Case Number:	Criminal Appeal 66 of 2014
Date Delivered:	17 Oct 2014
Case Class:	Criminal
Court:	Court of Appeal at Malindi
Case Action:	Judgment
Judge:	Hannah Magondi Okwengu, Milton Stephen Asike Makhandia, Fatuma sichale
Citation:	Peter King’ori Mwangi & 2 others v Republic [2014] eKLR
Advocates:	Mr Ngumbau Mutua for the Appellants Mr Peter Kiprop for the Respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	H.C.Cr.C.No.2 of 2008
Case Outcome:	Appeal dismissed, sentence substituted to death
History County:	Mombasa
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO.66 OF 2014

BETWEEN

PETER KING'ORI MWANGI

DANIEL KAMAU KIMEMIA

MAINA KAMAU ALLAN …… APPELLANTS

AND

REPUBLIC …… RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Mombasa (Odero, J.) dated 27th April, 2012

in

H.C.Cr.C.No.2 of 2008)

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JUDGMENT OF THE COURT

In the early hours of the morning of 29th December, 2007 at 2 a.m. to be precise, **Abdalla Mishomoroni (PW2)** and **Oliver Mkangi Onalo (PW4)** amongst other residents in a plot in Mishomoroni area of Mombasa County were disturbed from their deep slumber by noise coming from the house of yet another resident in the plot, one **Gideon Ng'ang'a**, "*deceased*." Fearing that the entire plot was under attack by thugs, the duo together with other neighbours ventured out. On coming out and with the assistance of the light in the plot, they were able to see three bare chested men well-armed with crude weapons, trying to force open the door to the deceased's house. One was armed with an axe and a metal rod, whereas the other two were armed with a metal pipe and stick respectively. Upon seeing them, one of the men ordered them back to their respective houses for their own security. Whereas PW4 heeded the advice, PW2 did not. Instead PW2 watched helplessly as the trio forced open the door, pulled out the deceased and visited terror on him. They beat him senseless. Both witnesses however, recognized one of the assailants as Baba Alex, the 2nd appellant herein. He was also a resident in the plot. Apparently, the terror was visited upon the deceased on the suspicion by the 2nd appellant, that the deceased was having an illicit love affair with his wife. The assault went on for hours. Given the intensity of the attack, the other residents in the plot could do nothing as they feared that they too could be attacked. The trio only stopped assaulting the deceased when the police officers from Nyali Police Station arrived at the scene having been contacted by PW4. They found the deceased lying in a heap

on the verandah comatose in a pool of blood. Apparently PW4 had defied the orders of the trio to retreat into the house. He had instead rushed to Nyali Police Station through the back door to alert them on what was going on in the plot. He was accompanied by another resident on the plot, **Mr. Ochieng**. On the way however, they met police officers on patrol duties led by **Cpl Joseph Ringera (PW5)** who they came back with to the scene. The three men were still armed and in a combative mood. The police officers were forced to cock their guns before the three surrendered. Upon observing the condition of the deceased, the police officers immediately put him in the police vehicle and rushed him to Coast General Hospital. They had already arrested the three assailants and placed them in custody. However the deceased passed on whilst undergoing treatment. It was PW2 and PW4 who identified the 2nd appellant as the principle actor in this rather unfortunate incident. They knew him as a resident and neighbour in the plot. They were assisted in this endeavour by the bright lights in the plot as well as in the verandah. They were however unable to identify the other two as they did not know them and had never seen them before in the plot.

Following the death a post mortem was conducted by **Dr K. N. Mondalha (PW3)** on the body of the deceased. He concluded that the cause of death was intra-cranial haemorrhage due to cut wounds to the head due to skull fracture. Having concluded investigations in the case, PW5 preferred against the trio the information charging them with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars given in the information were that *"1. DANIEL KAMAU KIMEMIA 2. PETER KINGORI MWANGI 3. MAINA KAMAU ALLAN on the 29th December, 2007 at Kadongo Village in Kisauni Location within Mombasa District of the Coast Province jointly murdered Gideon Ng'ang'a."*

The appellants denied the information and in particular having participated in the killing of the deceased. They all stated that they heard the deceased calling out for help in the Kikuyu language, their mother tongue. Since they were the only kikuyus in the plot, they decided to come to the aid of their brethren. In an attempt to rescue him from his attacker(s) whom they claimed may have forced his or their way into the house via the window, they broke down the deceased's door. Upon entering the room they found the deceased having already been assaulted and all that they did was to carry him out into the verandah for purposes of medical attention.

The 2nd appellant confirmed that the 1st appellant was his turn boy in the lorry that he drove ferrying potatoes from up country to Kongowea market in Mombasa. He also confirmed that he was a resident in the same plot. The 3rd appellant was otherwise his nephew. On the material day the 2nd appellant had arrived in his house at about 9 p.m. from Nakuru having travelled with the 1st appellant. The lorry was loaded with potatoes which they were to deliver at Kongowea market early the next morning. However, since the 1st appellant lived far in Jomvu area, they decided that he stays overnight in the 2nd appellant's house on the plot. The 3rd appellant was on the day visiting Mombasa for a bible school meeting. The meeting done, he contacted his uncle, the 2nd appellant who invited him to spend the night in his house at Mishomoroni. These then were the circumstances that bound together the appellants on the material night. The appellants in their defence further stated that within 10 minutes of having carried the deceased from his house into the verandah, police officers arrived at the scene. They told the police officers that the deceased had been attacked in the plot. They assisted the police officers to get the deceased into the vehicle so that he could be ferried to hospital. PW5 then requested them to accompany them to the police station to record their statements. They were left at the police station as the deceased was rushed to hospital. At about 6 a.m., PW5 returned from the hospital and informed them that the deceased had passed on. He then ordered them detained at the police station. Subsequently, they were arraigned in court on information they knew nothing about.

Confronted with these two diametrically opposite scenarios by the prosecution and defence, **Odero, J**. sought comfort in the prosecution case. In so doing she rendered herself thus:

*"Both **PW2** and **PW4** state categorically that it was the three accuseds who attacked and beat the deceased. I was able to observe the demeanor of the two eyewitnesses as they gave evidence. In my view they were both honest witnesses who told this court the truth of what they had observed. There is no evidence of any motive or reason either **PW2** or **PW4** would have had to tender false evidence against any of the accused persons. **PW4** confirms that when the police arrived at the scene all three accuseds were still armed. It is only when **PW5** cocked his rifle and threatened to shoot that they surrendered. If the mission of the three accuseds was merely to rescue the deceased from these unknown attackers why were they still armed when police came and why did it require a police officer to cock his rifle before they surrendered" The defence raised by the three accused is a fairly (sic) tale and is not believable at all. I dismiss the same as a fabrication. There were no unknown attackers. From the evidence I am satisfied that it was the three accused who broke down the deceased's door, dragged him out of his house and savagely attacked him with iron bars, wooden sticks and an axe. This unlawful assault by the three accuseds was the direct and proximate cause of the death of the deceased. I am therefore satisfied that the '**actus reus'** of the offence of murder stands proven."*

Having convicted the appellants, the court proceeded to sentence each of the appellants to 40 years imprisonment. We shall revert to this aspect of the sentence later in this judgment.

Dissatisfied with the conviction and sentence aforesaid, the appellants jointly lodged this appeal. Though each preferred separate grounds of appeal, they are nonetheless similar. They seek to impugn their conviction and sentence on the grounds that the trial court in evaluating the evidence tendered failed to take into account the contradictions therein; that the arresting officer should not have acted as the investigating officer; that the ingredients for the offence were not met, and finally; that their defences were not given due consideration.

The appeal came before us for hearing on 22nd September, 2014. However, prior to the commencement of the hearing, we drew the attention of the appellants to the fact that the sentence imposed upon their conviction for the offence of murder was irregular and that there was a possibility that we could interfere with it should we dismiss the appeal. That the interference would take the form of setting aside the sentence of 40 years imprisonment imposed on each one of them and substituting therefor with the correct sentence, death. The appellants having appreciated the effect and purport of the Notice, nonetheless opted to prosecute the appeal.

At the hearing of the appeal, **Mr Ngumbau Mutua**, learned counsel for the appellants abandoned all the above grounds of appeal and instead urged us to determine this appeal on the question of provocation. He conceded though that, that was not the defence advanced by the appellants during the trial. However he was of the opinion that since provocation is a matter of law, it can be raised at any stage of the proceedings including at the appellate stage.

In support of the defence of provocation, counsel submitted that the trial court failed to consider the issue of malice aforethought as against sporadic provocation on the part of the deceased on the 2nd appellant. The 2nd appellant had reasons to believe that the deceased was involved in a love affair with his wife. This was grave provocation according to counsel that led to the attack on the deceased by the appellants. This was confirmed by the fact that during the attack the 2nd appellant was all over the plot looking for his wife. Counsel submitted that in those circumstances, provocation negated the *mensrea*. Had the trial court considered the existence of the illicit love affair, it would have arrived at the conclusion that this was extreme provocation amenable to the offence of manslaughter as opposed to murder. He therefore urged us to so hold, quash the conviction and sentence for the offence of murder and in lieu thereof convict and sentence the appellants for the offence of manslaughter.

Mr Peter Kiprop, learned Principal Prosecution Counsel opposed the appeal. He submitted that the issue raised by the appellants was one of malice aforethought. That issue had been extensively dealt with by the trial court. The same goes for *Actus Reus*. That the appellants had armed themselves with an axe, iron bar and a piece of wood. Their intention was clear. In those circumstances, the defence of provocation was not available to the appellants. In any event the said defence was never raised during the trial. That being the case, the prosecution case was left unchallenged. Finally, counsel submitted that the sentence imposed was illegal and if this Court was minded to dismiss he appeal, he prayed that we revisit the sentence imposed, correct it by imposing the mandatory death sentence.

We have subjected the evidence tendered before the trial court to fresh and exhaustive evaluation as required of us as a first appellate Court and considered the submissions of counsel. The principle that must guide us is that a Court of Appeal will not normally interfere with the findings of fact made by the trial court unless they are based on no evidence, or are based on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings that he did. (See **Chemagong v Republic (1984) KLR 611).**

From the submissions of the appellants our task of re-evaluating and re-analysing the evidence has been made much easier. It is quite apparent that the appellants are no longer denying having killed the deceased. What infact they are now saying is that *"yes*, *we killed the deceased, but we did so out of provocation*." So we must look at the evidence tendered in that light. We appreciate though that provocation was not the defence that the appellants advanced at the trial. Infact their defence was that they did not know who killed the deceased. That they were good Samaritans who had responded and gone to assist their tribesman under attack from stranger(s) after hearing his pleas and cries for help from his house. However they were subsequently mistaken for the killers as they had forced open the door to the deceased's house in a bid to save him. The defence of provocation having not been advanced during the trial, we are disadvantaged as we do not know how the trial court would have reacted or treated such defence. Secondly, no evidence was led along those lines that would have assisted us to determine whether such evidence indeed supports the defence of provocation now being advanced. These limitations notwithstanding, it is a matter of law which we must grapple with.

We start from the premises, that provocation is not a complete defence that if advanced and proved would entitle the accused to an automatic acquittal. It is a partial defence, the effect of which is to leave it open to court to return a verdict of guilty to manslaughter if the court is satisfied the killing was as a result of provocation. So what is provocation" In the case of **Duffy (1949) I ALL ER 932**; provocation was defined as "*some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind …"*

Inherent in this definition at common law is the requirement of two conditions to be satisfied for the defence to be made out, namely:-

§ *The "subjective" condition that the accused was actually provoked so as to lose his self-control; and*

§ *The "objective" condition that a reasonable man would have done so.*

The dual concepts have found refuge in **section 209(1)** of the Penal Code. Provocation is therein defined as *"… The term 'provocation' means and includes, except 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 a conjugal,*

parental, filial or fraternal relation, or in the relation of master 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 or insult is done or offered …"

It must also be appreciated that once evidence is laid capable of supporting a finding that the accused was provoked, the burden is shifted to the prosecution to prove beyond reasonable doubt that the case was not one of provocation. See **Cascoe (1970) ALL ER 833** and **Doto s/o Mataki v R (1959) E.A. 860.** Again whether the accused was provoked to lose his self-control is a question of fact which the trial court has to determine based on the evidence presented. See **Criminal Law by J.C. Smith** and **Brian Hogan, 7th Edn. Pg.352.** Finally, in the same case of **Duffy** (supra), it was held that:-

"… Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of control, which is of the essence of provocation …"

Does the appellants' case fit the ring fence as set out in the aforesaid perimeters. We do not think so. As already stated, the appellants' defences at their trial were not provocation. Rather it were, "*we did not do it*. *We were victims of circumstances*."

No evidence with regard to provocation having been led, we are not able to determine whether the subjective and objective conditions were met. Secondly, to raise the defence now deprives the prosecution the chance to rebut the same. Even assuming that they had raised it earlier, the facts of the case and the conduct of the appellants themselves takes their case outside the defence of provocation as encapsulated under **section 207** of the Penal Code which is to the effect that:-

"… when a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only …"

There is no evidence that the appellants acted in the heat of the passion or were suddenly provoked as to lead them to act in the manner they did. It was never part of their defence case that the appropriate verdict should be manslaughter on the ground of provocation nor did they raise the issue in the submissions before the trial court. It is being raised for the very first time before us. The record shows that the appellants were represented throughout the trial by experienced advocates. It cannot therefore be said that it was an oversight or inadvertent error or mistake on their part that they did not raise the defence. We can only surmise that the defence of provocation now being advanced is an after thought.

