Case Number:	Criminal Appeal 46 of 1978
Date Delivered:	11 Jun 1979
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Chunilal Bhagwandas Madan, Cecil Henry Ethelwood Miller, Kenneth D Potter
Citation:	Joseph Mokwa v Republic [1979] eKLR
Advocates:	B Chunga for the Republic
Case Summary:	**Joseph Mokwa v Republic** **Court of Appeal, Kisumu** **11th June 1979** **Madan, Miller & Potter JJ A** **Criminal Appeal No 46 of 1978** ***Criminal law*** *– evidence – burden of proof - excessive force used in self defence – onus on prosecution to establish excessive force – onus not discharged.* Where self defence is successfully raised as a defence to a charge of murder, a verdict of manslaughter on the ground that excessive force was used in self defence is only open to the Court if the prosecution discharged the onus of showing that the accused had time for reflection and that he could have counted and aimed the blows which he inflicted. *Palmer v R* (1971) 55 Cr App Rep 223 disapproved.

	Appeal Joseph Mokwa appealed to the Court of Appeal (Criminal Appeal No 46 of 1978) against the sentence imposed on his conviction by Cotran J in the High Court, Kisii, on 20th September 1978 for manslaughter. The facts are set out in the judgment of the court. **Cases referred to in judgment:** 1. *Manzi Mengi v R* [1964] EA 289, EACA. 2. *Palmer v R* (1971) AC 814, [1971] 2 WLR 831, [1971] 1 All ER 1077, 55 Cr App Rep 223, PC. The appellant was not represented *B Chunga* for the Republic
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(Coram: Madan, Miller & Potter JJ A)

CRIMINAL APPEAL NO 46 OF 1978

BETWEEN

JOSEPH MOKWA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the sentence by Cotran J in the High Court, Kisii, on 20th September 1978)

JUDGMENT

The appellant was convicted of the offence of manslaughter in the High Court sitting at Kisumu. He had been indicted for the murder of Yuvinalis Onkebo.

The evidence for the prosecution was to the effect that on 13th December 1977 a girl named Maria Kemunto and her sister Kerubo were sitting together outside Kerubo's house. The appellant came there, got hold of Maria and told her to go with him, pulling her along. Kerubo intervened whereupon the appellant started to beat her. Maria ran to report the matter at the deceased's house nearby where the deceased was present with Kerubo's husband Nubi, Samson Tariani and Henry Ongesa. The four of them rushed out and found the appellant still assaulting Kerubo. The firstnamed three men held the appellant to stop him. They got hold of his jacket which he removed; he then took out a knife and stabbed the deceased four times, once in the forehead, twice in the left arm and once in the chest. The deceased died on the way to hospital. The evidence of PC Ambrose was to the effect that, on 16th December 1977, he saw an injury on the appellant's hand which also had a bandage on it. PC Ambrose testified that the appellant told him that he received the injury during the fight with the deceased.

The appellant was arrested on 15th December, and he made the following statement to the police on the same day:

It is true that I killed Yuvinalis Onkebo by stabbing him with a knife because they found me with a girl Maria and started beating me for nothing.

At his trial the appellant made the following unsworn statement in Court:

I was going to the home of Onkebo where there was some native beer. On the way I met Kemunto whom I had been seducing before. I greeted her and we started to talk. Her sister Kerubo was also going to the river. She found me standing with her sister. She shouted and alleged that I was pulling her sister. I said to her why are you shouting so loudly. I kept quiet and started to walk towards the home where there was beer. The people of that home, Tarian and many others came, held me and started asking me as to why I was pulling the girl. They started to beat me. Onkebo, the deceased, hit me on my left arm. Tarian got hold of my shirt. My coat was red; not this one. When I stood up, I stabbed him with a knife on

the arm and on the abdomen. That is all.

Cotran J said in his judgment that, looking at the evidence as a whole, he did not accept the version given by the prosecution witnesses for the following reasons:

1. The men must have come out of the deceased's house with a view to stopping the [appellant] from assaulting Kerubo and Maria. I entertained no doubt that they must have approached him in a hostile manner. Indeed, they admit that they caught him by the back of his jacket. It is obvious that there must have been some struggle between the deceased and the three men on the one side and the [appellant] on the other.

2. It is extremely difficult to believe that the deceased was not with the other three at that stage but came a little while later and was simply stabbed by the [appellant] having said nothing and having offered no provocation whatever. It is equally unbelievable that his colleagues stood idly by whilst he was being so stabbed; no less than four times.

3. The injury which the constable clearly saw on 16th December on the [appellant] must have come about as a result of the struggle or fight between the [appellant] and the other four men.

4. I am satisfied that the [appellants] version of the fight was not an afterthought because he consistently maintained it from the time he was arrested and made his caution statement to I P Wambunga.

The judge continued:

I, therefore, basically accept the defence version that the deceased and the other three men were all in the process of attacking the [appellant] and beating him when he drew out his knife and stabbed the deceased. [emphasis supplied]

The judge then said that the legal issue was what, on these findings of fact, the appellant was guilty of; that it had been argued for the prosecution that the appellant was guilty of murder because these facts neither amounted to provocation nor to self-defence. The defence had argued that the defence of self-defence had been established on those facts and, in the alternative, if the force used by the appellant in the circumstances was excessive then he would be guilty of manslaughter only; in the further alternative, upon the version of the defence there was provocation which would again reduce the charge of murder to manslaughter.

