Case Number:	Criminal Appeal 84 of 1984
Date Delivered:	13 Dec 1984
Case Class:	Criminal
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	James Onyiego Nyarangi, Alan Robin Winston Hancox, Alister Arthur Kneller
Citation:	Mungai v Republic [1984] eKLR
Advocates:	Mr BN Georgiadis for Appellant Mr B Chunga for the Republic
Case Summary:	**Mungai *v* Republic** Court of Appeal, at Nairobi December 13, 1984 Kneller, Hancox JJA & Nyarangi Ag JA Criminal Appeal No 84 of 1984 (Appeal from the High Court at Nairobi, Porter J) ***Criminal law*** *– murder - offence of - contrary to - Penal Code (cap 63)section 17 - killing arising from use of force in defence of person or property - whether a sufficient factor in reducing offence to manslaughter.* ***Criminal law*** *– manslaughter - offence of contrary to - Penal Code (cap 63) section 17 - reducing offence of murder to manslaughter – killing arising from use of force in defence of person or property - whether a sufficient factor to reduce offence of murder to manslaughter.* ***Evidence*** *- hearsay evidence - dying declaration - admissibility of - appellant charged with murder - appellant alleging sudden and violent attack by*

deceased - statement of deceased to his brother that he had not fought with appellant - absence of other evidence by which to test evidence of appellant - whether statement of deceased admissible as a dying declaration - Evidence Act (cap 80) section 33(a).

The appellant was charged with murder and after his trial, he was found guilty of the lesser offence of manslaughter on the basis of excessive use of force in defence of a person and on the basis also of provocation. He was sentenced to twenty-one months' imprisonment. At the trial, there had been no evidence to set against the testimony of the appellant and one Christine, who it was alleged had been attacked by the deceased and who the appellant had been endeavouring to protect, as to what had happened save that the deceased had while in hospital made a statement to his brother in which he emphasized that he had not fought with the appellant. The appellant had shot the deceased in the thigh and the police had left him bleeding and unattended for about 45 minutes before taking him to hospital where, again, there was delay in administering a blood transfusion. The deceased died the following day and the cause of death was certified to be cardiac and respiratory failure due to irreversible shock brought on by excessive bleeding due to bullet wounds. The appellant appealed against his conviction.

Held

1. It is a doctrine recognised in East Africa that the excessive use of force in the defence of the person or property, whether or not there is an element of provocation present, may be sufficient for the court to regard the offence not as murder but as manslaughter-*R v Ngolaile s/o Lenjaro* (1951) 18 EACA 164; *R v Shaushi* (1951) 18 EACA 198.

2. While there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered-*Palmer v Reginam* [1971] 1 All ER 1077.

3. The deceased's statement to his brother in which he emphasized that he had not fought with the appellant was admissible under the Evidence Act (cap 80) section 33(a) as a dying declaration. Nevertheless, the evidence of the appellant and Christine showed that the deceased had attacked both of them.

4. In a moment of unexpected anguish such as, as it was in this case, the sudden and violent attack by one person on another, a person in the situation of the appellant is not in law required to weigh to a nicety the exact measure of the action which it is necessary to take to deter the attack on that other person. The appellant's actions had not been unreasonable or excessive in the circumstances with which he was faced.

5. The appellant, though not being regularly married to the person who had been attacked, was entitled in law to take reasonable measures to prevent danger to her life and, moreover, he was entitled under the Penal Code section 392 to act to prevent the commission of a felony which was occurring in his presence.

6. (*Obiter*) A court should select the assessors and should take care not to appear to confirm rather than to select assessors. The trial judge having carried out an inquiry as to the suitability of the persons to be summoned to serve as assessors had not selected the assessors as provided under the Criminal Procedure Code (cap 75) section 297 but had recorded that the assessors "chose themselves", which was an error.

Appeal allowed.

Cases

1. *Ilapala s/o Ibrahim v Reginam* (1953) 20 EACA 300

2. *Selemani s/o Ussi v Republic* [1963] EA 442

3. *Palmer v Reginam* [1971] 1 All ER 1077

4. *Rex v Ngoilale s/o Lenjaro* (1951) 18 EACA 164

5. *Julius Matendechere s/o Masakho v*

Reginam (1956) 23 EACA 443

6. *The King v Biggin* [1920] 14 CAR 87; 1 KB 213; [1918-19] AER 501

7. *R v McInnes* [1971] 3 All ER 295

8. *R v Rose* [1984] 15 Cox CC 540; [1982] 2 All ER 536

9. *R v Shaushi s/o Miya* (1951) 18 EACA 1981

10. *Hau s/o Akonaay v R* (1954) 21 EACA 276

11. *R v Chisam* [1963] 47 Cr App R 130

12. *R v Duffy* [19667] 1 All ER 62

13. *Kaluma v Republic* [1968] EA 349

14. *R v Shannon* The Times 19th April, 1980; [1980] Crim LR 438

15. *George Karanja Mwangi v Republic* Criminal Appeal No 132 of 1983; [1983] KLR 522

16. *Kalume wa Tuku alias Saidi v Regina* (1954) 21 EACA 201

Texts

1. Butler, T.R.F., Mitchell S.G., (Eds) *et al*. (1973) *Archbold: Criminal Pleading, Evidence and Practice,* London: Sweet & Maxwell 38th Edn

2. Hailsham, Lord, *et al*, (Ed), (1976) *Halsbury's Laws of England,* London: Butterworths, 4th Edn para 1179

Statutes

1. Penal Code (cap 63) sections 17, 207, 208, 208(1), 213(a), 241, 244, 392

2. Evidence Act (cap 80) section 33(a)

3. Criminal Procedure Code (cap 75) sections 297, 382

Advocates

	Mr BN Georgiadis for Appellant *Mr B Chunga* for the Republic
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal Allowed.
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Hancox JJA & Nyarangi Ag JA)

CRIMINAL APPEAL 84 OF 1984

BETWEEN

MUNGAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, Porter J)

JUDGMENT

In the early hours of December 3, 1983, the appellant visited his girl friend, Christine Wahu, in her house at Riruta at about 2.00 am for the purpose of spending the remainder of the night there. Although he had three wives, he had been on close terms with Christine for many years and they had a daughter, Pascalina Waithira. At about 4.30 am, they were violently awakened by the deceased, Francis Mathai Maina, who had also had a relationship with Christine which was said to have ended in 1980. He was admitted by Christine in the mistaken belief that it was her brother who was frequently drunk and whom she hoped to quieten, and demanded to know if her husband was there, presumably referring to the appellant. She replied that he must have seen the (appellant's) car outside the house.

The deceased then attacked Christine, knocked her down, caught her by the neck, threatened to kill her and said, according to her evidence,

"Today you are going to die together with your husband".

This was followed by further violence and the deceased pushed or pulled Christine into the bedroom where the appellant still was. He repeated his threats to kill them both and threw Christine onto the bed, saying that he would not leave them until they were dead. He then took a hurricane lamp, threw it against the wall and some of the broken glass cut the appellant on the right eyebrow, causing a lacerated wound 3 centimeters long, from which it seems he bled considerably.

The appellant then got up from the bed, took out the revolver which he normally carries for his protection when he is responsible for large amounts of cash (he is by profession an accountant), and also as a result of a robbery on his parents' house, and fired a warning shot into the air. This shot was heard by Christine's brother Michael Ndungu Kiaro, who lived nearby. In the appellant's own words, he then:

“decided to leave. Go to sitting room. I found front door open. I went outside. There was a little normal lighting by sky outside”.

He continued:

“When I got outside, behind my car was a pick-up. I could identify that there were people in the front seat. I could not tell how many or who, more than one. They were talking. I was in a lot of pain from the cut I sustained. On my arm, one was a deep cut on my wrist and scratches on my forearm. Christine was still screaming in the house. Fight still going on. I tried to open the door which had been bolted behind me. I could not. I started kicking the front door with my feet. I had my gun in my right hand. My left covering my eyebrow. I did not know who assailant was. I thought the threats to be serious. The man had friends in his pick-up. Fight going on inside. I thought it must have been true what the attacker was saying”.

Meanwhile, the deceased continued to attack Christine inside the house, beating her with the hurricane lamp and uttering further threats to kill. The appellant called the deceased to go outside

“so that he could kill us both outside”.

It is not clear from her statement to which of the appellant or the deceased it referred. The deceased then locked the door from the inside while Christine hit him with an iron bar, thereby gaining a respite in which she was able to open the door. She emerged from it, still being held by her assailant.

At this stage, the appellant’s impression was, so he said, that Christine was quite desperate, and that

“this was the end of the road for her”.

She said under cross-examination,

“I felt I was nearing my death from being strangled”.

At all events, the appellant, with a view to stopping the fight, fired the gun, which he still had, at the deceased’s leg. He thought he had missed but it is clear from the post mortem examination that the deceased reached down, probably in fact, as a result of the wound he had suffered, but the appellant said he thought that he was reaching for a gun, and fired again, the bullet this time hitting the deceased’s left hand and his left thigh a second time. As a result of these injuries, the deceased fell to the floor of the verandah and lay there until Kiaro brought the police from Riruta Police Post, who must have arrived at the house shortly after 5.00 am. They took possession of the gun from the appellant. Leaving the injured man there, without even a blanket covering him, the police returned to Riruta in the appellant’s car, and called the 999 patrol, which arrived at about 5.45 am and proceeded to the scene, which was about half a mile away. There was a conflict in the evidence as to whether the deceased told them where he was injured, or was unable to speak and merely showed the police officers his injuries. He was taken by police vehicle to the Kenyatta National Hospital. His clothes were soaked in blood and it is obvious that even then he had lost a considerable amount of blood. The appellant’s initial reaction to Kiaro’s question.

“Have you killed him""

was

“I think I haven’t killed him. I just shot him in the leg and hand.”

It was the appellant who had instructed Kiaro to call the police.

Though the record states that Dr Quereshi testified that the deceased had arrived in the Casualty Department of the Kenyatta National Hospital at 6.25 pm on December 3, it is clear from the medical notes that were produced in evidence at the trial that he was in fact admitted there at 6.25 am. The timing of the events which occurred in relation to him throughout that day is of importance when it is remembered that the deceased was obviously losing a lot of blood, and, indeed, told his brother, Simon Njaria, who visited him twice that day, that he was bleeding a lot and that “the doctors did not know why”. This coupled with the pathologist’s testimony that though neither wound was immediately fatal, either or both caused a great deal of bleeding is highly relevant as to the cause of death, (a point not specifically argued, by Mr Georgiadis on behalf of the appellant) for Dr Ribiero continued :-

“If not attended to early and promptly then such a person would go into irreversible shock and bleed to death”

and “Two hours before treatment would be inordinate delay. Dangerous to leave treatment that long”.

As one of the bullets had exploded and fragments went into the pelvis and damaged the bladder and rectum, there was some bleeding internally as well as externally.

Although the patient was given attention at the hospital, inasmuch as his left wrist and lower lip, which had a cut, were stitched, it seems that he did not receive any blood by transfusion until about midday; the medication sheet records that he was to be given two units of whole blood fast. He was not seen by Dr Quereshi until 7.40 pm over twelve hours after admission, when, *inter alia*, he was given a further four pints of blood “as fast as possible”. The deceased nevertheless died the following day, andthe cause of death certified as cardiac and respiratory failure due to irreversible shock, due to excessive bleeding due to bullet wounds. Even when he was seen by Dr Quereshi, he is recorded as having gone into irreversible shock.

Curiously, Mr Georgiadis did not press the issue relating to the cause of the deceased’s death, and took the view that the treatment, or perhaps the lack of it, which the deceased received fell short of the second part of paragraph (a) of section 213 of the Penal Code. The paragraph states :-

“A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases – “(a) if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill”.

The emphasis is ours. This matter has caused us some concern because though the patient was admitted into the hospital less than two hours after the shooting, we think that in view of Dr Ribiero’s evidence, particularly under cross-examination, it cannot be gainsaid that had the deceased received adequate medical treatment, and therefore sufficient blood by transfusion, and had the police used the appellant’s car and taken him to the hospital straightaway, his death might well have been avoided.

We revert to the circumstances of the offence. The appellant was taken to the police post and thence to Kabete and Parklands Police Stations respectively, where two enquiry statements were recorded from him on December 3 and December 5, and he was charged with the full offence of murder on December 6. The trial proceeded before Porter J with the aid of assessors and he was found guilty of manslaughter on the respective bases of excessive use of force in defence of Miss Wahu and himself, and of provocation, and sentenced to twenty one months' imprisonment. He now appeals to this court against his conviction only.

Though Mr Georgiadis said that the judge had gone through the motions of considering the question of provocation, he submitted that this was not really a case of provocation at all. Indeed, it is not included in his memorandum of appeal. We accept from Mr Chunga, the learned Assistant Deputy Public Prosecutor, who has represented the Republic throughout this case, that there are instances where the issues of the excessive use of self defence go hand in hand with or, more correctly, overlap, that of provocation.

The judge, however, did deal substantively, and not merely formally, with the issue of provocation. He expressly left this question to the assessors and the second assessor made an express finding that the appellant was provoked both inside the house and outside it, thus leading to the opinion he returned that the appellant was guilty of manslaughter. The third assessor obviously considered that the deceased's conduct had amounted to provocation which, coupled with the amount of force used, which he said was excessive from the time the deceased entered the bedroom, reduced the finding on the murder charge to one of manslaughter.

The judge, in passages that were dealt with extensively and supported by Mr Chunga, said that he was not prepared to differ from the unanimous opinion of the assessors on the question of the excessive use of force in defence of the person (either the person of the appellant or of Miss Wahu) unless those opinions were perverse. On the contrary, he respected their view of the facts, and this led to his finding that because of the excessive force used, the defences of self defence and defence of the person of Miss Wahu, fell to the ground. It was because of this conclusion that the judge then turned to the issue of provocation, and the remainder, and concluding, part of his judgment, was devoted to finding that the provocation to which the appellant was subjected continued throughout until he fired the gun the second time, and that he was consequently guilty of manslaughter by virtue of section 207 of the Penal Code. He considered this, as he said, as a separate issue because it did not follow that proof of the use of excessive force led to a finding of provocation. Notwithstanding this, the case in this court was presented by both counsel on whether the degree of force used by the appellant in repelling the attack by the invader, (as we think the evidence demonstrated that the deceased was, on that night at least, both a trespasser and an intruder), was reasonable in all the circumstances, as Mr Georgiadis claims, or excessive, out of proportion, unnecessary and unreasonable in the defence either of Miss Wahu or of the person of the appellant, as Mr Chunga submits.

Mr Georgiadis divided his argument under five main headings, submitting, *inter alia*, that the prosecution had failed to negate the twin issues of defence of the person raised by the appellant at the trial, and that since the judge had made no specific finding that the appellant's appreciation of the circumstances when he fired either the first or the second shot was erroneous, he should not have found that the defence of the person was not available to the appellant. He said that not only had the appellant, who was lawfully in the house, been violently awakened by a person who was a total stranger to him, and had retreated to outside the house when the door was locked behind him, but that he was still virtually undressed, and that it was unreasonable to expect him to go and summon assistance from the next house about a hundred feet distant, whose occupants might be in a similar state of undress and unreadiness. Accordingly, it was not unreasonable for him to have shot the deceased not only once but

twice, in view of the murderous threats still being uttered by the deceased coupled with the fact that he was still holding Miss Wahu (none of whose evidence was disbelieved or rejected) by the neck with one hand at the time of the second shot and that he, the appellant, had one hand over his injured eye.

It might be that the deceased had no weapon, but Mr Georgiadis demonstrated, by reference to portions of the evidence relating to the deceased's clothing, that there was ample basis for the appellant's belief that he had one. Furthermore, had he had any intention other than to deter the appellant, why should he shoot at his legs and not at a more vital part of his body" Added to all this was the presence of those whom he thought were the deceased's friends in the pick-up vehicle which had materialized and parked behind his own, but which moved away at some time while he was outside the house.

In a detailed and vigorous submission in support of the conviction, Mr Chunga sought to show that there could have existed no reasonable basis for the appellant's stated belief that the deceased had any kind of weapon, much less a firearm. Both the occupants of the house (that is the appellant and Miss Wahu) stated that at no stage did they see the appellant with any weapon. Had he had a weapon, he would hardly have picked up the hurricane lamp and thrown it at the appellant. Therefore, it was reasonable to suppose that if the deceased had had a gun, such were the threats he was making and his behaviour, he would have used it at that stage. Neither had the deceased forcibly entered the house but had been admitted by Miss Wahu. He was a jilted lover who had no lesser right to be in the house than the appellant. Moreover, there was no evidence that any of the occupants of the pick-up had attempted to get out of it and participate in the fracas.

There was no basis, Mr Chunga submitted, for any finding that the second shot was fired because either Miss Wahu's or the appellant's life was in peril, and as a result, the judge had given correct directions on the law relating to defence of the person and on provocation. The appellant's reaction in firing two shots in rapid succession at very close range were out of proportion and exceeded all the bounds of reasonable force, particularly as he had already retreated out of the house before the incident happened and was out of danger. Thus the appellant's actions were dictated by motives of vengeance rather than by any question of self-defence or defence of Miss Wahu. If any other conclusion were possible on the fact, Mr Chunga continued, the appellant would have adopted one of the safer options which were clearly open to him, one of them being the use of the gun as a club, a passage in the judgment which was heavily criticized by Mr Georgiadis, or going to fetch assistance. He relied quite strongly on the decision in *Ilapala s/o Ibrahim v R* (1953) 20 EACA 300, in which, after a dispute at a wedding feast, the second appellant saw the deceased sitting on top of his co-accused and hitting him with his fists, and struck him on the back of the head with a stick, causing his death. The Court said, at p 301:-

"We do not find in the judgment any indication as to whether the learned trial judge accepted the first accused's story as to his being throttled but, even if that be assumed in the appellant's favour, it does not, in our opinion, provide him with any excuse for his attack on the deceased, nor does it afford any mitigation so as to reduce the offence to manslaughter. We do not consider that section 383 of the Penal Code can be called in aid of the appellant for, even if it be conceded that he knew that the deceased was committing a felony, the method which he adopted to prevent the commission of that felony cannot in the circumstances, be considered as reasonable. There were other people sitting about in the compound but he made no effort to invoke their assistance; and, indeed, his action in going to fetch the stick and running up to the deceased from behind suggests a malicious attack rather than any genuine desire to defend his companion."

Finally, Mr Chunga stressed the importance of the opinions of the assessors that the appellant had

used excessive force, which he likened to the findings of a jury and which, after the correct directions they had received, the court should not interfere with, nor should we embark on a re-valuation of the evidence unless it had been shown that there were misdirections or factors not taken into account by the judge.

The law in this country relating to defence of the person or property is contained in section 17 of the Penal Code which states :

“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 the defence of person or property shall be determined according to the principles of English Common Law.”

While the law of provocation is dealt with and defined in sections 207 and 208 of the same Code, sub-section (1) of the latter providing :-

“208 (1). The term “provocation” means and includes, except as 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 or 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.”

Much of the argument in this court and the High Court centred on the East African decision in *Selemani s/o Ussi v Republic* [1963] EA 442 and on the Privy Council decision in *Palmer v R* [1971] 1 All ER 1077, the judge setting out *in extenso* a passage from page 446 of the first of these reports. From the former, it would certainly appear that in East Africa there is a doctrine that the excessive use of force in defence of the person or property, whether or not there is an element of provocation present, is sufficient for the courts to regard the offence not as murder but as manslaughter. This is shown also by the decision in *R v Ngoilale s/o Lenjaro* (1951) 18 EACA 164 in which the following passage appears at pages 164 and 165 :-

“On these facts, whilst the learned judge recognized that an element of provocation was present, he came to the conclusion that the appellant’s mode of retaliation was entirely disproportionate to the provocation offered. He thought also that a mere push was unlikely to have deprived the appellant of his power of self-control. We are not so satisfied, however, that the learned judge appreciated fully that in the circumstances under which the appellant drew his knife there was also definitely an element of self-defence, or that if he did have this in mind, and there are passages both in the notes of his summing-up to the assessors as well as in the judgment which suggest that he did, that he sufficiently realized that although the appellant may have gone beyond what in fact was required to defend his person against assault, that fact would not inevitably make his offence murder. If a man acting in good faith exceeds the power given him by law to defend himself and kills his assailant, the resultant homicide whilst not justifiable may yet be excusable, so that his offence can be regarded as manslaughter and not murder. We believe that this aspect of the doctrine of “*se et sua defendendo*” is sometimes overlooked in these territories, probably because the draftsmen of the Penal Code operating in East Africa did not see fit to include in the chapter “Offences against the person” a section similar to the second exception to section 300 of the Indian Penal Code which is as follows :-

“Culpable homicide is not murder, if the offender in the exercise in good faith of the right of private defence of person or property exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any

intention of doing more harm than is necessary for the purpose of such defence”.”

The draftsman did, however, include a section, which in Tanganyika is section 18 of the Code, which under the marginal head “Defence of person or property” is as follows :-

“Subject to any express provisions in the Code, or any other law in operation in the Territory, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English Law.”

This, in our view, is another way of stating the exception to section 300 of the Indian penal Code because we regard that provision in the Indian Penal Code as an accurate codification of English common law principles.”

See also *Matendechere s/o Masakho v R* [1966] 23 EACA 443.

The authority cited for the proposition in *Selemani*’s case is *The King v Biggin* [1920] 14 CAR 87. That was a case where, on a charge of murder, the appellant was convicted of manslaughter on the basis of the judge’s direction to the jury that :-

“if he (the appellant) exceeded the necessities of the occasion in resisting violence, that would justify a verdict of manslaughter.”

The conviction was, however, quashed on other grounds, but it was the basis for the passage to that effect in Archbold’s *Criminal Pleading, Evidence and Practice*, until the advent of the 38th Edition of that work in 1973 (when it was omitted) which was after the decision in *Republic v McInnes* [1971] 3 All ER 295, which itself referred to the then recent decision in *Palmer v R* which also referred to *R v Biggin*. In *Palmer v R* it will be remembered that the appellant’s defence that he had acted in self defence was rejected and the conviction of murder was upheld. The question expressly left to the Privy Council for their decision was whether:-

“in cases where on a charge of murder an issue of selfdefence is left to the jury it will in all cases be obligatory to direct the jury that if they found that the accused while intending to defend himself had used more force than was necessary in the circumstances they should return a verdict of guilty of manslaughter""

At page 1082 the Privy Council said:-

“It would seem to be clear that the jury were satisfied that it was the appellant who without justification had fired the fatal shot with the intention either of killing or of inflicting serious bodily harm. Their Lordships conclude that there is no room for criticism of the summing-up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury, they must be directed that if they consider that excessive force was used in defence, then they should return a verdict of guilty of manslaughter. For the reasons which they will set out, their Lordships consider that there is no such rule”

and they continued at page 1084:-

“hence it was argued that in every case where selfdefence is left to a jury they must be directed that there are the three possible verdicts, ie guilty of murder, guilty of manslaughter, and not guilty. But in many cases where someone is intending to defend himself, he will have had an intention to cause

serious bodily injury or even to kill and if the prosecution satisfy the jury that he had one of these intentions in circumstances in which or at a time when there was no justification or excuse for having it – then the prosecution will have shown that the question of self-defence is eliminated. All other issues which on the facts may arise will be unaffected."

It would therefore appear that under the English common law, in 1971 at any rate, the doctrine that excessive force in defence of person or property would result in a conviction of manslaughter rather than murder was by no means settled, and the passage which Mr Georgiadis cited from page 1088 of the report in *Palmer v R* should be read in this light, as is shown by the following citation from the judgment of Edmund Davies LJ (as he then was) in *R v McInnes* (*supra*) at page 301:-

"The final criticism levelled against the summing-up is that the learned judge wrongly failed to direct the jury that if death resulted from the use of excessive force by the appellant in defending himself against the aggressiveness of the deceased, the proper verdict was one of not guilty of murder but guilty of manslaughter. Certainly, no such direction was given, and the question that arises is whether its omission constitutes a defect in the summing-up."

The Privy Council decision in *Palmer v Reginam* provides high persuasive authority which we, for our part, unhesitatingly accept, that there is certainly no rule that, in every case where self-defence is left to the jury, such a direction is called for. But where self-defence fails on the ground that the force used went clearly beyond what was reasonable in the light of the circumstances as they reasonably appeared to the accused, is it the law that the inevitable result must be that he can be convicted of manslaughter only, and not of murder" It seems that in Australia that question is answered in the affirmative (see Professor Colin Howard's articles, '*Two Problems in Excessive Defence*'), but not, we think, in this country. On the contrary, if self-defence fails for the reason stated, it affords the accused no protection at all. But it is important to stress that the facts on which the plea of self-defence is unsuccessfully sought to be based may nevertheless, serve the accused in good stead. They may, for example, go to show that he may have acted under provocation or that, although acting unlawfully, he may have lacked the intent to kill or cause serious bodily harm, and that way render the proper verdict one of manslaughter."

Neither is there any inconsistency in this in *R v Rose* [1984] 15 Cox CC 540 in which the homicide by the son of his father was held to be wholly excusable and the issue of manslaughter was not left to the jury at all.

On the basis, then, of the common law as it stood in England after 1971, the judge was right (if this be the correct interpretation of this passage in his judgment) in saying that if the assessors' view of the facts, that the force used was excessive, was accepted, then

"the defence of self-defence of Miss Wahu fall to the ground and I am bound to look as have the assessors at provocation."

But if this is so, how is it that the assessors, if correctly directed as Mr Chunga claims, at least in part, returned opinions of manslaughter on the grounds of the excessive use of force by the appellant"

However, notwithstanding the fact that section 17 of the Code statutorily requires that criminal responsibility for the use of force in defence of person or property shall be determined according to English common law, it does appear that the doctrine is recognised in East Africa that the excessive use of force in the defence of person or property may lead to a finding of manslaughter: see *R v Ngoilale* [*supra*] and *R v Shaushi* (1951) 18 EACA 198, the latter of which was cited with approval in *Hau s/o Akonaay v R* (1954) 21 EACA 276 in which, at pages 277 and 278, the following passage occurs :-

"In the circumstances covered by the Common Law rule cited above and in the circumstances of the instant case there exist elements of both self-defence and provocation. This Court has already in *R v Ngoilale* and *R v Shaushi s/o Miya* [1951] 18 EACA 164 and 198, indicated its view that section 18 is wide enough to justify the application of any rule which forms part and parcel of the Common Law relating to self-defence and in the latter

said (at p 200) :-

"No doubt this element of self-defence may, and, in most cases will in practice, merge into the element of provocation, and it matters little whether the circumstances relied on are regarded as acts done in excess of the right of self-defence of person or property or as acts done under the stress of provocation. The essence of the crime of murder is malice aforethought and if the circumstances show that the fatal blow was given in the heat of passion on a sudden attack or threat of attack which is near enough and serious enough to cause loss of control, then the inference of malice is rebutted and the offence will be manslaughter."

We have no doubt therefore that, in the instant case, the learned trial judge should have directed himself in accordance with the rule of Common Law which we have cited."

The importance, of course, of whether there is this doctrine, in this case is because the issue of provocation was abandoned before us, or virtually so, and thus if the rule were as it was stated in England in 1971, namely that an excess of force vitiates the defence of the person entirely, then, if the assessors and the judge's findings of fact were right, the result in law would (subject to the no longer live issue of provocation) be that the appellant should have been convicted of murder.

However, we think, in view of the earlier East African cases we have considered, and the more recent English decision in *R v Shannon* the Times April 19, 1980, that, the true interpretation of the judgment of the Privy Council in *Palmer v R* is that while there is no rule that excessive force in defence of the person will in all cases lead to a verdict of manslaughter, there are nevertheless instances where that result is a proper one in the circumstances and on the facts of the case being considered. Neither does section 241 of the Code affect this position for it sets out that to which we have referred in statutory form, that is to say that, a person entitled to use force is criminally responsible for any excess thereof. In *R v Shannon* the appellant was charged with the murder of a much heavier and more aggressive man whom he had stabbed three times with a pair of scissors which he had in his pocket. The court, after considering and adopting *Palmer v R*, concluded that it had not been established that the force used was excessive and by way of retaliation and revenge, and consequently, that the verdict of manslaughter was unsafe and unsatisfactory and ought not to stand.

There is another and in many cases co-existent principle which we should consider before returning to the facts of this case. This was stated and adopted in *R v Chisam* [1963] 47 CAR 130 at p 133 as follows:-

"Where a forcible and violent felony is attempted on the person of another, the party assaulted, or his servant or any other person present, is entitled to repel force and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, or at least an honest belief based on reasonable grounds that there is such a necessity."

Again the emphasis is ours. The latter part of this passage of course supports Mr Chunga's statement of the law in this respect, and the main part of it was the basis for the decision of the Court of Criminal Appeal in *R v Duffy*, [1965] 1 QB 63, in which the question of whether the appellant in that case

was entitled to do that which she did in defence of her sister, that is to say whether she was within one of the permitted relationships, was held to have been a wrong approach, and that there was a general liberty, even as between strangers, to prevent a felony, and that a person may, in circumstances of necessity, intervene with the object of restoring the peace by rescuing the person being attacked. This is put in a similar form in a passage cited to us by Mr Chunga from *Halsbury's Law of England* 4th Edition Vol II at paragraph 1179. It is also put in the form of a duty to use all reasonable means to prevent the commission of a felony in section 392 of the Code. The failure to put this principle to the jury in *R v Duffy* resulted in the conviction for unlawful wounding being quashed. This aspect formed quite a substantial part of Mr Georgiadis's submission on behalf of the appellant.

In the instant case, we have the uncontroverted fact that the appellant was asleep in bed in a house to which he had lawfully been admitted, and that he and Miss Wahu were suddenly and violently awakened by the deceased who uttered threats to kill them both, and assaulted, and continued to assault, Christine in such a way that most people would either think her life was in danger or at the very least, she would suffer serious harm at the hands of the deceased. There was nothing to set against the evidence of the two surviving occupants of the house as to what happened during the period of the deceased's incursion, which probably occupied less than an hour, save that of the statement made by the deceased to his brother, in which he emphasized that he was not fighting with the appellant. We are prepared to accept from Mr Chunga, on the authority of *Kaluma v Republic* [1968] EA 349, that this was admissible under section 33(a) of the Evidence Act as a "dying declaration". Nevertheless, the evidence of the appellant and of Christine show that the deceased attacked the appellant by throwing the hurricane lamp at him, the glass of which caused him injury. Amongst other things the deceased said :-

"Say your last prayers for today is your last day."

and "Today is your final day, and I must finish you in the presence of your husband."

His action, in our view, matched his words and the appellant was entitled to feel great apprehension and, as he said, very insecure, even at the stage when the deceased emerged with Christine onto the verandah.

We agree with the learned judge that on the authority of *Palmer v R* the appellant was not in law required to weigh to a nicety the exact measure of the action which it was necessary to take to deter the deceased from attacking Christine further. But this must be taken in the light of the explanation of that decision in *R v Shannon,* in which the court said that the passage:-

"If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken"

was in effect a bridge between the objective test, that is to say, what was reasonable from the view point of an outsider looking at a situation quite dispassionately, and the "subjective test", that is to say, the view-point of the accused person himself, with the intellectual capabilities of which he might, in fact, be possessed, and with all the emotional strains and stresses to which at the moment in question he might be subjected. It is, again, we think, uncontroverted that the appellant fired only at the legs and not at a more vulnerable part of the deceased. This can only have shown an intent to disable, that is to deter, and is relevant to the subjective intention of the appellant when he fired the shots. Neither are we satisfied that the appellant's stated belief that the deceased was reaching for a gun, which was why he fired again, was an unreasonable one, bearing in mind all that had taken place in rapid sequence inside, and that which was continuing to take place, outside the house, and that the appellant was himself

bleeding, and in some pain, from the cut above his eye. We think the facts of this case are markedly distinguishable from *Ilapala*'s case (*supra*) on which Mr Chunga relied.

We do not consider that either the judge or, under his direction, the assessors, fully appreciated the subjective approach to the appellant's actions on the night in question. Moreover, we cannot understand the learned judge's reference to the consideration by the appellant of the use of the gun as a club, which is his apparent reason for finding that the appellant used excessive force in firing the gun. This suggestion was not introduced by either counsel, and we cannot find anywhere in the record that it was put to the appellant, for example :-

"Why did you not consider using the gun as a club so as to deter the deceased from continuing to strangle Christine""

so as to enable him to deal with the suggestion. We agree with Mr Georgiadis that this was a serious misdirection which went to the very root of this appeal, because it ignores completely one of the vital points made on behalf of the appellant, which was that he fired at the legs of the assailant for the purpose of disabling and therefore deterring him from further attacks on Christine.

The appellant's account of his reason for firing the first shot was:-

"I felt very insecure. It came to my mind to stop the fight. I fired my gun intending to hit the leg of the man so he would stop. I must have been 5 to 6 paces away. There appeared to be no reaction to the 1st shot. Still standing firmly. I thought if I hit him he would fall."

This then was his subjective state of mind when firing the first shot. We also agree with Mr Georgiadis that that part of the judgment which deals with them tends to slide the issues of the two shots together, whereas of course, the appellant gives a completely different reason for firing the second shot. We think that the form of the direction excluded a sufficient consideration of the state of the appellant's mind at the material time. We find it very difficult to say, in the anguish of the moment, that viewed subjectively according to the decision in *R v Shannon*, the appellant's actions were unreasonable or excessive, in all the circumstances of the case and bearing in mind the situation with which he was faced. He thought Christine's life was in danger. He had a long standing relationship with her and they had a thirteen year old child. Even though they were not regularly married (as in the reverse situation in *Kalume wa Tuku v R* (1954) 21 EACA 201, a case cited by Mr Georgiadis) he was entitled in law, in our view, to take reasonable measures to prevent danger to her life, which it is impossible to say was not reasonably apprehended by him. Moreover, on the authority of *R v Chisam* and *R v Duffy* (*supra*), and bearing in mind section 392 of the Code, we think he was entitled to act to prevent the commission of a felony which was occurring in his presence.

For these reasons, we allow the appeal, quash the conviction, set aside the sentence and direct that the appellant be set at liberty if he is not otherwise lawfully held in custody.

We would add two comments. First, the judge having carried out an adequate inquiry as to the suitability of the person summoned to serve as assessors did not select the assessors as is provided for under section 297 of the Criminal Procedure Code but recorded that the assessors "chose themselves". That was an error. As we have said recently :-

"…… the Court shall select the assessors and a Court should take care not to appear to confirm rather than to select assessors."

See *George Karanja Mwangi v Republic*, Court of Appeal Criminal Appeal 132 of 1983 (unreported). This error is, however, curable under section 382 of the Criminal Procedure Code.

Secondly, that the hearing of the appeal was unnecessarily protracted because of the state of the record, with inconvenience to the court and counsel. Even after we sent it back for re-certification, there were still gaps and words which were at variance with the sense of the passage in which they appeared. In view of the judge's comment to us that 'the cyclostyled record which was supplied to the Court of Appeal bears little relationship to the original record,' we find it amazing that the deputy registrar, a professional officer, placed the certificate that it was a true copy, under his hand, when it was nothing of the kind. Attention to these duties may be tiresome, but they ensure that the convicted person has a fair hearing on his appeal based on an accurate and true record of all that occurred at his trial.

Dated and Delivered at Nairobi this 13th day of December 1984.

A.A.KNELLER

.....

JUDGE OF APPEAL

A.R.W.HANCOX

.....

JUDGE OF APPEAL

J.O.NYARANGI

.....

AG. JUDGE OF APPEAL

I Certify that this a true copy of

the original.

DEPUTY REGISTRAR