

THE PEOPLE v MUCHABI (1966) ZR 130 (HC)

HIGH COURT

EVANS J

14th DECEMBER 1966

Flynote and Headnote

[1] Criminal law - Provocation - Discovery of spouse in flagrante delicto.

The discovery of one's spouse *in flagrante delicto* constitutes grave provocation.

[2] Criminal law - Provocation - Mistaken killing of wrong person - Honest and reasonable but mistaken belief.

A mistaken belief in the existence or non-existence of facts or a state of affairs can be a defence of provocation only if the mistake is honest and reasonable.

[3] Criminal law - Mistake of fact - Provocation.

See [2] above.

Cases cited:

- (1) *R v Alayina* 1957 R & N 536.
- (2) *R v Gross*, 77 JP 352.
- (3) *Musole v The People*, NRCA 134/64.
- (4) *Mutambo v The People*, CAZ 24/1965.

Statute construed:

Penal Code (1965, Cap. 6), ss.11, 177, 180 (a) and (c), 184.

Thistlethwaite, State Advocate for the people

Cobbett - Tribe, for the accused

Judgment

Evans J: The accused is charged under s.177 of the Penal Code with murdering Gilbert Katungu (hereinafter called 'the deceased') at Namwala on or about the 14th September, this year.

The *onus* rests throughout upon the State to prove, upon the evidence and beyond reasonable doubt, that the accused caused the deceased's death by an unlawful act and of malice aforethought, which is deemed to be established by proof of any of the circumstances specified in s.180 of the said Code.

The principal witnesses for the State were the accused's wife, Mwakole Nabulyato, and her lover, Golden Nyambi. The accused himself testified and was cross - examined at length. Many of the relevant facts are not in dispute, and, where there are conflicts in the evidence, I prefer the accused's testimony (which in the main he gave convincingly and intelligently) to the evidence of his wife and of Nyambi (who both testified unconvincingly and at times inconsistently with each other). Upon the whole of the evidence, I find the following facts proved:

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1. The accused and Mwakole were married according to their tribal customs some seven years ago.
2. At all material times they lived together at Sisk's compound (apparently otherwise known as Mafutu compound) at Namwala.
3. For some months prior to September, 1966, Mwakole had been associating, probably intimately, with Nyambi. The accused was aware of the association, but his wife denied his accusations of adultery, and he was loathe to stop the association lest he should be charged in the local court with making a false accusation of adultery, because he had no evidence but merely strong suspicions of the real relationship between his wife and Nyambi.
4. On the 27th August this year, the accused and his wife attended a local beer - drink from the early afternoon until sometime after dark, both consuming a quantity of beer. It is immaterial whether or not Mwakole became drunk; but the accused did, though not to any great degree. On his own admission, he was in possession of his senses and could see, walk and think without difficulty.
5. At about 8 p.m., the accused went to urinate, leaving Mwakole sitting at the beer - party, and he found her missing on his return. She had, in fact, gone off with Nyambi to his house, where they committed adultery and subsequently together went to sleep.
6. Discovering that Mwakole was no longer at the beer - drink, the accused looked for her in vain at their house and again at the beer - drink, and he then concluded that she and Nyambi had gone somewhere together, and he determined to seek confirmation of their suspected adultery.
7. He then went to Nyambi's house, where he stood outside for some time, listening for sounds of his wife and Nyambi within. He heard nothing, so went to another house some ten yards away, listened outside and heard no sounds. He remained calm and not angry and then walked to a third house, the builder of which had gone away and left it unoccupied.
8. He listened outside this third house (which was entirely constructed of poles and grass) and from within heard sounds of heavy breathing and the rustling of grass. He listened carefully to those sounds for some time (in cross - examination he indicated a time of twenty minutes or more), concluded that his wife and Nyambi were committing adultery in the house and therefore became very angry and lost his self - control. In his own words (in examination - in - chief):

' I was very upset and lost my senses and did not think living was worthwhile and I decided to finish them off.'

In cross - examination, he put it this way:

' My suspicions were confirmed, but I did not look in the house and challenge them because my heart did not allow me to do that - you cannot nurse your heart. I could not control my heart - I was very angry and I nearly burst . . . I did not shout out in anger because my thoughts all went away because of the anger.'

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9. He had no weapon in his possession, so he struck a match, lit the grass wall of the house and stood back and watched to see if his wife and Nyambi came out.

10. While the house was burning (and, in view of its construction and the time of the year, it must have been consumed rapidly) the accused saw his wife come from Nyambi's house (where she and Nyambi had been awakened) and go to her house. There, he made her sleep on the floor and told her that she had got him into trouble because he had burned someone's house.

11. The tragedy of this case is that, whereas Nyambi and Mwakole were not in the burnt house, the innocent deceased was, and he ran screaming from the house with his pyjama jacket on fire and suffering from third - degree burns on 60 *per cent* of his head and body surface. He was taken to Namwala Hospital, where he was treated by a Principal Medical Assistant, but he died on the 13th September and was buried at Namwala the next day.

Although he made no submissions on the point, defence counsel directed some cross - examination to the question of whether the accused caused the deceased's death, so I must deal with it. The issue could have been determined beyond any doubt if the said Principal Medical Assistant (and a doctor who, according to mere hearsay evidence, visited the hospital whilst the deceased was a patient there) had been called by the State or by the defence, but I have to be satisfied beyond reasonable doubt that the accused caused the death. It is not or not seriously disputed that the accused's firing the house caused the before-mentioned burns on the deceased. His brother, Jameson Kandala (P.W.4), stayed with him at the hospital until he died, when his burns had not healed - his hair had not grown again and his skin had not returned to its normal condition. His body was exhumed (and was in an advanced state of decomposition) on or about the 3rd October, on which day Dr Lavalette conducted a post - mortem examination and concluded that the cause of death was shock caused by the said burns, which he described as very serious. He testified that it is possible that the man would have recovered if he had received specialist medical treatment, that he (the doctor) could not tell whether the deceased had had adequate medical treatment and that the man would have died had he received no such treatment. He said that the deceased's internal organs were too decomposed to permit their detailed examination and that there was no evidence of any bone damage. He further testified that Principal Medical Assistants are competent men, who are normally promoted to that rank after fifteen to twenty years' service as medical assistants, who receive a year's training at a hospital,

which training almost invariably includes instruction in the treatment of burns, and he said that he would like a Principal Medical Assistant to consult a doctor when treating burns of the type suffered by the deceased. Now, there is no evidence of what treatment the deceased received in Namwala Hospital or whether such treatment caused the death and nothing whatever to point to any improper, mistaken or unskilful treatment (*vide* s.184 of the Penal Code) and, upon the whole of the evidence, I am satisfied beyond reasonable doubt that

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the deceased died from the burns received when the accused set fire to his house; in other words, that the accused caused his death.

The main defence is provocation, based on honest and reasonable mistake. Subject to the provisions (with which it is not necessary for me to deal) of subsection (2) of s. 182 of the Penal Code, I would hold that the State had not negatived provocation beyond reasonable doubt if in fact and to his knowledge the accused's wife and Nyambi had been having sexual intercourse in the house (as he thought), because [1] the discovery of one's spouse *in flagrante delicto* constitutes grave provocation; [2] [3] or if his mistake, in concluding that that was the situation, was honest and reasonable, because there is authority for the proposition that the defence of provocation is available to a person who receives legal provocation but by mistake kills someone who did not offer the provocation - *R v Alayina* [1] and *R v Gross* [2] (Archbold, 35th ed., para. 2517).

I am prepared to accept that the accused's mistake was an honest one, but was it also reasonable? Section 11 of the Penal Code reads (so far as is material):

' A person who does . . . an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act . . . to any greater extent than if the real state of things had been such as he believed to exist . . . '

I would stress that there is no *onus* on an accused to prove or establish the defence of mistake. As with all defences, with the exception of insanity (not suggested here), it is for the State to negative the defence beyond reasonable doubt when it arises.

In *Musole v The People* [3], it was held that a mistake engendered by intoxication cannot be a reasonable one, but in the instant case I have found that the accused was not much intoxicated (fact No. 4 above), and neither he nor his counsel has suggested that his slightly inebriated state in any way affected his belief that his wife and Nyambi were committing adultery or his capacity to form any specific intent. As Blagden, CJ, put it in *Musole's case* (*supra*): ' . . . there are two tests to apply: the objective test of whether the mistaken belief was a reasonable one; and the subjective test of whether the accused honestly held that mistaken belief.' The following were, I find, the bases for the accused's belief here:

- (a) His knowledge of an association between his wife and Nyambi.

- (b) His suspicion - I can put it no higher, for he admitted he had no evidence - that they committed adultery on occasions, and his determination to seek such evidence.
- (c) His wife's disappearance from the beer - drink and his subsequent vain search for her.
- (d) The absence of any noise in Nyambi's house.
- (e) His apparently incorrect understanding that the house (which he burnt) was normally unoccupied and was thus a suitable place for illicit sexual intercourse, coupled with his

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knowledge that Nyambi was aware that he (the accused) knew Nyambi's house.

- (f) The noises which he has described - heavy breathing and the rustling of grass.

Viewing these bases and their cumulative effect as favourably as possible towards the accused, and applying the standard of the reasonable man in Zambia (*Mutambo and Others v The People* [4]), I am quite unable to hold objectively that the accused's mistaken belief was a reasonable one. He had only a suspicion that his wife's and Nyambi's association was an adulterous one; he had not seen his wife leave the beer - drink, let alone leave it with Nyambi, he heard no voices or sounds or manifestations of passion within the house; he made no visual or other checks to confirm that his wife and Nyambi were within and the noises which he heard could well have been (as indeed they were) those made by a sleeping man. In what I unhesitatingly find to be an unreasonable, and what I would term a blind belief, he deliberately set fire to the house in order, to quote his own words, 'to finish them off'.

In the result, I am satisfied beyond reasonable doubt that no provocation was offered to the accused, that his mistaken belief in the existence of facts (which, if they had existed, might well have made available to him the defence of provocation) was not a reasonable belief, that he intended to kill his wife and Nyambi (but caused the deceased's death instead) by unlawfully firing the house, knowing that someone was in it, and that, accordingly, malice aforethought has been established by virtue of subparagraphs (a) and (c) of s. 180 of the Penal Code.

The State has proved beyond reasonable doubt this charge of murder, and I find the accused guilty and convict him as charged.

Accused convicted