The judge said that on the facts as he found them there was no question of provocation as defined in sections 207 and 208 of the Penal Code. First, because the appellant never said that he was provoked. With respect, even if an accused person does not say that he was provoked, the Court still has to examine the evidence to decide whether there was legal provocation.

The judge appreciated this for he said "nor was there any other evidence to show that the appellant was provoked".

We are unable to agree with the judge when he said that, secondly:

there was no evidence whatever that the wrongful act directed at the [appellant], ie the beating he received at the hands of the deceased and the other three men, deprivedhim of his power of self-control, that it was quite clear the [appellant] knew what he was doing and never lost his power of self-control.

We consider that the wrongful act of beating of one man by four men together is an act of a nature which is capable of causing provocation to the victim and depriving him of his self-control; the evidence as to which is provided by the victim's reaction in turning upon his assailants by attacking them. The next question that would arise is whether the assault and the beating received by the victim at the hands of his assailants was such as to induce him to commit an assault of the kind which he did to bring it within the definition of provocation as enacted in section 208(1) of the Penal Code, ie:

The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of sucha nature as to be likely, when done to an ordinary person .... 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.

In the circumstances of this case, the beating inflicted upon the appellant jointly by the four men constituted provocation which was likely to deprive an ordinary person of the type of the appellant (there was no evidence of his being a peculiar, special or sophisticated person or of anything else untoward about him) of the power of self-control so as to commit the assault of the kind which he did. In a country where the carrying of a knife on the person, in particular in rural areas, is the order of the day and a common incident of life, the kind of assault committed by the appellant was a likely result of the provocation offered to him.

With respect, the judge correctly directed himself that where a person in the legitimate right of self-defence of person or property uses excessive force or more force than was necessary in the circumstances (always providing that all other elements of self-defence are present) he should not be convicted of murder but of manslaughter; *Manzi Mengi v R* [1964] EA 289,292. We find ourselves unable to subscribe to what is stated in the headnote to the Privy Council's decision in *Palmer v R* [1971] 55 Cr App Rep, 223, ie:

There is no rule that where on a charge of murder an issue of self-defence has been left to the jury they must be directed that, if they consider that excessive force was used in self-defence they should return a verdict of guilty of manslaughter.

Cotran J then said:

I have already held in this case that I basically accept the [appellant's] version that there was a fight betweenhim and the other four men; I accept that he was beaten by them; I accept further that having regard to the circumstances he must have been in a reasonable apprehension of a serious injury to himself surrounded as he was by these four hostile men who were beating him. I am satisfied that he could not have, by retreating or otherwise, broken off the fight or avoided the assault on him. I am, however, by no means satisfied that he used no more force than was necessary in the circumstances. He could easily have used his knife to administer one stab wound, say, on the arm or leg and certainly there was no necessity for him to inflict four stab wounds in the circumstances prevailing. I hold, therefore, that whereas the other conditions necessary to establish the defence of self-defence have been established, there was excessive force used and the [appellant] is guilty of manslaughter only.

Let us try to recapture the scene. The four men rushed out of the house and they set about the appellant. They were four hostile men who were beating him. He was not only in a reasonable

apprehension of a serious injury to himself but one of the four men (the deceased) inflicted an actual injury upon him. The appellant drew his knife in self-defence. In the circumstances the only way that he could defend himself was to use the knife which he was compelled to do because he could not have (by retreating or otherwise) broken off the fight or avoided the assault on him. He used his knife when he was terror-stricken, in a state of fear, probably in an overwhelming state of fear, because his personal safety was in danger, and “in a reasonable apprehension of a serious injury to himself”. As the attack upon him by the four men developed, the appellant would have been justified in thinking that it could result in the destruction of his life. Such a thought in his mind would have been both justified and reasonable. Four men rushing out of a house to attack one single man is heavy odds indeed, he cannot be blamed if he becomes frantic and develops or suffers from temporary mental derangement. He must have used his knife as he could, probably in quick and rapid succession without aiming the blows at any particular part of the deceased’s body. It would be unreasonable to expect a person who is defending himself against four persons in a *melee*, for that is what it must have been, to have inflicted only one blow or to have aimed his blow or blows at any particular part of the body of one of his assailants, as if there was time to reflect and choose. His blows must have been directed at the deceased because the deceased had inflicted an injury upon him, and in self-defence to prevent further injury to his person. If he had waited or reflected either to limit the number of his blows or to aim them at some part or parts of the body he might have suffered injury, possibly a more serious injury.

The judge came to the conclusion that the appellant was acting in selfdefence but that he had used more force than was necessary in the circumstances. The onus was on the prosecution to prove this. This onus was not discharged. The number of blows inflicted is not the only criterion. The assault has to be judged in the context of the affray. The onus was also on the prosecution to prove, in the circumstances of the attack upon the appellant in which four men who rushed towards him with the aim of doing violence (which one of them in fact did), that there was time for reflection and the appellant could have both counted and aimed his blows in a manner considered reasonable by the judge. This onus was also not discharged.

For these reasons in our opinion the judge erred in rejecting the plea of se1f defence. Therefore, we quash the conviction and set aside the sentence.

The appellant is to be set at liberty unless otherwise lawfully detained.

Appeal allowed.

Daed and delivered at Kisumu this 11th day of June 1979.

C.B MADAN

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JUDGE OF APPEAL

C.H.E MILLER

…….....

JUDGE OF APPEAL

K.D POTTER

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR