

Section II

Case Summaries on Violence
Against Women

Chapter 5

Domestic/Intimate Partner Violence

Case 5.1 Uganda v Jackline Uwera Nsenga

(Criminal Session No. 0312 of 2013)

High Court of Uganda at Kampala

Aspects relevant to VAWG: Intimate partner violence, role of judiciary in raising awareness, impact on sentencing

Summary of facts

Jackline Uwera Nsenga (accused) was charged with the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The particulars of offence were that the accused on the 10th day of January 2013, with malice aforethought, caused the death of one Nsenga Juvenal, her husband. The accused denied the charges and the prosecution called 13 witnesses in a bid to prove its case.

The evidence was as follows. On the night of 10th January 2013 at about 09.00pm, the accused returned to their residence in Bugolobi, where she parked her car outside the gate and waited. She pressed the bell and her husband, Juvenal Nsenga (hereinafter referred to as 'the deceased'), came to open the gate. It was during the process of opening the gate that the accused's car knocked it open and overran the deceased. The deceased was then dragged on the rough surface of the driveway for a distance of 10.3 metres. He sustained multiple injuries on his body. Immediately after the incident, the accused sought assistance from some people to put the deceased into the same vehicle and delivered him to Paragon Hospital in Bugolobi. About five hours later, Nsenga was pronounced dead at the said hospital. Given the marital acrimony between the deceased and accused, it was the prosecution's contention that the accused intentionally knocked down the deceased, hence the charge of murder.

In her defence, the accused presented evidence from five witnesses. The defence case was that although the accused admitted to overrunning her husband with the car she was driving, she didn't intend to kill him. It was her testimony that the car simply jerked and ended up knocking him down. The couple had been married since 1994 and blessed with two children.

Issues and resolution

The prosecution discharged, beyond reasonable doubt, the burden of proving that there was death; the death was unlawful; the death was caused with malice aforethought; and that the accused person participated in or caused the death of the deceased. Evidence of the state of the accused and deceased's marriage was adduced in proving malice aforethought.

The court declined to find that the state of their matrimonial relationship was a manifestation of the ordinary wear and tear typical in marriages. There were very grim marital problems that had gone on for over ten years, had become chronic and life-changing, leading the accused person's search for solutions including counselling with family members and prayers, among other interventions. The conduct of the accused, before, during and after knocking down Nsenga, offered corroboration to the deceased's dying declaration that the accused knocked him down with the car.

Conviction

The accused was found guilty and convicted, as charged, of the offence of murder contrary to section 188 and 189 of the Penal Code.

Sentence

The accused, seeking the lenience of court, stated that she was a first time offender, had two children and was remorseful. Before sentencing her to a period of 20 years in prison, the court noted the fact that the accused person had not enjoyed her marriage, especially in the last ten or so years. The couple had two children and the accused was the surviving parent. If the maximum penalty as prescribed in respect of the offence were to be imposed, the children would suffer even more than any of the affected persons in this whole situation. The court further noted that violence results in physical injury, psychological trauma, and at times death, as in the present case, and yet the consequences can cross generations and truly last a lifetime for the family and society at large. These components of society remain traumatised by the gruesome murder, regardless of the degree of the generation of the marital relationship. The court was of the view that the accused should have sought a lawful, legally acceptable way of bringing her frustrations to an end. This was a family matter that got out of hand; the message is that violence must be stopped. Couples are strongly advised to seek guidance and help from family members, friends and relevant institutions to help resolve their differences.

Ratio Decidendi

- (a) In proving malice aforethought, reliance can be placed on circumstantial evidence for a conclusion that an accused person bore an intention to kill.

Contribution to gender jurisprudence/Point to note

- In sentencing the accused, the judge took into account the fact that the accused had maternal duties and that a long sentence would adversely impact on her children.

Case 5.2 Republic v Francis Paul

(Criminal Case No. 25 of 2008)

High Court of Tanzania at Kilosa

Aspects relevant to VAWG: Manslaughter, domestic violence, intoxication does not take away criminal responsibility, role of the court in punishing violence against women, role of judiciary to create awareness of the consequences of VAW

Brief summary of facts

The accused person was charged with manslaughter contrary to section 195 of the Tanzania Penal Code.¹ The particulars of the offence alleged that on the 28th day of August, 2007, at Magolle village, Kilosa district in Morogoro region, he unlawfully caused the death of one Zaina Mohammed. He appeared in court and when the charge was read to him, he pleaded guilty and a plea of guilty was entered and the prosecutor gave the following summary of the case.

On the 28th of August 2007, the accused, the deceased and one Koba Paulo went drinking some local brew at Kaukunga. The accused and the deceased were husband and wife, respectively. The deceased got so drunk that when the accused suggested that they should go back home, she was not able to walk and asked the accused to carry her but he refused and started slapping her on the face. He beat her on the head and stomach as he ordered her to stand up and walk. She stood up and the three started walking to go back home as the accused person continued to assault her all over the body. Paulo tried to intervene and told the accused to stop beating up the deceased, but he did not listen to Paulo. When they reached the home of Mussa, a brother of the accused, the deceased cried out for help and Mussa came and rescued her. The accused then carried the deceased and when they reached their homestead, he dropped her on the ground and dragged her along the ground into the homestead.

The following morning, the accused went to the village chairman and reported that his wife (deceased) had suddenly died. A post-mortem was performed on the body of the deceased and the report thereof revealed that the deceased died as a result of a head injury. The accused person was

arrested and charged with manslaughter. The accused admitted these facts as correct and he was convicted as charged.

Issues and resolution

Although the accused person was a first offender, the prosecutor asked the court to take note of the fact that murder cases arising from domestic violence were on the increase in the area where the offence was committed.

In mitigation, the accused pleaded with the court for leniency saying he was remorseful and that he was drunk at the time of the offence.

He asked the court to consider it in his favour that when he realised that his wife was dead, he went and reported the matter to the village chairman.

Before sentence, the court took into account the fact that both the accused and the deceased were drunk with alcohol at the time of the offence and that no weapon was used in assaulting the deceased. The court condemned excessive drinking, which had resulted in loss of life, and observed that a custodial sentence was called for. The learned trial judge sentenced the accused to imprisonment for ten years.

Ratio Decidendi

The Intoxication of an accused does not absolve him of criminal liability.

Case 5.3 Uganda v Lydia Draru Alias Atim

(Criminal Session Case No. 0404 of 2010)

High Court of Uganda at Kampala

Aspects relevant to VAWG: Domestic/intimate partner violence, verbal abuse, physical violence, threats of violence, provocation, reasonable apprehension of imminent threat to her life, accused acting in self defence

Summary of facts

Lydia Draru alias Atim was charged with the offence of murder. The particulars of the offence were that on or about 10th November 2009, at her home in Namuwongo, Kampala District, the accused murdered Major General James Kazini, by hitting him with a blunt iron bar. When the accused appeared before court for plea, she offered to plead guilty to the lesser offence of manslaughter; but the prosecution was unwilling to amend the charge sheet to reflect the lesser offence, maintaining that the case against the accused was one of murder. The accused was then arraigned for murder and

she pleaded 'not guilty', but maintained her plea of 'guilty' of manslaughter stating that she indeed killed the deceased, albeit unintentionally.

The prosecution witnesses included a pathologist who conducted a post-mortem on the deceased, the doctor who examined the accused after the alleged murder and an eyewitness to the alleged murder.

Other witnesses included the officer who analysed the genetic DNA of exhibits found at the scene of the crime, a scenes of crimes officer and a neighbour, who allegedly witnessed the conduct of the accused after the alleged murder. The accused gave evidence in defence and called no witness.

The prosecution adduced evidences establishing the death of the deceased, as well as the mental and physical disposition of the accused at the time of the offence, and sought to prove the fact that the death was intentional and therefore unlawful. The only eyewitness was a niece of the accused person, who was in the house at the time of the alleged offence. According to her testimony of the events of the morning of 10th November 2009, there were two stages of violence between the deceased and the accused. The first stage ensued upon the couple's return to the accused's house. This entailed a one-sided quarrel with the deceased berating the accused. The witness testified that she was summoned by the deceased and told that her aunt (the accused) was a thief and had been bringing men to her house. As the deceased berated and made the accusations against the accused, the witness said that the accused was crying.

The second stage of the violence that preceded the alleged murder ensued shortly after 6.00am on the same day. The witness testified that the deceased accused her aunt (the accused) of stealing his money, but the accused denied stealing his money and walked away towards the witness's room and asked the deceased to leave the house. Instead he followed her, boxed and slapped her severally, while the accused pleaded with him to leave her. The accused then returned to the sitting room and the deceased again followed her there, threw her on a sofa and attempted to strangle her. The deceased then took the accused's handbag and phone and ordered her to leave the sitting room, which she did. He demanded his portraits, collected his magazines and made for the door. At that stage, the accused dashed into the bedroom and came out with an iron bar with which she hit the deceased on the back and head and he fell down and died.

The defence of the accused was in agreement with the evidence of her niece, who was the only eyewitness for the prosecution.

The accused testified that upon their return to the house, the deceased accused her of theft and befriending other men, boxed and beat her up until the two of them reached the sitting room, where he attempted to strangle her. The accused also stated that during the first stage of their fight, the deceased had

threatened her after breaking a glass on the table and throwing a whisky bottle at her that missed and hit the chair. PW5 who visited the scene of crime confirmed that the sitting room was littered with broken glass, indicative of violence having ensued before the murder. The accused admitted hitting the deceased in self-defence, after he told her he was going to fetch his gun from his car and kill her. The car was parked outside her house in the parking lot. She pleaded provocation and said that when she hit the deceased with the iron bar, she was acting in self-defence as she feared for her life.

Once she realised what she had done, she testified that rather than fleeing the scene of crime as she'd been advised by a relative, whom she had called on phone, she opted to stay and take responsibility since she had not intended to kill the deceased. She broke down repeatedly as she recounted her shock on realising the magnitude of the offence she had committed. The evidence of the scenes of crimes officer lends credence to the accused's fear for her life in so far as it confirms that a loaded revolver was recovered from a brown bag in the deceased's car.

Issues and resolution

The prosecution was required to prove, beyond reasonable doubt, the fact of death and, secondly, that it was the accused who killed the deceased. Finally, the prosecution was required to prove malice aforethought on the part of the accused.

The learned judge was satisfied that the prosecution had proved the fact of death beyond reasonable doubt. On the accused person's own admission, the court also found that she was the person who caused the death of the deceased by hitting him with a blunt object. However, the court found that the violence that ensued during the two confrontations was at the behest of the deceased. On whether the prosecution established malicious intentions on the part of the accused, the court held that the manner in which the 'murder' weapon was used was not proven to indicate malice aforethought. The court rejected the defence of provocation and found that the accused had been harassed, insulted and assaulted by the deceased for most of the early hours of the morning. In those circumstances, the court found that the purported provocation was neither sudden nor did the death take place in the heat of passion.

The court however considered the conduct of the deceased before the alleged murder and found that the deceased was to blame for the events leading to the murder. The court also considered the conduct of the accused before and after the murder and found that malicious intention on her part had not been proved beyond reasonable doubt. The court considered her conduct after the crime and noted that she did not flee the scene, as had been advised by some of those she called. Instead, she made telephone calls to the area chairman

and her relatives and told them what had happened. The court was of the view that her conduct was inconsistent with malice aforethought. The court further noted that her demeanour when she gave her evidence supported the assertion that the accused was in shock when admitting to killing a man that had been quite close to her. The court found that the recovery of a loaded revolver lent credence to the accused's fear for her life, and accepted the defence position that the deceased threatened to get his gun and kill the accused and that she responded to this threat in self-defence. However, considering the injuries inflicted, the court found that the accused's own account did not justify the amount of force she used against the deceased.

Conviction

Finally, the court found that she did not foresee the deceased's death as a natural consequence of her physical attack on him. As the accused person did not foresee the deceased's death as a natural consequence of her physical attack on him, the court found that the prosecution had failed to prove the ingredient of malice aforethought beyond reasonable doubt and acquitted the accused of the offence of murder contrary to sections 188 and 189 of the Penal Code Act. The judge, however, found her guilty of the offence of manslaughter contrary to sections 187 (1) and 190 of the Penal Code Act, convicted her of that offence and sentenced her to 14 years' imprisonment.

Ratio Decidendi

- a) The defence of self-defence is not available where an accused uses greater amount of force than could be held reasonable for self-defence.
- b) The defence of provocation is not available to an accused whose fatal blow which causes death is neither sudden nor within the heat of passion.

Case 5.4 Jackline Vidanya Baraza v Rep.

(Criminal Appeal No 79 of 2011)²

Court of Appeal, Nairobi, Kenya

Aspects relevant to VAWG: Murder, domestic violence

Summary of facts

Jackline Vidanya Baraza (the appellant herein), was charged before the High Court at Nairobi, with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars contained in the

information were that on 1st February 2008 at Golden Gate Estate, Industrial Area, within Nairobi, the appellant murdered Munax Ashok Kumar Dave. She denied the charge and was tried, found guilty, convicted and sentenced to death. She appealed against conviction and sentence.

The prosecution evidence was that the appellant was a house-help employed by the deceased and her family. She had worked with the deceased for nine months until the fateful day of the deceased's brutal murder. The appellant's routine was to report to work at 8.00am daily, and leave at 4.00pm. Her duties included opening and closing the gate upon the entry or departure of the deceased's family members. On 1st February 2008 (fateful day), the appellant reported on duty and opened the gate for the husband of deceased, who he left for work just before 8.00am. The deceased's 18-year-old daughter (A), a student at an academy in Westlands, Nairobi, had left for school long before the appellant reported to work. On returning home from school at around 5.00pm, she found the front door locked. She rang the bell, but there was no answer. She walked to the back door and found it unlocked. As she opened the door, she saw blood all over the wall and the floor. She ran out to the neighbours inquiring if anyone had seen her mother.

When she did not get a positive answer, she and the neighbours called out for the guard, who accompanied them to the inside of the house, where they found the deceased lying in a pool of blood. She was dead. A then called her father, while the neighbours called the police.

PC Livingstone Kihanda and PC Martin Kamau ('the investigators') were the investigating officers who visited the scene of crime and testified that they found the deceased lying in a pool of blood in the bathroom, with deep stab wounds on the neck, and the deceased's long, black hair wrapped around her neck. They found blood all over the floor of the kitchen, and along the wall to the bedroom and toilet. There were clothes scattered all over. They took pictures of the scene and the body, but were unable to trace the appellant.

In November 2008 Ashok, the deceased's husband, offered to engage a private investigator, and in January 2009, with the help of the police and the local chiefs, the private investigator (Joseph Mutinda) apprehended the appellant in Busia.

Mutinda testified that when he first approached the appellant at the home of her parents, she was visibly shocked and even attempted to escape. Paul Ouma Musunga, an Assistant Chief who had accompanied Mutinda to the home of the appellant's parents, and who was present at the time of the appellant's arrest, also testified that the appellant appeared very shocked on seeing them.

The appellant was then handed over to the police, who arranged for her to be examined by Dr Zephaniah Kamau; he testified that he found stab wounds on the appellant that were consistent in age to those found on the deceased. His

examination of the appellant indicated scars on the left lower face, left of the mouth, below the left lower lip, jaw and upper abdomen, all occasioned by a sharp object.

The post-mortem report on the deceased, prepared by Dr Jane Wasike, showed that the death was caused by 'penetrating neck injury caused by a sharp object'.

In her defence, the appellant gave unsworn statement admitting that she reported to work on the morning of the material day, but denied committing the offence. She testified that on that day, when she left that evening, the deceased was alive and well and in the company of two women. She testified that the deceased had let her out of the gate. The appellant claimed to have reported to work the next two consecutive days, but found no one at home.

Having been satisfied that the prosecution had proved its case, the trial court convicted the appellant and sentenced her to death, a decision which the appeal was lodged against.

Issues and resolution

The appeal was lodged on the grounds that the learned judge erred in law and in fact in failing to find that the prosecution case was not proved beyond reasonable doubt.

The second ground was that the learned judge erred in law and fact in basing the conviction on circumstantial evidence, despite the existence of a reasonable hypothesis of the innocence of the appellant; that the learned judge erred in law by finding that the principle of rebuttable presumption as provided in sections 111(1) and 119 of the Evidence Act Cap. 80 was applicable; that the learned judge erred in law and in fact by convicting the appellant despite there being no eyewitness to the incident leading to the death of the deceased; that the learned judge erred in law and fact by convicting the appellant despite there being no forensic evidence linking the appellant to the death of the deceased; that the learned judge erred in law and fact in failing to find that a crucial witness was not called; that the learned judge erred in law and fact in failing to find that the prosecution's evidence was inconsistent and could therefore not be relied upon to make a safe conviction; and, finally, that the learned judge erred in law and fact in dismissing the appellant's defence.

In his submissions, counsel for the appellant, relying on his supplementary grounds of appeal, argued that the evidence before the High Court was entirely circumstantial and did not meet the threshold required in convicting the appellant. He argued that the appellant's 'disappearance' from the workplace, and the 'shock' she showed on being found several months after the incident, were not sufficient to convict her. He argued that the appellant's

own testimony that she indeed left the deceased alive and well, and that she reported to work the following day and the day after, but found no one at home, should be believed. With regard to the injuries found on the appellant's body, counsel argued that these were not conclusive to determine her guilt.

On the other hand, learned state counsel argued that the appellant, being the last person to be seen with the deceased; having disappeared immediately after the incident; found to be in 'shock' when approached and with the medical evidence that she also had scars that were consistent with a physical struggle with the deceased; and having been occasioned roughly around the time of the deceased's death, all pointed to the appellant's guilt.

The learned judges were in agreement that the case was based purely on circumstantial evidence, as there was no eyewitness account on how the deceased was killed. The prosecution relied on a series of circumstances to establish the guilt of the appellant. The court was of the view that the evidence on record did warrant the conviction of the appellant based on circumstantial evidence. This was because all facts which formed the chain of circumstances relied on by the prosecution were proved to the required standard. The prosecution did establish that the appellant was the last person in the company of the deceased; that she left, presumably at 4.00pm, which was her normal departure time, without anyone, including the guard, seeing her; that she went into hiding for several months; and upon being discovered several months later, she was visibly shocked, tried to escape, but was apprehended; and that a medical examination of her showed she had scars that were consistent with a struggle she had had with the deceased and which roughly coincided with the time of the incident.

The learned appellate judges were satisfied that all this pointed to the fact that it was the appellant who killed the deceased, after which she disappeared and was arrested several months later. They further found that the nature of injuries sustained by the deceased were evidence that they were inflicted with the requisite malice aforethought. Whether or not the motive of the murder was known or could be established, they found that the statutory elements of malice aforethought as set out in section 206 of the Penal Code were established.

Verdict

The court ruled that the appeal lacked merit, dismissed it and upheld the appellant's conviction and death sentence.

Ratio decidendi

In proving the offence of murder, reliance can be placed on circumstantial evidence which incriminates an accused person.

Case 5.5 David Munga Maina v Republic³

Court of Appeal, Kenya

Aspects relevant to VAWG: Domestic violence, murder, effect of intoxication, malice aforethought, gender stereotypes/women's roles, gender stereotyping in the courtroom, male supremacy, sentence, role of judiciary in creating awareness and punishing VAW

Summary of evidence

The appellant was charged before the High Court with the offence of murder c/s 203 as read with section 204 of the Penal Code. The particulars of the offence stated that, on the 14th day of October 2012 at Thumaita village, Kirinyaga district in Central Province of Kenya, the appellant murdered Sarah Muthoni Ngari (deceased/victim). He was found guilty, convicted and sentenced to suffer death according to the law. He appealed to the Court of Appeal and the conviction for murder was set aside and substituted with a conviction for manslaughter, on account of intoxication on the part of the appellant prior to the killing.

The deceased was the second wife of the appellant. On 14th October 2002, the first witness (PW1) was passing near the house of the accused when he heard screams emanating from the house. Out of curiosity, he went and found the accused beating up the deceased and demanding an explanation as to why she had come home drunk. The accused used the wooden handle of a hoe to assault the deceased.

He assaulted her with it until it broke, after which the appellant got a branch of a coffee tree and continued assaulting the deceased. PW3, PW4, PW5 and PW6 at some point also witnessed the accused beating up the deceased, but none of them appears to have intervened. PW4 specifically said he did not intervene because the appellant was known to beat up his wives and in each case nobody intervened. PW3 heard the deceased pleading with the appellant to stop beating her, but the appellant continued to assault her. After these witnesses saw what happened, the deceased was never seen again.

On 19th October, the appellant went to the home of his mother-in-law (PW11) and reported that the deceased had gone missing. Acting on information from the local chief of the area and other people, PW8 arrested the appellant on 20th October 2002 and placed him in police custody. The following day, PW12 was passing by the cell where the appellant was held and the appellant called him. As a result of what the appellant told the witness, the body of the deceased was exhumed from the appellant's farm. The body had head injuries and aspirated food in the trachea. There was inhalation of materials from the trachea into the chest cavity. The post-mortem revealed

that the cause of death was head injury using a blunt object and asphyxia due to vomited food material in the trachea.

In his defence, the appellant had told the High Court that on the material day, he went drinking alcohol at a Bar in Kagio town from 2–5 pm and went home feeling drunk. He did not find the deceased, who came back later very drunk. On asking how she could take care of children while drunk, she told him that it was not the duty of women to educate children. He slapped her twice and she ran away and did not return. The appellant said he did not know her whereabouts until 21st October 2002, when he was arrested and three days later told that his wife's body had been found buried. He denied killing the deceased or knowing how she met her death.

Issues and resolution

The prosecution was required to prove the death of the victim, malice aforethought and that it was the appellant who killed her. The post-mortem evidence conclusively proved the fact of death. The assessors returned a unanimous verdict of guilty. The trial court agreed with them and found that, although the appellant had been drinking alcohol between 2 pm and 5 pm on the material date, the drinking was by choice and not by the malicious or negligent act of another person. It had therefore been proved that the appellant was the one who killed the deceased, and he drank voluntarily and the necessary *mens rea* to cause the death of the deceased was present.

On appeal, the Court of Appeal found that there was overwhelming evidence from witnesses, who saw the appellant beating up the deceased. The court observed that the beating appeared to have taken place for a fairly long time with one witness (George) having witnessed it at about 4.00 pm, whereas the other witnesses witnessed it at 6.00 pm and at about 7.00 pm.

In the court's view, that explained why witnesses did not see each other at the scene, and why some witnesses did not see such items as the jembe handle or the coffee tree branch being used in the assault, and with some witnesses saying that they saw the appellant kicking and hitting the deceased with fists. The Appellate Court noted that it was after that beating, which went on into the night, that the deceased was not seen alive again and that the next time that she was seen was when her body was exhumed from the appellant's farm. In the circumstances, the court found that the irresistible inference that any reasonable tribunal would arrive at was that the appellant knew how the deceased had met her death and how she came to be buried at his farm. The appeal court upheld the finding of the High Court, that it was the appellant who killed the deceased and buried her on his farm.

However, the court faulted the High Court finding that in killing the deceased, the appellant acted with malice aforethought. They found that the

learned judge, in her summary to the assessors, did not inform the assessors that intoxication or drunkenness could reduce the charge of murder to that of manslaughter if the assessors found that the appellant, in beating the deceased, was heavily under the influence of drinks to the extent that he was not capable of forming intent to murder. They found that in her judgement, the learned judge considered the appellant's evidence in defence that on the material day, just prior to the incident, he had been drinking from 2.00 pm to 5.00 pm, but she dismissed that as being by choice and not by the malicious or negligent act of another person. The Appellate Court further observed that the learned judge went on to say that there was no evidence that the appellant was so drunk as to be incapable of knowing what he was doing or as to be temporarily insane.

The Court of Appeal faulted the learned judge on the above finding, which the court held was a misdirection as it seemed to suggest that the appellant should have adduced such evidence. The court relied on the case of *Nyakite s/o Oyugi v R*,⁴ where the Court of Appeal held that the burden of raising a defence of intoxication so as to negate an intent to kill or cause grievous harm was on the accused person.

The court also faulted the learned trial judge on failure to consider that the response of the deceased to the appellant's question on who would care for the children, though minor, could have amounted to provocation. They argued that the learned judge did not consider such a remark, with the background of rural folk still intent on maintaining men's supremacy over their wives, and that perhaps if she had done so, she may have come to a different conclusion – particularly if she had noted that both were apparently under the influence of alcohol.

Finally, the Appellate Court held that the trial court had failed to deal with the defence of intoxication, which emerged from the defence and which could have reduced the charge to manslaughter had it been properly considered.

The benefit of doubt as to whether the appellant was so drunk as to negate the intent to kill, went to the appellant and together with the mild provocation by the response by the deceased, and considering that both were drunk, the court held that the offence of murder was not established, as required by law, and that the evidence established the offence of manslaughter. The appeal was allowed to the extent that the conviction for murder was reversed and substituted with a conviction for manslaughter *c/s* 202 read with section 203 of the Penal Code.

It is important to note how gender stereotypes find their way into the courtroom. The Court of Appeal in reducing the offence committed to manslaughter considered, among other things, that being a typical rural

man, the deceased's answer to the appellant's question on whose duty it was to take care of children amounted to provocation. The court seemed to agree that taking care of children is a women's role in the community and that questioning whose role it is to take care of children may not be taken kindly by a typical village man who has consumed some alcohol.

Ratio Decidendi

In considering the defence of provocation, due regard is to be paid to the rural background of the accused before ascertaining whether an act of a deceased person amounted to provocation.

Contribution/Point to note

The basis upon which the Court of Appeal accepted the defence of provocation clearly shows that cultural norms and values find their way into the courtroom.

Case 5.6 Prosecutor v Fatirakumutima

(RPA 0255/09/CS)

Supreme Court of Rwanda

Facts

The appellant killed his wife, with whom he had four children. According to the appellant's evidence before the High Court, the murder had occurred after he attempted to have sex with his wife but was turned down. The appellant resorted to forcing his wife to have sex, which according to the appellant led her to squeeze his testicles. He then proceeded to strangle and beat her. The appellant finally released the deceased, which resulted in her falling to the ground unconscious.

The appellant declined to report the offence as advised by his neighbour and instead went into hiding. On his apprehension, the appellant was charged with multiple offences, which included assassination and murder. He was tried and convicted of the offence of murder; the trial court found that there was insufficient evidence to make out the charge of assassination.

On appeal, it was argued by the appellant that the trial court disregarded the fact that he killed his wife by accident. It was also argued on his behalf that the court had given him a heavy sentence, overlooking the fact that he had orphans who needed to be looked after and the fact that in committing the murder he was provoked by his wife, who had squeezed his testicles.

In affirming the conviction of the lower court, the Supreme Court of Rwanda held *inter alia* that:

1. Beyond the appellant's own assertions, nothing else in the oral and documentary evidence could be relied on to prove that the deceased had squeezed the appellant's testicles, hence the defence of provocation was not available.
2. The appellant had intentionally killed the deceased and this was proved by the fact that he had strangled and slapped the deceased. In addition to this, the appellant had neglected to take the deceased to hospital, despite the fact that she was unconscious after the ordeal and died several hours later.
3. The fact that the appellant had children could not serve as a mitigating circumstance, because it was by virtue of the appellant's action of murder that they had become orphans.

Case 5.7 Prosecutor v Cyuma Miruho

(RPA 0142/10/CS)

Supreme Court of Rwanda

Facts

The appellant repeatedly hit his wife with a machete and thereafter a big piece of wood, resulting in her death. The appellant stated that his wife had delayed to return home and therefore he had left his house to look for her and ascertain what had happened to her. According to the appellant, he found his wife cheating on him, which enraged him causing him to hit her three to four times with the machete. The appellant admitted this to the judicial police during an interrogation.

The appellant was charged with the offence of assault and intentional bodily injuries resulting in unintentional killing. The Intermediate Court of Nyagatare ruled that the appellant should be charged with murder, as opposed to assault and intentional bodily injuries resulting in unintentional killing, and accordingly transferred the case to the High Court, Rwamagana Chamber.

The High Court found the appellant guilty of murder and sentenced him to imprisonment for 25 years.

On appeal to the Supreme Court, the appellant argued that the offence with which he was charged was wrongly classified and maintained he should have been charged with the original offence of assault and intentional bodily injuries resulting in unintentional killing as opposed to murder. The appellant also contended that the High Court disregarded the mitigating

circumstances, which included the fact that the accused had reported himself to the police and the fact that he was provoked by the deceased's actions of sexual infidelity. According to the appellant, no man could abstain from committing an offence when he encountered his wife cheating on him.

In response for the state, the prosecutor argued that there were no grounds upon which the offence could be reclassified. The prosecutor argued that the appellant had departed from his house with the machete, stating that he would hit his wife if he found her at fault. The prosecutor argued that this suggested that he intended to repeatedly hit her with the machete. On mitigating circumstances, the prosecutor argued that the appellant did not prove that his wife was cheating on him and in any case it would not have been sufficient excuse to kill. The prosecutor also contended that the appellant's act of turning himself in could not be considered as a mitigating circumstance.

The Supreme Court of Rwanda held *inter alia* that:

1. The weapon used by the accused, a machete, and the act of repeatedly hitting the deceased, who was defenceless, with the machete and then the big piece of wood indicated that the appellant bore an intention to kill.
2. The trial judge had not overlooked the mitigating circumstances, because he had considered the fact that the appellant was a first time offender and had reduced the sentence from life imprisonment to 25 years.
3. According to Article 35 of the Decree Law No. 21/77 of 18/08/1977, a fixed term of imprisonment could not last more than 20 years and the accused should have been sentenced to 20 years' imprisonment.

Outcome

The accused's appeal partially succeeded and his sentence was reduced to 20 years' imprisonment.

Point to note

The court concluded that a husband's finding his wife in an act of adultery does not constitute provocation for purposes of reducing murder to manslaughter.

Notes

- 1 Cap. 16 {R.E. 2002}.
- 2 *Jackline Vidanya Baraza v Republic*, 2015 eKLR, available at: www.kenyalaw.org.
- 3 {2006} eKLR, available at: <http://www.kenyalaw.org>.
- 4 1959 EA 322 at page 325.