A glimpse of what the appellants perceive to have been provocation came from their counsel whilst submitting before us. Counsel stated that the trial court failed to consider the issue of malice aforethought as against sporadic provocation on the part of 2nd appellant by the deceased. That the Judge had not considered that the 2nd appellant suspected that the deceased was involved in an illicit love affair with his wife. That this was grave provocation that led to the attack. That PW2 had stated in his evidence that whilst at the scene he had observed the 2nd appellant move from house to house looking for his wife. Thus he had reasons to believe that the deceased was involved in a love affair with his wife. Had the trial court considered the existence of that love affair, then it should have arrived at the conclusion that this was extreme provocation thereby reducing the offence to one of manslaughter.

We would at once dismiss these submissions as merely being speculative and based on conjecture. They also amount to more or less evidence being advanced by counsel for the appellants

from the bar which courts normally frown upon. We say so because the appellants did not either through examination of witness or in their respective defences during the trial say so. Counsel for the appellant would want us to believe that because the 2nd respondent was seen during the incident by PW2 moving from house to house searching for his wife, we should draw the inference that, that was evidence of intense provocation. PW2 however did not testify as to whether the 2nd appellant told him why he was looking for his wife from house to house. He did not say that he was looking for his wife in the houses because he suspected that the deceased had slept with her and that he was hiding in those houses. It may well be that the 2nd appellant was searching for his wife for other reasons and not necessarily because of suspicion. There is no evidence that the 2nd appellant had found his wife and deceased in a compromising state and that she had thereafter escaped and that is why he was looking for her all over. The trial court was least impressed by that line of argument as it only came through the evidence of PW2 and PW5 and not the appellants. They were merely speculating the probable motive of the attack.

Had the appellants found the deceased and the 2nd appellant's wife *in flagrante delicto*, one would have understood if they reacted the way they did. However, this was not the case, and even if it was, how would that impact on the 1st and 3rd appellants so as to drive them to act so violently against the deceased. The wife was only married to the 2nd appellant and not all the appellants. That said, we may pause here to ask, was it mere coincidence that the appellants were at the same place and time when this heinous crime was committed as the appellants wanted the trial court to believe" We do not think so. It does appear to us that the 2nd appellant went out of his way to secure the services or assistance of the 1st and 3rd appellants in the commission of the offence for whatever reason. Thus the conduct of the appellants wholly undermines the defence of provocation. It is evident that a lot went into planning and subsequent execution or commission of the offence by the appellants. Thus the 2nd appellant had ample time to cool off. The appellants therefore did not act in the heat of the moment or passion. From the evidence, the appellants congregated in the 2nd appellant's house as early as 9 p.m. They waited until the dead of night, at 2 a.m. to be precise, to unleash and visit terror on the deceased. They forced the deceased's door open, dragged him out into the veranda and assaulted him for hours until he passed out. They were all armed with crude weapons. Whereas the 2nd appellant was armed with an axe and a metal rod, the 1st and 3rd appellants were armed with wooden stick and iron bar respectively. The deceased moved up and down the verandah in a bid to escape to no avail. He was overwhelmed by the appellants. We are saying all these to show that the defence of provocation could not possibly hold in the circumstances of this case. So that even assuming that the appellants had raised it in their defence the facts of this case and the conduct of the appellants themselves took this case outside that defence as contemplated in **section 207** of the Penal Code. We so hold with the consequence that we reject that defence, much as it was belatedly raised. In our finding, the eventual killing of the deceased was premeditated and therefore amounts to murder, pure and simple.

We have observed in the course of this judgment that the sentence imposed by trial court upon conviction was irregular and the appellants were put on appropriate notice. Nonetheless the appellants opted to prosecute the appeal. In sentencing each appellant to 40 years imprisonment; this is what the learned Judge said:-

"I have considered the mitigation on behalf of all the three (3) accused persons. No doubt the offence is serious. Due to their actions a human life was needlessly lost. I am aware and take cognizance of emerging jurisprudence that the death penalty ought not be mandatory upon a conviction for murder. However, I feel that a deterrent sentence is called for. I therefore sentence each accused person to serve forty (40) years imprisonment …"

The learned Judge in making reference to emerging jurisprudence was obviously influenced by the Court's decision in the case of **Godfrey Ngotho Mutiso v R (2010) eKLR** where this Court, differently

constituted, held that the death sentence was not a mandatory sentence for every capital offence. This decision was made in 2010. However in October, 2013 a five-judge bench of this Court reconsidered that decision and came to the conclusion that death penalty was mandatory sentence upon conviction of a capital offence. That was in the case of **Joseph Njuguna Mwaura & 2 others v Republic, Nairobi Criminal Appeal No. 5 of 2008 (UR).**

In view of our finding on conviction which we uphold, we dismiss the appeal and pursuant to the notice given to each of the appellant which they chose to disregard, as they were entitled, we set aside the sentence imposed on the appellants aforesaid and substitute therefore, the sentence of death on each one of them.

Orders accordingly.

Dated and delivered at Mombasa this 17th day of October, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR