IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , G.B.M. KARIUKI & GATEMBU - JJ.A)

CRIMINAL APPEAL NO. 109 OF 2013

BETWEEN

NICHOLAS MUTURI CHIANDE.....APPLICANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi

(Ochieng, J) Dated 29th November, 2012.

in

H.C.CR.A. NO. 44 OF 2002

****

JUDGMENT OF THE COURT

1. The appellant ***Nicholas Muturi Chiande*** was arraigned before the High Court of Kenya Nairobi vide Criminal case Number, 44 of 2008 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code Cap.63 laws of Kenya. The particulars of the charge read that on the 2nd May 2008 at Kibera Laini saba slums within Nairobi area murdered ***Mule Muli***. He denied the charge.

2. The prosecution called a total of eight (8) witnesses, while the appellant was the sole witness for the defence. In a judgment delivered by ***Fred A. Ochieng, J*** on the 8th day of November, 2012 the appellant was found guilty of the offence of murder as charged, convicted and sentenced on 29th November, 2012 to the only sentence prescribed by the law for this offence, namely death.

3. The appellant was aggrieved by that decision. He appealed to this Court, in person citing six grounds of appeal in a home made memorandum of appeal lodged on the 18th day of December, 2012. These grounds were subsequently supplemented by three other grounds of appeal in a supplementary memorandum of appeal dated the 9th day of July, 2014 lodged in this Court on the 10th day of July, 2014. These read:-

> ***1. That the trial Judge erred in fact and in law in convicting the appellant on circumstantial evidence which did not reach the threshold required by the law.***

2. That the trial Judge erred in law and in fact in convicting the appellant for the offence charged notwithstanding that the identification parade was not properly conducted because the witness saw the appellant before the parade was assembled.

3. That the trial Judge erred in law in convicting the appellant for the offence charged notwithstanding that he was not told the reason for his arrest at or within reasonable time of the arrest.

4. In his oral submissions to Court, ***Mr. R. A.O. Oyalo,*** learned counsel for the appellant, urged us to allow the appeal on the grounds that no witness saw the appellant stab the deceased; that the prosecution evidence was therefore purely circumstantial; that ***PW1, Damaris Nzembi Masitu and PW4 Mutinda Muli*** gave contradictory evidence; that the said contradictions were never reconciled by the learned trial Judge; that PW4s evidence lacked corrobative evidence; the evidence of PW1 and PW4 was therefore unreliable and should not have been relied upon by the learned Judge as a basis for convicting the appellant.

5. Further, ***Mr. Oyalo*** urged us to find that the holding of an identification parade was an exercise in futility and therefore inconsequential to the prosecutions case as PW4, the sole identifying witness for the identification parade, was the one who pointed out the appellant to the police officer for arrest; the arresting officers failed to inform the appellant of the reasons for his arrest; the appellant's constitutional rights were thus infringed, which infringement should impact negatively on the prosecution's case but positively on the appellant's appeal entitling this Court to reverse the appellant's conviction, substituting it with an order of acquittal.

6. In response to the appellant's submissions***, Miss Jacinta Nyamosi*** Senior Assistant Director of Public Prosecution appearing for the State urged us to dismiss the appellant's appeal on the grounds that though the evidence relied upon by the prosecution was purely circumstantial, the same was none the less overwhelming, water-tight and therefore met the legal thresh hold for admission of circumstantial evidence as a basis for a conviction. To ***Miss Nyamosi,*** there is on record ample evidence to demonstrate that the appellant indeed entered the deceased's' house or room on the fateful day;, both the deceased and appellant knew each other; the appellant was known to ***PW1, Damaris Nzembi,*** as he was a frequent visitor to the deceased's house; PW1 had heard the deceased and appellant converse amicably previously on several occasions and she was therefore in a position to register not only the appellants voice but also his appearance; PW1's testimony should therefore be believed as being available when she said she saw the Appellant pass by her door (PW1's); that she was attracted to the incident by an apparent commotion or argument that was coming from the deceased's room shortly after she had heard the appellant ask the deceased to open for him and upon opening her door and peeping out she saw the appellant emerge from the deceaseds' house carrying a blood stained knife; and as such the learned trial Judge rightly relied on it in support of the appellants conviction.

7. Miss Nyamosi argued that not much weight was attached to PW4's evidence by the learned trial Judge because PW4 was a child of tender years as at the time of the incident; he did not witness the stabbing of the deceased; it was undisputed he was in the house with the deceased when the appellant came to that house; he saw the appellant carrying an object when he entered the deceased's house; although PW4 could not tell what type of object it was ***Miss Nyamosi;*** has no doubt that the object PW4 saw appellant holding on the fateful day was nothing but the blood stained knife that PW1 saw the appellant holding when the appellant emerged from the deceaseds' house after the commotion.

