21/12/2020, Dr. Benjamin Okun conducted an autopsy on the body of the deceased, witnessed by Alice Atieno, the deceased's sister, and Wellington Odee, the deceased's son, at Ukwala Sub County Hospital.

12. The postmortem form which was produced as PEx1 shows that the cause of death was due to cardiorespiratory arrest secondary to penetrative (deep) head injury with multiple cut wounds and *Polytrauma* secondary to multiple fractures and cut wounds leading to haemorrhage.

13. The accused person was taken into custody and on 15/12/2020, she was interrogated at Ugenya DCI by Assistant Superintendent of Police James Ngao to whom she confessed to having unlawfully killed the deceased. The confession statement recorded by the accused was produced as PEx 9 and the Proforma Confession Form was produced as PEx 2. Statements of all witnesses who would have testified against the accused were also produced as PEx 3, 4, 5, 6 and 7.

14. Before taking the Plea, the accused was mentally assessed on 26/1/2021 at Jaramogi Oginga Odinga Teaching and Referral Hospital and was found to be mentally fit to stand trial. The Mental assessment Report was produced as PEx 8. No weapon was produced in court in connection with the unlawful killing of the deceased. Upon admitting the above facts as being true and upon the court convicting the accused person on her own plea of guilty, the Prosecution indicated that she may be treated as a first offender.

15. In Mitigation, Mr. Mshindi advocate for the accused submitted that his client was very remorseful and prayed for a non-custodial sentence as she has a family that depends on her. Further, that she acted in self defence and willingly surrendered to the police. That she initially hid the body out of fear and that she was a victim of perpetual domestic violence being meted on her by

her deceased husband evidenced by scars on her head – backside (shown to the court and visible). He submitted that the accused person's father in-law transferred title of land in her name because she is trusted as the deceased could sell family land and waste the proceeds.

16. In addition, it was submitted that the accused is a respected village elder and had invested a lot in the deceased's home.

17. The court gave the accused an opportunity to mitigate in her own words. The accused person spoke endlessly of how she had been subjected to torture and inhuman treatment by the deceased for a long time since her marriage to the deceased and that earlier on in the month of November on 6th November 2020, the deceased had assaulted her until she almost passed on and even when she was assisted by a neighbour to Luanda Kongongo Hospital, he did not bother yet she was seriously injured, and she was admitted in hospital. That he never visited her nor pay her hospital bills. She stated that the deceased continued issuing threats to kill her and her son unless she gave him the title deed to the land which was in her name. A Good Samaritan paid her hospital bill.

18. She stated that she was a third wife to the deceased but that his 2 wives left him because of his cruelty and that she was caring for his 4 children plus her own 10 year old son born of the deceased. She stated how she persevered all the torture because she had never had a child before she got married to the deceased and that therefore when she became pregnant with his child, she felt relieved and thought he would change his violent behavior and be a good husband.

19. The accused further stated that she had cared for her father in law before he died and so, he gifted her a title to a portion of his family land to enable her feed the family as the deceased was an irresponsible drunkard. She added that the deceased had threatened to kill her all the time if she reported him to the police or sued him for the repeated assault.

20. Further, that the deceased used to assault the accused in the presence of their children and villagers whom she led and embarrass her. That although she discovered that the deceased was HIV positive while she was negative, she hung on him and that at times he used to hide his anti-retroviral drugs then threaten to kill her and her child. That the deceased always beat her up whenever he returned home and found her to have made a meal comprising green vegetables. She maintained that she killed the deceased out of self defence as she was the one to be killed by the deceased on the fateful night.

21. Upon hearing the mitigations by the accused and her advocate Mr. Mshindi, I ordered for a Presentence report which was filed on 1/3/2021 by Catherine Amimo, Probation Officer, Ukwala.

22. The Probation Report describes the accused as a 49 old mother of a ten year old boy, a village elder, farmer and tailor. The Probation report reveals exactly what the accused narrated to court that she was a victim of domestic violence and that she nearly died from the frequent beatings administered on her by the now deceased husband. That she is very remorseful and pleads for leniency.

23. The area community leaders welcome a non-custodial sentence although they warned that due to some tension from the deceased's family, she should not be released to that community immediately. Further, that she needs counselling on trauma and be accorded a chance to care for her young son and an opportunity to reconcile with her in laws and clan members of the deceased.

DETERMINATION

24. Having considered all the above mitigation and circumstances under which the offence admitted by the accused person **Truphena Ndonga Aswani** was committed, I am persuaded beyond a shadow of doubt that albeit the accused unequivocally admitted to unlawfully killing the deceased, the facts coupled with her mitigation establish killing in self defence, although, from the detailed injuries in the postmortem report, and considering the fact that the deceased was intoxicated, the accused used excessive force in defending herself. Self defence is an absolute defence where it is proved that the force used to kill the deceased in self defence is not excessive, following imminent danger.

25. In the present case, considering the domestic violence that the accused had undergone over the years, occasioned by her deceased husband, the deceased is vividly described as an irresponsible, violent, brutal and torturous human being who did not treat the accused with any dignity or respect at all. He constantly butchered her from time to time and never provided for the family but she persevered and neither took revenge nor deserted him for her own safety. The accused person, from her description of how she

was assaulted and tortured on 6/11/2020 culminating in her being admitted in hospital and nearly died, even then, the deceased neither paid her a visit in hospital nor apologized to her. He also did not pay her hospital bill. He acted with impunity and was determined to continue torturing her until the unfortunate fateful night when he got a dose of his own medicine.

26. From the facts of this case, on 14/12/2020, the deceased was ready to actualize his threats of cutting the accused with a panga, with the deceased picking a quarrel over a title deed that the accused had been given by her father in law, the deceased's own father. The details of this case reveal that the deceased could not be trusted with family land and even a portion that was given to him by his father, he sold it and consumed all the proceeds on alcohol then he landed on the accused with torture, demanding to be given the title held by the accused person. On this latter date and night, it appears that the torture had to come to an end as the deceased was determined to kill the accused using a panga which he picked from his bedroom corner.

27. The deceased was intoxicated as usual and had he killed the accused, it would just add to another case of manslaughter because he was under intoxication and the accused person's story would never be told by anyone since the dead tell no tales. We would never know that the accused herein was undergoing domestic violence which she had lived with throughout her marriage to the deceased. In the course of the deceased raising the panga to cut the accused, there is un rebutted submission by the accused that she managed to snatch the panga from the deceased and cut him in self defence. He breathed his last.

28. From the facts narrated by the Prosecution, the Probation Officer and the accused person in mitigation, the situation was either the accused was to be killed or she be killed.

29. **Loraine Patricia Eber** writes as follows in **The Hastings Law Journal Volume 32 Issue 4 Article 71-1981** on **"The Battered Wife's Dilemma: To Kill or to Be Killed:"**

"Cumulative terror" by some writers, and one attorney who represents battered women has called the husband's constant battering "murder by instalment." These terms accent the fact that the battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating. The battered wife thus is literally faced with the dilemma of either waiting for her husband to kill her or striking out at him first.

30. In Kenya, Section 17 of the Penal Code provides:

"17. Subject to any express provisions in this code or any other law in operation in Kenya, criminal responsibility for the use of force in defence of person or property shall be determined according to the principles of English Common Law.

31. The common law position as regards the defence of self defence was well articulated in **Solomon Beckford vs The Queen** as cited in **I.P Veronicah Gitahi & Another Vs Republic [2017] eKLR [1987] 3 All ER 425**, and of this Court in **Ahmed Mohammed Omar & 5 Others v. Republic, Cr. App. No. 414 of 2012**, In short, at Common law, defence of self-defence allows one to use reasonable force to:

- (1) defend oneself
- (2) prevent attack of another person
- (3) defend their property

32. The Court of Appeal in **Ahmed Mohammed Omar & 5 others vs. Republic (2014) eKLR** dealt with the aspect of self-defence in great detail in the following manner:

*"The common law position regarding the defence of self-defense has changed over time. Prior to the decision of the House of Lords in **DPP v. MORGAN [1975] 2 ALL ER 347**, the view was that it was an essential element of self-defense not only that the accused believed that he was being attacked or in imminent danger of being attacked but also that such belief was based on reasonable grounds. But in **DPP v MORGAN (supra)** it was held that:*

“.....if the appellant might have been labouring under mistake as to the facts, he was to be judged according to his mistaken view of facts, whether the mistake was, on an objective view, reasonable or not. The reasonableness or unreasonableness of the appellants' belief was material to the question whether the belief was held, its unreasonableness, so far as guilt or innocence was concerned, was irrelevant.”

