IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 127 OF 2012

BETWEEN

DAVID MUGAMBI M'MAUTA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Lesiit, J.)

dated 22nd September, 2011

in

H.C.CR.C NO. 14 OF 2003)

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JUDGMENT OF THE COURT

1. **David Mugambi M' Mauta,** the appellant, 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 in the High Court at Meru. The particulars of the offence were that on 21st March, 2001 at Akachiu Location in Meru North District within the then Eastern Province, the appellant murdered James Kamui Kaithera.
2. The prosecution called a total of 6 witnesses in support of its case against the appellant. It was the prosecution's case that on 21st March, 2001 at around 9:00 p.m. while PW1, Joseph Kalunge (Joseph), PW2, Silas Mithika M'arimba (Silas), PW3, John Mithika (John), and James Kamui Kaithera (deceased) were having tea at a café in Kiije Market, the appellant came and started demanding Kshs. 50/= from the deceased. The deceased owed the appellant Kshs. 50/= being the balance of his wages for cutting miraa in the deceased's shamba. According to Joseph, Silas and John, the deceased promised to pay the appellant on a later date. The appellant left the cafe and returned after five minutes. The deceased paid for his tea and as he was leaving the café, the appellant, who was then standing at the entrance to the café, cut the deceased on the forehead with

a panga he had. The deceased screamed and the appellant ran away. Joseph, Silas and John saw what happened and were able to recognize the appellant using the light from a tin lamp that was inside the café. Joseph informed PW4, Alice Mutume (Alice), the deceased's wife what had happened to the deceased. Joseph testified that he and Alice took the deceased to Maua Methodist Hospital and reported the incident to the police. The deceased died the following day.

3. PW5, PC Bernard Kaguru (PC Bernard), testified that on 21st March, 2001 at around 2:30 a.m. while on duty at Maua Police Station, he received a report from Alice that the deceased had been attacked by the appellant with a panga and that he had been admitted at Maua Methodist Hospital. PC Bernard in the company of PC Kiura went to the hospital and found that the deceased was unconscious. They then went to the scene and found blood stains at the entrance of the café. PC Bernard went to the appellant's house on the same day but did not find him. Thereafter, he made several visits to the appellant's home without success. On 11th April, 2002 the appellant in the company of a village elder surrendered himself to the police. PC Bernard testified that the appellant told him that he surrendered himself because he feared the deceased's relatives would lynch him. Upon interrogation by PC Bernard, the appellant admitted that he had fought with the deceased over Kshs. 50/=.
4. PW6, Dr. Finsten Tsuma (Dr. Finsten), produced a post mortem report prepared by Dr. G. Kimani in respect of the deceased. The report indicated that the cause of the deceased's death was loss of blood due to a torn large blood vessel in the brain secondary to the brain compression as a result of the assault.
5. The appellant in his defence gave a sworn statement. He testified that the deceased was his uncle who used to employ him on several occasions as a casual labourer to cut miraa in his shamba. On 21st March, 2001 at around 9:00 a.m. the appellant left his home and headed to the deceased home where he had been hired to cut miraa in consideration of wages of Kshs. 150/ =. He cut the miraa until 4:00 p.m. Later on at around 5:00 p.m he left the deceased's home and went to his house to change his clothes. He stated that after selling the miraa he had cut, the deceased paid him Kshs. 100/= and promised him to pay the balance of Kshs. 50/= later in the evening. Between 8:00 p.m. and 9:00 p.m., the appellant went to the café at Kiije Market where they had agreed to meet with the deceased who would pay him the balance of his wages. As he was drinking tea, the appellant saw the deceased enter the café and stand near the door. He asked the deceased to pay him the balance of Kshs. 50/= so that he could use the same to pay for the tea he was drinking. The appellant testified that the deceased got angry and asked him whether he wanted everyone to know that he owed him money. It was then that the appellant noticed that the deceased was drunk. The deceased then went to where the appellant was seated and slapped him on the head causing the appellant to nose bleed. The deceased took the appellant's tea and poured it on him. One Dick, the son of the owner of the café, tried to separate the deceased and the appellant without success because the deceased was holding the appellant with his shirt. While the deceased was pulling the appellant out of the chair he was sitting on, the appellant picked up a panga that was on the next table. The deceased who was dragging the appellant outside the café threatened to finish him off. As the appellant flashed the panga he had picked up he accidentally cut the deceased on the forehead. The appellant maintained that he did not intentionally cut the deceased but intended to scare him with the panga so that he would let go of him. He further testified that he only surrendered himself on 11th April, 2002 because he feared that the deceased's relatives would lynch him; and that prior to his surrender he was at home and had not gone into hiding.
6. Being convinced that the prosecution had proved its case beyond reasonable doubt, the trial court (Lesiit, J.) convicted and sentenced the deceased to death. It is against the above conviction and sentence that the appellant has filed this current appeal based on the following grounds:-

- ***The Superior Court erred in law and fact in failing to direct its mind to the provision of section 72(3) (b) of the Constitution and thus failed to come to inevitable conclusion that the appellants rights were flouted.***

- ***The learned Judge of the Superior Court erred in law and fact in failing to come to the conclusion that the evidence of identification was not consistent and that the circumstances of identification of the appellant were not conducive to positive identification of the appellant.***

- ***The learned Judge of the Superior Court erred in law and fact in failing to come to the conclusion that the appellant had raised a reasonable defence of self defence.***

- ***The learned Judge of the Superior Court erred in law and fact in failing to warn herself of the dangers of convicting on evidence taken by a different Judge and therefore came to the wrong conclusion in convicting the appellant.***

- ***The learned trial Judge erred in law in failing to come to the conclusion that there were glaring gaps in the prosecution's evidence and therefore wrongly convicted the appellant.***

- ***The learned Judge erred in failing to come to the conclusion that the appellant acted under extreme provocation.'***

7. Mr. H. K. Ndirangu, learned counsel for the appellant, submitted that the appellant was arrested on 11th April, 2002 and arraigned in court on 21st May, 2002, 24 days after his arrest contrary to section **72(3)** of the former **Constitution.** He contended that this issue was not resolved in the High Court despite being raised by the appellant. Mr. Ndirangu contended that the evidence on identification of the appellant was not positive because there was only one source of light, the tin lamp and it was dark. Further he stated that there were contradictions in the prosecution's case on the sitting arrangement in the café because it was dark.
8. He submitted that the appellant had raised a reasonable ground of self defence. This is because the appellant admitted to cutting the deceased with a panga after the deceased poured tea on him and assaulted him. According to Mr. Ndirangu the issue of self defence is further reinforced by the fact that there was only a single cut wound on the deceased. He contended that there was conflicting evidence as to when the deceased was cut; whether it was while he was seated down or when he was walking out of the café.
9. Mr. Ndirangu urged us to make a finding that the appellant killed the deceased in self defence; and in the alternative find that the appellant was provoked by the deceased and reduce the charge to manslaughter. He further submitted that the appellant was never informed of his right to recall a witness in light of the trial being conducted by two different judges.
10. Mr. Lugadiru, Senior Public Prosecution Counsel, in opposing the appeal, supported the conviction and sentence issued by the trial court. He submitted that the delay in arraigning the appellant before the trial court was explained by the prosecution which explanation was accepted as reasonable by the trial court. Mr. Lugadiru maintained that since the appellant admitted cutting the deceased the issue of his positive identification did not arise.
11. He contended that there was no evidence tendered by the appellant that the deceased was armed during the incident; and that the force that was used by the appellant was excessive in the circumstances, and therefore the issue of self defence does not arise. Mr. Lugadiru submitted that the issue of objection in respect of the matter proceeding from where it was when a new Judge took over the trial was never raised by the appellant. He maintained that the appellant had not demonstrated that trial by a new Judge occasioned a miscarriage of justice.
12. Mr. Lugadiru contended the inconsistencies in the prosecution's evidence as to the sitting arrangements were not critical and the fact that the appellant admitted to cutting the deceased rendered those inconsistencies immaterial. He further submitted that there was no evidence on record that the deceased was the aggressor. He contended that it was the appellant who went where the deceased was seated and cut the deceased as he was walking out of the café; and that it was the appellant who was the aggressor.
13. This being a 1st appeal, this Court is obligated to re-evaluate and re-analyze the facts and evidence which resulted in the decision of the High Court. In **Okeno V. Republic [1972] E.A. 32** it was held:-

> ***"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] E.A. 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. (Shantilal M. Ruwala v. R., [1957] E.A. 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] E.A. 424."

14. We have considered the grounds of appeal, submissions by learned counsel and the law. The appellant contends that his fundamental rights under **Section 72(3) (b)** of the former **Constitution** were violated because he was not arraigned in court within 14 days of his arrest. From the evidence on record it is clear that the appellant was arrested on 11th April, 2002 and was arraigned in court on 21st May, 2002. **Section 72(3) (b**) of the former **Constitution** stipulates that a person arrested for a capital offence, should be arraigned in court within 14 days of his arrest. **Section 72(3) of** the former **Constitution** further stipulates if a suspect is not arraigned within the requisite period, the prosecution may be required to explain if the delay was necessary and not unreasonable. We have perused the record and we find that the prosecution gave the reasons for the delay in arraigning the appellant in court first, due to the fact they were waiting for instructions from the Attorney General and that secondly, the High Court vacation was in August and September. We are of the considered view that the explanation given by the prosecution for the delay in arraigning the appellant in court is reasonable.
15. On the issue of identification we agree with Mr. Lugadiru that the appellant having admitted to have cut the deceased, the evidence on his identification and the inconsistencies on the sitting arrangement in the café are immaterial. This is because it is not in dispute that the appellant cut the deceased on the forehead with a panga; and that the deceased died as a result of the injury caused by the appellant.
16. On the issue of self defence, the burden is always placed on the prosecution to prove that the accused was not acting in self defence. In ***R-vs- Lobell (1957) 1 ALL ER 734,*** the court held:-

'***Where the defence of self defence is set up in a criminal case, the onus of proving the accused's guilt remains with the prosecution, and if on the whole evidence the jury are in doubt whether the act was done in necessary self defence, they should find the accused not guilty.'***

We are not persuaded that self defence holds any weight in this case. This is because there was no evidence that the deceased was armed. Therefore, the force which the appellant used in cutting the deceased with a panga was excessive in the circumstances. See ***Mokwa -vs- Republic(1979) KLR 202.***

In ***Palmer –vs- Region (1971) 1 ALL ER 1077,*** the Court held,

"Where the evidence is sufficient to raise the issue of self defence, that defence will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not by way of self defence. If the prosecution succeeds in this then the issue is eliminated from the case. Other possible issues will remain, in particular, the circumstances may be such as to raise an issue of whether there was provocation which would justify a verdict of manslaughter or whether the intent necessary to constitute the crime of murder was lacking."

17. Going by the actions of the appellant, even if we are not persuaded by a defence of self defence, we nonetheless entertain the evidence of provocation which would reduce the offence to manslaughter.
18. On the defence of provocation **section 208** of the **Penal Code** provides for the definition of provocation as:-

"208(1)The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate

care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."

19. Provocation can vitiate a criminal offence. See ***Chivasi &another –vs- Republic (1990) KLR 5298.*** In this case there was evidence that there was a dispute over payment of Kshs. 50/=. As per Lord Goddard CJ in ***R –vs- Whitfield (1976) 63,*** provocation means some act or series of acts done or words spoken which could cause any reasonable person a sudden and temporary loss of self control rendering him so subject to passion as to make him for a moment not a master of his mind. Lord Goddard further held that provocation is not an absolute defence, it is only available to an accused to reduce an otherwise clear case of murder to manslaughter. The law is clear that an accused person does not assume the responsibility of proving the defence he puts forward to a charge. It is upon the prosecution to call evidence and disprove the defence. In ***Kenga –vs- Republic (1999) 1 E.A 141***, the court held,

'The accused does not have to prove provocation but only to raise a reasonable doubt as to its existence.'

Based on the evidence on record, we find that in this case that the deceased provoked the appellant by refusing to pay the balance of his wages being Kshs. 50/=. This is because taking into account the fact that the appellant was a casual labourer and that he was following up on payment of Kshs. 50/= clearly shows he was struggling to make a living. The appellant in his defence testified that the deceased slapped him on his head, poured tea on him and dragged him out of the cafe with his shirt. We find that the said conduct by the deceased amounted to provocation and angered the appellant to the extent that he lost self control. In Elphas ***Fwamba Toili – vs- Republic*** **- Criminal appeal 305 of 2008,** this Court held *that:-*

"In our view, once a person is provoked and starts to act in anger, he will do so until he cools down and starts seeing reason. This is because he will be suffering under diminished responsibility and the duration of that state may very well depend on individuals. ."

20. We are of the considered view that in light of the foregoing that the prosecution did not prove the offence of murder against the appellant. For the offence of murder, there are three elements which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the accused had the malice aforethought. *(See* ***Nyambura & Others-vs-Republic, [2001] KLR 355).*** Instances when malice aforethought is established is provided for in **Section 206** of the **Penal Code***:-*

"Malice aforethought shall be deemed to be established by evidence proving any

one or more of the following circumstance:-

(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;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

In view of the law and facts, it cannot be established that the appellant had premeditated his reaction towards the deceased. We are of the considered opinion that from the evidence on record, we are unable to establish whether the appellant came with the panga as alleged by the prosecution. Therefore, we are unable to infer malice aforethought on the appellant's action of cutting the deceased. In the case of ***Mabonga vs. Republic*** **(1974) EA 176** this Court's predecessor stated as follows:-

> ***"... The Judge should have considered the defence of provocation and sought the opinion of his assessors as to whether this forcible seizure of the cow was in the particular circumstances of this case provocation sufficient to have rendered the offence from murder to manslaughter. His failure to direct himself or the assessors to this issue was a serious misdirection. In the circumstances, we think it will be unsafe to allow the conviction for murder to stand, as on evidence, provocation cannot be ruled out. We accordingly quash the conviction for murder and set aside the sentence of death. We substitute therefore a conviction for manslaughter and a sentence of ten years imprisonment."***

21. The upshot of the foregoing is that we find that this appeal has merit. Accordingly we set aside the appellant's conviction of murder and the sentence of life imprisonment and substitute it with a conviction of manslaughter and sentence the appellant to 15 years imprisonment, commencing the 22nd September, 2011, which is the date of the judgment of the High Court.

Dated and delivered at Nyeri this 18th day of September, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

….....

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