8. On alleged contradictions between the testimony of PW1 and PW4, it was ***Miss Nyamosi's*** submission that indeed there appears to have been a contradiction in the testimony of these two witnesses (PW1 and PW4) regarding what the argument between the appellant and the deceased was about. PW1 said the argument was over a phone that the appellant had demanded of the deceased; whereas PW4 said the argument was over money. To ***Miss Nyamosi,*** the contradiction was not only minor but also immaterial and inconsequential and was therefore rightly ignored by the learned trial Judge.

9. Turning to the evidence on the identification parade, it was ***Miss Nyamosi's*** contention that this may

not have been necessary in view of the clarity of the evidence on the record on how the appellant was arrested but the fact of its having been erroneously conducted did not water down the overwhelming evidence tendered by the prosecution.

10. Turning the alleged infringement of the appellant's constitutional rights, ***M/s Nyamosi*** invited us to note that the appellant never raised this at the earliest opportunity during the trial to enable the prosecution respond to it by way of an explanation. We were urged to therefore find that it is not only an after thought but also that the appellant suffered no prejudice, as the charge was read to him in a language he understood and that that is why he participated in the trial proceedings without any complaints.

11. Being the first appellate Court, we are duty bound in law to revisit the evidence that was adduced before the trial Court, analyze it, evaluate it, and come to our own conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing all the prosecution witnesses and the appellant and we should therefore give allowance for that. See the case of ***Okeno versus Republic [1972] EA 32*** where in the predecessor of this Court , the Court of Appeal for Eastern Africa, held *inter alia* that:-

> ***"It is the duty of a first appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld"***

12. In obedience to the above principle, we have revisited the record and re-analyzed and re-evaluated the evidence. We note that in arriving at the conclusion reached, the learned trial Judge, *inter alia,* made the following observations:-

> ***"In this case, PW1 was very familiar with the voice of both the accused and the deceased. She described them as very close friends.***
>
> ***She was sure that it was the accused who arrived at the house of the deceased on that fateful morning. PW1 heard the accused call out the name of the deceased.***
>
> ***Later, PW1 encountered the accused as he was leaving from the residence of the deceased. Therefore, had there been any doubt about the identity of the person whose voice PW1 had heard earlier, the same was removed.***
>
> ***Furthermore, PW4 also picked out the accused at an Identification parade. That corroborates the evidence of PW1, regarding the identity of the person who was at the residence of the deceased that morning.***
>
> ***There is no witness who actually saw the accused stab the deceased. In effect all the evidence is circumstantial. Nonetheless, the said evidence points at the accused, (and only at him), as the person who used the knife to stab the a deceased. After using it, he displayed it openly. He even dared the neighbours of the deceased to come out of their houses, if they were sufficiently courageous.***
>
> ***I have no doubt in my mind that it is the accused who stabbed the deceased."***
>
> ***....***

13. The appeal under review having arisen from a criminal conviction, the first guiding principle that we have to bear in mind in deciding whether to affirm or upset the learned trial Judge's findings is as was stated *inter alia* by ***Sir Udo Udema, Chief Justice In Sekeleto versus Uganda [1967] EA 531:***

> ***"(i) As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else"***

14. As rightly observed by the learned trial Judge, the appellants conviction rested on circumstantial

evidence. The law as regards the principles upon which a Court can rely on circumstantial evidence to convict an accused person has long been crystallized by along line of decisions by both the predecessor of this Court that is the Court of Appeal for Eastern Africa and this Court. In the often quoted case of ***Rex versus Kipkering Arap Koske & Another [1949]*** volume 16EACA 135, the Court of Appeal for Eastern Africa held as follows;-

> ***"(1) That in order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused"***

15. In ***Simoni Musoke versus Republic [1958] EA 715*** it was also held *inter alia* that:-

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference"***

In ***Mwangi and another versus Republic [2004] 2KLR*** this Court went further to state *inter alia* thus:-

> ***"In a case that depends on circumstances evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is in-capable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."***

So also in the case of ***Mwita versus Republic [2004] 2KLR 60*** in which there was a reiteration that:-

> ***"It is trite that in a case depending exclusively upon circumstantial evidence, the Court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than a guilt.***

16. The circumstantial evidence that the prosecution relied upon to convict the appellant centres not only on PW1's identification of appellants voice but also his physical appearance. In ***Karanja & Another versus Republic [2004] 2KLR 140,*** this Court put forth two propositions; one that

> "***evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger;*** two***, that*** ;
>
> ***"Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize some-one he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are some-times made"***

17. The circumstantial evidence relied upon by the prosecution is that which was tendered through PW1 and PW4. PW4 was no doubt a child of tender years. He gave unsworn testimony limited to seeing a person identified as the appellant come to the house where in PW4 shared with the deceased who was PW4's father. He witnessed an argument ensue between the deceased and the appellant over money. He left the room. When he came back he found the deceased lying in a pool of blood with stab wounds on the chest. We have been invited to discount this evidence as worthless. The learned trial Judge appears to have used PW4's evidence as corroborative evidence to that of PW1. The appellant asserts that as evidence needing corrobaration itself, it cannot possibly corroborate the evidence of PW1.

18. The position in law on this is as was stated by this Court. in the case of ***Johnson Muiruri versus Republic [1983] KLR 445*** wherein it was held, *inter alia,* that "***where a child of tender years gives unsworn evidence , then corroboration of that evidence is an essential requisite***." The same position

was reiterated by this Court in the case of ***Oloo versus Republic [2009] KLR 416*** wherein the Court held *inter alia* that:-

> ***"Corroboration of the evidence of a child of tender years was only necessary where a child gave unsworn evidence."***

See also the case of ***Shida Kasungu Baya and 4 others versus Republic Mombasa CRA No. 273 of 2006 (UR)*** for the proposition that evidence of a child of tender years that requires corroboration cannot be used for corroboration.

19. Applying this principle to PW4's evidence, we find that it was correctly submitted by the appellant that PW4's evidence cannot in law corroborate that of PW1**.** It has therefore to be excluded as corroborative evidence. The net result of such exclusion is that PW1's evidence would be regarded as evidence of a single witness. The position in law regarding the testimony of a single witness is as set out in section 143 of the evidence Act Cap 80 laws of Kenya. It reads:-

> ***"143 No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact."***

20. It means that it was permissible for the prosecution to rely on the evidence of PW1 to support the appellant's conviction with the only caveat being that it had to meet the thresh-hold set by crystallized case law. In the case of ***Abdalla Bin Wendo & Another versus Regina [1953] 20EACA 166*** the predecessor of this Court, the Court of Appeal for Eastern Africa had this to say:-

> "***Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification .....***

21. PW1's evidence that she was an opposite neighbour of the deceased was not controverted. It was also her testimony that the appellant and the deceased appeared to be friends; the appellant frequented the deceaseds' house; PW1 had heard both the deceased and the appellant converse previously. According to her, she was familiar with their voices. That is why she was able to pick out the appellant's voice when he called out to the deceased to open for him.

22. PW1 went on to state that indeed she heard the deceased open for the appellant. There appeared to have been an exchange of words between the two which degenerated into an argument over a phone which the appellant had allegedly demanded from the deceased. It is this heated argument between appellant and the deceased that drew the curiosity of PW1. She says she opened the door to her room and peeped out and that that is when she saw the appellant emerge from the deceaseds room brandishing a blood stained knife and dared any one to approach him. Frightened, she closed her door. It was only after hearing movement outside that she opened her door and went out. She headed for the deceaseds' house and found deceased lying in a pool of blood. She recounted information on the assailant at the earliest opportunity.

23. The trial Judge found PW1 a truthful and credible witness. We find nothing on the record to make us doubt that finding. There is nothing on the record to suggest that she could have fabricated the evidence and implicated the appellant in connection with the commission of the offence. The knife she saw satisfied the description of a sharp object that inflicted the fatal injuries' on the deceased as found by PW7 ***Dr. Francis Ndiangui. Miss Nyamosi*** urged us to find that the appellant had the opportunity to commit the offence. We entirely agree with her as there is nothing to show that there was any other intruder that could have made his way to the deceseds house (room) at that point in time PW1 only heard two (2) voices during the commotion, that of the deceased and that of the appellant. When she peeped out of her room, she only saw the appellant leaving the deceaseds' room holding a blood stained knife. The evidence therefore points irresistibly to the appellant as the person who inflicted the fatal injuries on to the deceased.

24. The state urged the trial Judge to find that the appellant did cause the fatal injuries on the deceased with malice aforethought. Elements or ingredients of malice aforethought are enshrined in section 2006 of the Penal Code (supra). The learned trial Judge did not only take note of these elements but also applied them to the facts before him and was satisfied that the prosecutions evidence had met the threshold set therein. Section 2006 of the penal code (supra) defines malice aforethought *inter alia* as follows:-

> ***"206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-***
>
> ***a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
>
> ***b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
>
> ***c. An intent to commit a felony;***

25. The learned trial Judge applied the above malice aforethought elements/ ingredient, to the facts before him. To the learned trial Judge found on the basis of the facts before him that the appellant either intended to kill the deceased or to cause grievous harm to him. He had this, *inter alia,* to say:

> ***"He and the deceased had been good friends. But on the day in question, he visited the deceased whilist already armed with a knife. He demanded either his mobile phone or money from the deceased.***
>
> ***The interaction degenerated into an argument. And the accused then used the knife which he had carried to stab the deceased. He used so much force that the knife penetrated deep into the chest of the deceased lacerating the heart and the diaphragm."***

26. We have no quarrel with the above observations. Indeed the use of excessive force by the appellant in driving the knife into the deceaseds' chest to the extent of badly damaging a vital organ- namely the heart was sufficient proof that the appellant indeed either intended to cause the death of the deceased or did not care whether death would occur or not. The appellant must also have known that such an action on his part would probably cause the death of or grievous harm to the deceased. The appellant's action did in fact cause grievous harm to the deceased which ultimately resulted in the deceaseds' death. On this account, we find malice aforethought enshrined in section 2006 (a) and (b) of the penal code (supra) were satisfied. The conviction is therefore safe.

27. The above conclusion is sufficient to dispose of this appeal but there is no harm in our making findings on the other aspects of the case raised by the rival arguments of counsel firstly for purposes of completeness of the record, and secondly for purposes of jurisprudential value. These other aspects of the case hinge on the value of the identification evidence and infringement of appellant's constitutional right. Indeed an identification parade was held but by dint of the fact that the parade identification witness was in fact the one who pointed out the appellant to the police for arrest, the evidence of identification parade cannot therefore stands. We however agree with the assertion of ***Miss Nyamosi*** that its exclusion does not weaken the prosecution evidence. The court could safely act on the evidence of PW1 alone to found a conviction.

28. As for the alleged infringement of appellants' constitutional rights, we agree that this should have been raised at the earliest opportunity at the trial to allow the prosecution an opportunity to give an explanation. In the absence of such a step having been taken, the appellant's remedy lies in damages. Where an accused person is held beyond the period allowed by the Constitution this does not vitiate the charge or render it bad. The right of an accused person is to be fairly tried without delay. It is not not to be tried if there is delay. At any rate, detention of an accused person before arraignment in Court beyond the

Constitutional limit would give rise to a claim for illegal detention, and hence damages. We are alive to the guiding principle that though we are custodians and watchdogs of the rule of law and are enjoined to protect an accused person's. Constitutional rights during criminal proceedings, we should nonetheless not lose sight of an equally important principle that an accused person has to account to society for his or her own actions and where he or she violates societal norms he/she has to face the consequences set by law with regard to such breach. See the case of ***Julius Kamau Mbugua versus Republic.CRA. No. 50 of 2008.*** Wherein this Court made the following observations with regard to similar constitutional provisions under the repealed Constitution:-

> ***"The underlying question arising in this appeal is whether an unconstitutional extra judicial incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested, or, if tried, whether he is entitled to a discharge or acquittal.***
>
> ***...***
>
> ***In our view, the right of a suspect to personal liberty before he is taken to court under Section 72(3) (b) are clearly distinct from the rights of an accused person awaiting trial under Section 77 (1).***
>
> ***...***
>
> ***In our view, it is not the duty of a trial court or an appellate court criminal with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused***
>
> ***...***
>
> ***The law gives jurisdiction to the criminal courts to try any person suspected of having committed a criminal offence subject to the constitutional safeguards. There is a no law including the 1963 Constitution before repeal which bars such prosecutions or ousts the jurisdiction of the criminal courts in such cases.***
>
> ***...***
>
> ***Even if we were to agree that the extra judicial incarceration before a person is charged has a direct bearing on the subsequent trial, the detention must first be shown to be unreasonable using the same principles, standards and considerations including societal interest as apply to consideration of breach of trial within reasonable time.***
>
> ***...***
>
> ***Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under section 84(1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in section 72 (6) was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damaged."***

The upshot of the above is that we find no merit in this appeal. The sentence having been lawful, we have no alternative but to dismiss this appeal in its entirety.

Dated and Delivered at Nairobi this 28th day of November, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.