33. In *BECKFORD v R* (*supra*) it was also held that if self-defence is raised as an issue in criminal trial, it must be disproved by the prosecution. This is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful. In such cases, the prosecution is enjoined to prove that the violence used by the accused was unlawful.

34. In *R. v WILLIAMS* [1987] 3 ALL ER 411, Lord Lane, C.J. held:

“In case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If, however, the defendant's alleged belief was mistaken and if the mistaken was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it.”

It is acknowledged that the case of DPP v MORGAN (*supra*) was a landmark decision in the development of the Common Law regarding offences against the person in that it fundamentally varied the test of culpability where the defence of self-defence is raised from an objective test to a subjective one. See also *SMITH AND HOGAN'S CRIMINAL LAW*, 13TH Edition, Page 331.

Section 17 of the Penal Code subjects criminal responsibility for use of force in the defence of person or property to the principles of English Common Law, except where there are express provisions to the contrary in the Code or any other Law in operation in Kenya. In the appeal before us, the trial court rejected the appellants' defence because it applied an objective test.'

35. However, applying the subjective test and taking into account the particular circumstances of this case, this Court is persuaded that the accused person acted in self-defence when she killed the deceased husband with a panga that he had purposed to use to cut her into pieces. There is ample evidence that the accused person was attacked by the deceased who was armed and in such circumstances, that the only way out was for the accused person to engage the deceased. The accused person did not anticipate that the deceased would attack her that night although it was his custom to beat her up and leave her for dead. In my humble view, the threat and fear of death on the accused person was so eminent and so the only way for her to save her life was to immobilize the deceased. She however used more force by cutting him severally on the head and arms as shown by the multiple injuries he sustained as per the postmortem report produced as exhibit 1.

36. In addition, there is unrebutted evidence by the prosecution as narrated in the facts of the case that the accused suffered from domestic violence. She however never left her husband and always hoped that he would change especially after her bearing a son for him. His other wives are said to have deserted him because of his violence towards them. He used to beat up the accused in the presence of their children and even villagers whom she led, being their village elder.

37. According to **Loraine Patricia Eber**, (*supra*) the battered woman's perception of the immediacy of the danger and the necessity of using deadly force is real. The writer poses the question **“Why Battered Women Stay**, “and proceeds that:

“Just as there is no ready, simplistic reason why men beat their wives, there is no easy answer to why battered women stay with their abusive husbands. Emotional dependency has been suggested as a primary reason. Often a battered woman is not only emotion-ally dependent on her assailant but also on the marriage itself. The sex-role conditioning that leads wives to bear the burden for the success of the marriage often causes the battered wife to feel guilty about the beatings and to give her husband innumerable second chances. Low self-esteem and fear of their husbands frequently characterize battered women and force them to stay with their battering husbands. Some women even feel that somehow they must deserve the beatings.

Battered women give assorted reasons for not leaving their husbands. Because these women are emotionally dependent, they may hold the false hope that their attackers will reform. Some are afraid to leave because they fear for their safety or the well-being of their children. Others have no money of their own so they hesitate to leave, particularly with their children. Finally,

some women simply have no place to go because they have no money and are unaware of the availability of shelters or other free lodging for wo-men in their situation. Wife beating remains a very serious problem and a difficult one to solve. A long history of legal and social legitimization of men beating their wives is hard to overcome. The absence of any firm understanding of why men beat their wives makes it impossible to identify potential wife beaters in advance and help them before they resort to violence. The reasons battered women stay with their husbands are similarly complex and difficult to comprehend, particularly because emotional dependency is often involved.”

38. Although the writer above was referring to a study carried out in the Americas Continent, the scenario is no different from Kenya where domestic violence through wife beating is a norm. In several studies carried out in Kenya on **Intimate Partner Violence(IPV)**, it is revealed that in most communities and households, *if your husband doesn't beat you, he doesn't love you. Further, that there are a bunch of social, cultural, traditional norms and beliefs about IPV in Kenya that the violence within relationships is usually normalized, condoned and seen as a private matter. Within the Kenyan cultural context, IPV is a common, normal and timeless tradition. It is seen as unchangeable and a normal part of the local culture (Hatcher et al., 2013; Gillum et al., 2018)*

39. Albeit domestic violence applies in the case of women battering their husbands as well, according to **Dobash & Dobash (1979: ix)** in their book “**Violence Against Wives,**” *“men's violence against their wives is the most brutal expression of patriarchal domination. The positions of women as wives and men as husbands is historically structured as a hierarchy where men possess and control women.”*

40. Domestic violence is a form of Gender-Based Violence (GBV). **The National Crime Research Centre** defines **Gender Based violence** as:

“Bodily harm inflicted by man on woman” (National Crime Research Centre, 2014:x).

41. The **UN Declaration on the Elimination of Violence against Women (DEVAW)** was adopted by the United Nations General Assembly in 1993. The Declaration covers physical, sexual and psychological *violence* as well as *violence* both at home and elsewhere in society. The Declaration expresses concern that violence against women is an obstacle to the achievement of equality, development and peace. Violence against women is defined as:

“Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” (UN, 1993)

42. The Declaration states three categories of violence against women: violence perpetrated by the State, such as violence against women in custody and as part of warfare; violence occurring within the general community, including rape, sexual harassment, trafficking in women and intimidation at work; and violence in the family and in the private sphere, for example incest and selective abortions).

43. According to the Declaration, violence against women is rooted in the historically unequal power relations between women and men. It also explains that violence against women is *‘one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.’*

44. The UN member states are therefore urged to legislate against the violence, work preventively and improve the situation of victimized women.

45. The accused herein is no doubt a victimized woman whose efforts in the household of the a deceased was vilified through domestic violence.

46. Having said all the above, I am persuaded that the accused killed the deceased in self defence but applied excessive force hence the defence is not absolute.

47. On what appropriate sentence I should mete out, the maximum sentence upon conviction for manslaughter is life imprisonment. However, sentencing is in the discretion of the trial court.

48. In **FREDRICK AMBANI NAITIRI V REPUBLIC [2014] EKLR**, the High Court stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

7. The **Judiciary Sentencing Policy Guidelines** lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

1. **Retribution:** To punish the offender for his/her criminal conduct in a just manner.
2. **Deterrence:** To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law abiding person.
4. **Restorative Justice:** To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. **Community protection:** To protect the community by incapacitating the offender.
6. **Denunciation:** To communicate the community's condemnation of the criminal conduct.

49. Applying the above principles and guidelines to this case, I am persuaded that the accused person deserves a non-custodial sentence to enable her be counselled to recover from the traumatic experience that she underwent prior to, during and after the unfortunate demise of her husband whom she loved and stuck with despite his HIV status yet she was HIV negative and bore him a son who is 10 year old. The accused also fosters the deceased's children whose mothers left him due to his violence and therefore she does not deserve to be punished harshly as she was a victim of torturous domestic and gender based violence. She had no voice. She was silenced into accepting beatings to be her normal life until she nearly lost her own life. She is lucky to be alive.

50. This court believes that through this judgment, the accused person and others who have undergone or are undergoing domestic and gender based violence can have their voices heard. They are encouraged to Report to any law enforcement agency or to the many Non-governmental organizations that are registered and are involved and dedicated to the advancement of life and human dignity. Run for your lives, both women and men who are abused. There is no love that can never be lost. Yet love should never be lost by killing one another. Find an escape route to safety. Do not condone violence being meted on you! Be remembered and be celebrated as a person who escaped from the jaws of the lion and not as one who condoned being predated on by the ugly teeth of the hyena.

51. Accordingly, considering her mitigations and circumstances under which the offence was committed, and appreciating that every life is precious, I sentence the accused person **Truphena Ndonga Aswani** to serve non-custodial sentence of One day imprisonment, to last at the end of this court session.

52. I further order that the accused person shall be aided by this court from the witness expenses vote with travelling expenses to reach a safe place of abode, other than her matrimonial home, assisted by the Probation Officer, Ukwala, who shall also organize for counselling sessions to enable the accused person recover from the traumatic experience that she had with her late husband.

53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 9TH DAY OF MARCH, 2021

R.E. ABURILI

JUDGE

In the Presence of:

Mr. Kakoi, Principal Prosecution Counsel

Accused person present in court

Counsel Mr. Mshindi Advocate (present virtually)

Court Assistants: Ms. Modestar and Mr. Mboya



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