IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 18 OF 2011

BETWEEN

PHINIUS GIKUNDA M'NTHIRI .....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court at Meru (Emukhule,*J.)*

delivered on 23rd February, 2011

in

H.C.CR. C NO. 47 OF 2006)

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JUDGMENT OF THE COURT

1. Phinius Gikunda M'Nthiri, the appellant herein was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, Chapter 63 of the Laws of Kenya. The Information is that on the 14th day of May 2006 at Gatimbi Location in Meru Central District within the then Eastern Province, murdered Francis Mutua M'Gitwamikwa.
2. The deceased and the appellant were family friends. PW1 testified that he was at his home on 14th May 2006 and at 5.00 pm he heard screams; one person was chasing the other and he found that the deceased was being chased by the appellant; they both appeared drunk. When they entered his home, he inquired what their problem was and the deceased informed him that the appellant was chasing him for some money. He ordered them out of his compound. A little later on the same day, PW1 again heard screams from the deceased that the appellant was beating him. PW1 in the company of two other people went to the scene of the screams and found the deceased standing and he told him to report the matter to the police if he had been beaten. PW1 testified that he met the deceased the next day who confirmed to him that he had reported his ordeal to the police. He heard 2 months later that the deceased had died.
3. PW2, wife of the deceased testified that her husband told her he had been hit seriously by Phinius Gikunda, the appellant. That he was hit at the back side of the neck thereby losing one tooth. The deceased was admitted to hospital and died after about 10 days. PW3 a son of the deceased testified that on the material day, he was returning home from a church pre-wedding meeting

when he met PW1 who informed him that his father, the deceased, had been cut on the road by the appellant. He went to his father's home and the deceased confirmed to him that he had been hit by the appellant. PW4, a police officer testified that the deceased made a report of an assault at Kariene Police Station on 15th May 2006, a day after he had been assaulted by the appellant; the deceased reported that the assault was "with blows and kicks on the right of the ear and had also knocked out one lower tooth." That on 24th May 2006, PW3 reported to the police that the deceased had died while undergoing treatment. PW5, Dr. Macharia testified that he conducted a post mortem on the deceased and established that he died from internal bleeding in the haematoma right side. He formed the opinion that the cause of death was intercranial haemorrhage, an internal bleeding caused by injury by a blunt object. He confirmed that there were no external injuries on the body; that the bleeding by the deceased could have been caused by a broken vessel, but could also be due to a violent fall.

4. The appellant gave sworn testimony in his defence. He stated that the deceased was his friend and they were neighbours; that he used to live with the children of the deceased upon their circumcision. That he saw the deceased on 14th May 2006; they were having drinks in a canteen taking local brew from mid-day till 5.00 pm. That they went away together and passed through the home of PW1 who did not welcome them saying he did not want drunkards in his home. That he did not assault the deceased and he was not involved in his death.
5. After trial, the learned Judge convicted the appellant and sentenced him to death as by law prescribed. Aggrieved by the judgement, an appeal was lodged to this Court.
6. Five grounds of appeal have been raised:

i. ***That the learned Judge erred on a point of law in relying on the evidence of PW1, PW2, PW3 and PW6 in convicting the appellant when the evidence of the said witnesses was in the nature of a dying declaration.***

ii. ***The learned Judge erred on a point of law in dismissing the appellant's preliminary issue that his constitutional right under Section 72 (3) of the former Constitution had been infringed and further erred in failing to call upon the prosecution to explain the reasons for detaining him for a period of one month and 16 days before bringing him to court.***

iii. ***The learned Judge while analyzing the evidence erred on a point of law in setting out a hypothesis, conclusions and reasons whi*****ch were not supported by the evidence.**

iv. ***That the learned Judge erred on a point of law in making a finding that the ingredients of murder were proved against the appellant and in making a finding that the injuries that occasioned the death were inflicted by the appellant.***

v. ***The learned Judge erred on a point CRIMINAL APPEAL NO. 18of law in failing to exercise the benefit of doubt that existed in the prosecution evidence in favour of the appellant.***

7. At the hearing the appeal, learned counsel Ms J.K. Ntarangwi appeared for the appellant while Mr. J. Kaigia, Assistant Director of Public Prosecution represented the state.
8. Counsel for the appellant abandoned the second ground of appeal observing that the law on constitutional delay in arraigning an accused before a trial court within 24 hours has been settled by this Court and the remedy lies in a civil action for damages. Counsel elaborated on the other grounds of appeal and submitted that the conviction of the appellant was based on a dying declaration and the trial court did not caution itself of the need to evaluate if the dying declaration was properly made. She cited the case of ***John Matu Gichuru – v- R , Criminal Appeal No. 53 of 1997*** in support of this submission. It was submitted that the trial court came up with its own hypothesis to define medical terms which ought to have been defined by PW5 who was the medical doctor who performed the postmortem examination; that the learned judge erred by coining a theory and finding that the deceased did not fall yet there was no evidence to this effect; that the learned Judge ignored the testimony by PW1 and the defence that both the deceased and the appellant were drunk; that whereas the trial court accepted intoxication as a mitigating factor, the court shifted the burden of proof to the appellant and the issue of intoxication was not given

due consideration and weight by the learned Judge. The appellant observed that the investigating officer was not called to testify and the evidence of assessors was not reflected in the trial court proceedings. Counsel submitted that malice aforethought and other ingredients for the offence of murder were not proved; that during trial, the appellant had offered to plead to a lesser charge of manslaughter and this was declined; that if intoxication had been considered and the fact that the appellant was not armed at the time of the offence, then the proper charge ought to have been manslaughter.

9. The state opposed the appeal but supported conviction for the lesser offence of manslaughter. It was submitted that the motive for the offence appears to be that the deceased had not paid the dues of the appellant and despite this, the appellant should not have taken the law into his own hands. Counsel submitted that the issue of drunkenness is relevant and it appears there was no intention to kill but the force used was unreasonable. In addition, counsel submitted that the learned Judge erred to the extent that the appellant was not given an opportunity to mitigate after conviction.
10. We note that the appellant abandoned the ground of appeal on the constitutional right to a fair trial. We reiterate that there are many instances in which this Court has held that a delay in arraigning a suspect in court beyond 24 hours does not necessarily entitle the suspect to an acquittal**. (See *Domimic Mutie Mwalimu - v- R Crim. Appeal No. 217 of 2005; and Evanson K. Chege - v - R Crim*. *Appeal No. 722 of 2007)***. If any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages (See ***Julius Kamau Mbugua – v- R Criminal Appeal No. 50 of 2008*).**
11. This is a first appeal. *In* ***OKENO V. R. [1972] EA 32 at p. 36*** the predecessor of this Court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDYA V. R. [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (SHANTILEL M. RUWAL V. R. [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS V. SUNDAY POST [1958] EA 424."***

12. We have considered the grounds of appeal and submissions by counsel. We have examined, considered and re-evaluated the evidence afresh. The evidence against the appellant is largely circumstantial and inculpatory; there was no eye witness to the murder; however, from the testimony of PW 1, the appellant was seen chasing the deceased at about 5.00 pm and the deceased informed PW1 that the appellant beat him up. In the case of ***R –v- Kipkering arap Koske & another (1949) EACA 135***, it was held that

> ***"in order to justify 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 guilt".***

13. The appellant has raised the ground that the trial judge did not take into account that the evidence of PW1, PW2, PW3 and PW6 was in the nature of a dying declaration. PW1 testified that on 14th May 2006 he heard screams from the deceased who stated he was being beaten and he was screaming "oi, I have been hit/beaten". PW1 asked the deceased who had beaten him and he replied it was Phinius Gikunda who had beaten him.
14. PW 2 the wife of the deceased testified that when her husband came back home on 14th May 2006 at about 6.30 pm, he told her he had been hit seriously by Phinius Gikunda. That he had been hit on the back side of the neck thereby losing one tooth. PW 3 testified that on the material day at about 6.00pm, he was from a church pre-wedding party and on his way home he was told that his father had been cut on the road. He proceeded to his father's home where he talked to him; he

stated that he had been seriously hit by Phinius Gikunda. PW 6 a brother to the deceased testified that on 14th May 2006 at 9.00 pm he was at home with the deceased who had called for him, that they talked and the deceased informed him he had been beaten by the appellant and he had lost a tooth.

15. We have considered the testimony of PW1, PW2, PW3 and PW6 and we are of the view that the statements made by the deceased amount to a dying declaration. We note that the deceased died five days after telling PW1, PW2, PW3 and PW 6 that he had been seriously hit by the appellant. On the whole, we find that the evidence of PW1, PW2, PW3 and PW 6 is consistent that the deceased stated the appellant had seriously hit him. These statements amount to a dying declaration under **Section 33** (a) of the **Evidence Act, Cap 80** of the **Laws of Kenya**. The relevant Section provides:

> ***"Statements, written or oral, of admissible facts made by a person who is dead …… are themselves admissible in the following cases:***

a. ***When the statement is made by a person as to the cause of his death, or as to any circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question and such statements are admissible whether the person who made them was or was not at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;***

16. This Court has considered the above provisions in several cases. In ***Pius Jasunga s/o Akumu – v – R (1954) 21 EACA 333***, the predecessor of this court stated:

> ***The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field on Evidence has repeatedly been cited with approval..... It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (R-v-Eligu s/o Odel & Another (1943) 10 EACA 9) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused..... But it is generally speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration."***

17. Our reading of the Judgement reveals that the learned Judge did not appreciate that the testimony of PW1, PW2, PW3 and PW 6 amounted to a dying declaration made by the deceased. The defence in its submissions addressed the issue; however the trial Judge did not caution himself as is required in the case of ***Pius Jasunga s/o Akumu – v- R (supra)*****.** This being a first appeal, it is our duty to evaluate the evidence on record. We have taken caution that the testimony of PW1, PW2, PW3 and PW6 amount to a dying declaration. We are satisfied that there is no question of mistaken identity since the deceased knew the appellant as close family friends. The alleged offence took place in broad day light. The testimonies by all the witnesses are consistent. PW1 saw the appellant chasing the deceased. Though these statements were made in the absence of the appellant, we are satisfied that the deceased did say that it was the appellant who had seriously hit him. This statement was repeated to different persons and also reported to the police. We find that these statements were admissible under **Section 33 (a)** of the **Evidence Act**. Although the learned Judge did not address his mind to the issue of a dying declaration, he properly admitted and considered the evidence.

18. The appellant's other contention is that the trial Judge while analyzing the evidence set out a hypothesis, conclusions and reasons which were not supported by evidence. In the case of ***Okethi OKale & Another – v – R 1965 EA 555***, the predecessor of this court warned that it is an error for a trial court to take into account extraneous matters that are not in evidence. The court stated that "in so far as those aspects are not in evidence, a court of law cannot canvass them as that would mean importing into judgement extraneous circumstances which should be discouraged". In this

case, a post mortem report duly filled and signed was produced by Dr. Macharia, PW 5. The cause of death was stated therein. Learned counsel who represented the appellant at his trial did cross-examine the doctor who conducted the post mortem. The appellant contend that the trial Judge erred in defining medical terms. The Judge expressed himself: "The Doctor put the cause of death as **infracranial haemorrhage caused by blunt injury; massive subdural haematoma** which means "***solid swelling of clotted blood within tissue***"; Infracranial haemorrhage is massive bleeding within the skull." The appellant contend that the trial judge erred in attempting to define these medical terms and thus introduced extraneous matters into the judgement. We have analysed the reasoning contained in the judgement; it was the duty of the trial Judge to evaluate the whole evidence before him and arrive at his own conclusions, no prejudice was caused to the appellant through the learned Judge's reasoning, evaluation and analysis of the post mortem evidence. The trial judge did not create the theory that the injuries of the deceased could have been due to a fall, this was evidence by the defence and the Judge was duty bound to consider it, evaluate it and make a finding thereon. We concur with the conclusions and findings of the trial Judge and see no reason to fault the learned Judge; no extraneous matters were introduced in the judgement.

19. The appellant contend that the trial Judge did not address himself to the issue of intoxication. In the case of ***Kedisia – v- Republic*** ***(2009) KLR 604,*** this Court differently constituted stated that "evidence of drunkenness need not necessarily come from an accused person himself; such evidence can come from the prosecution witnesses and it cannot simply be ignored because it has only come from the prosecution witnesses." In the case of ***Boniface Muteti Kioko and Willy Nzioka Nyumu – v – R*** ***(1982-88) 1 KLR 157*** one of the holding is:

> ***"It was the duty of the Judge to deal with alternative defences, such as intoxication, that emerged from the evidence which might reduce the charge to manslaughter".***

In the instance case, the state submitted that the issue of intoxication was not raised as a defence before the trial judge. In the case of ***Manyara – v – R*** ***(5) (1955) 22 EACA 502*** the Court stated:

> ***"It is of course correct that if the accused seeks first to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is misdirection if the trial court lays the onus of establishing this upon the accused."***

20. In this case, the learned Judge did not consider the issue of intoxication; the evidence of PW1 is that the appellant and deceased appeared drunk when they entered his compound at about 5.00 pm on the material day. The appellant in his defence stated that he and the deceased started taking local brew from about mid-day on the date of the alleged offence. The trial Judge erred in not considering this issue and to determine whether the appellant had the requisite *mens rea* for the offence. In our view, the benefit of doubt as to whether the appellant was so drunk as to negative the intent to kill or cause grievous harm goes to the appellant. The offence of manslaughter was established. The evidence that both the appellant and deceased were drunk was relevant but the trial Judge did not give consideration to this fact.
21. The totality of the above is that we allow the appeal against the offence of murder and set aside the conviction and sentence of death. We substitute in its place a conviction for the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code. The appellant is sentenced to serve a sentence of 15 years with effect from 19th September 2006.

Dated and delivered at Nyeri this 20th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR