IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 59 OF 2013

BETWEEN

CHARLES M'TOMUGAA M'TOMAUTA …….....……..APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Meru

(Makau, J.) delivered on 19th December, 2012

in

***H.C.CR. Case No. 79 of 2005*)**

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JUDGMENT OF THE COURT

1. The appellant Charles M'Tomugaa M'Tomauta was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap 63 of the Laws of Kenya**). The Information was that on 23rd day of October 2005 at Athirugaiti location in Meru North District within Eastern Province murdered Richard Mwongera. The appellant was tried, convicted and sentenced to death by the Honourable Justice Makau of the High Court sitting at Meru. Aggrieved by the conviction and sentence, he has lodged this appeal.
2. The prosecution tendered evidence from two eye witnesses. **Sampson Mutembei PW 1** testified that he operated a tea kiosk and knew the appellant as his customer. He testified that on 10th October 2005 at 7.30 pm while seated outside his kiosk in the company of the **deceased Richard Mwongera** and **Joses Thuranira PW 2**, he saw the appellant making noise as he was walking and quarrelling to himself while saying he would kill someone. The appellant had not reached the kiosk but he was heading towards it. PW 1 testified that the appellant reached the kiosk whereupon he threw a stone. The stone hit the person seated in the middle who was Richard Mwongera – now deceased. Mwongera was hit on the forehead and he fell down. That together with PW2, they took Mwongera to his parent's home and he was admitted to hospital and later discharged. Mwongera was re- admitted to hospital and he died. PW 1 testified he was able to

identify the appellant from his voice and from moonlight and light from the lamp he had lit which was at the window of the kiosk. He stated the appellant appeared drunk.

3. **PW 2 Joses Thuranira** testified that on the material day 10th October 2005 at around 7.30 pm he was at the kiosk of PW 1 seated outside with PW1 and the deceased. That he heard someone coming shouting he would kill someone; he recognized that person when he came near was the appellant. That the appellant threw a stone and it hit the deceased on the forehead; there was moonlight and a lamp in the kiosk; upon being hit, the deceased fell down and together with PW 1,they took the deceased to his parents home. The deceased was taken to hospital, treated and discharged. He was later admitted again to hospital and he died.
4. **PW 4 Thiakulu Cyprian Mwirabua** a medical doctor by profession testified that he conducted a post mortem on the body of the deceased and found a depressed skull fracture with sharp edges 3 X 3 ½ inches. The frontal was depressed by a large haematoma and had a crater of 8 X 6 cm and increased intracranial pressure. That the deceased died due to increased cranial pressure secondary to epidob imatoma which was secondary to depressed fractured skull.
5. The appellant in his sworn testimony denied causing the death of the deceased and stated he did not know how he died as he was far away. The appellant stated that before he was arrested, his son told him that police were looking for him as it was said he had hit the deceased with a stone. The appellant in cross-examination stated he could not recall 10th October, 2005 and he neither knew PW1 nor PW2 and he had never met the deceased. **DW 2 Bundi Mugaa**, a son to the appellant testified that on the material day 10th October 2005, the appellant was at a place known as Ndira. That he visited the deceased in hospital and while there the deceased told him he was suffering from malaria.
6. The learned judge upon hearing the evidence of the prosecution and defence found the appellant guilty and sentenced him to death. The Honourable Judge expressed himself thus:

> ***"The defence contention was that the accused did not commit the offence as he was far away. The accused relied on alibi defence…The issue in this case is who threw the stone which hit the deceased on the forehead causing severe injury which caused his death after a few days. In this case there were direct eye witnesses PW1 and PW 2. … I find that PW1 and PW 2 had sufficient time to see and recognize the attacker. Given that PW1 and PW 2 had heard the accused saying "he would kill someone" as he approached them, the two were keen to observe the identity of the attacker.***
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> ***On malice aforethought, the Honourable Judge stated that malice aforethought was established. The accused used a heavy stone to hit the deceased on the forehead from a close range. Forehead is a very sensitive area to hit with a heavy stone. The accused action was both calculated and deliberate. It is clear the accused had formed an intention to cause death of someone or to do grievous harm to any person, whether that person was the person actually killed or not. The ingredie*nt *for the offence of murder ... was fully and firmly established".***

7. Aggrieved by the conviction and sentence by the Honourable Judge, the appellant in his memorandum of appeal has cited various grounds which can be compressed as follows*:*

i. ***That the learned judge mismanaged the case so badly that the accused was denied justice and due process of the law.***

ii. ***That the learned judge demonstrated bias and seemed to be tilting or inclined in favour of the prosecution case in that he emphasized the mistakes of the defence case without noticing glaring contradictions and discrepancies in the prosecution case.***

iii. ***The learned judge erred in fact and law by failing to find that from the evidence adduced, the appellant could not have formed the intent or mens rea to commit the offence convicted of.***

iv. ***The learned judge failed to accept the fact that a new condition being sickness from malaria had intervened and taken place between the alleged assault and the time of death of the***

deceased thus complicating the cause of death and no toxicological tests were done on the body of the deceased.

v. ***That the learned judge erred in fact and in law by failing to address himself to the elements of recognition by vision and voice which were not satisfactorily proved.***

vi. ***That the learned judge erred in law and fact by ignoring the fact that alleged offender was said to have been totally intoxicated and disoriented and therefore could not possibly have constructed malice aforethought.***

8. At the hearing of the appeal, the State was represented by State Counsel N. Ongige while learned counsel M. M. Kioga appeared for the appellant.
9. Counsel for the appellant reiterated the grounds of appeal and concentrated on allegations of mismanagement of the case by the trial court; he challenged the qualifications of the medical doctor who conducted the post mortem. Counsel stated that the trial Judge erred in ordering the defence to supply its witness statement to the prosecution. He submitted that the prosecution have no right to receive statements of defence witnesses. Counsel submitted that the judge erred in failing to find that **PW4 Thiakulu Cyprian Mwirabua** who testified as an expert witness and who conducted the post mortem was not a pathologist; PW 4 was a medical doctor and not a pathologist; he was not competent to conduct a post mortem on the deceased. Further, the post-mortem report prepared by PW4 was worthless and should have been disregarded. On the issue of voice and visual recognition, counsel for the appellant submitted that the Honourable Judge erred to the extent that he failed to conduct analysis to determine the intensity of the light emitting from a lamp which was allegedly on the window and no evaluation was carried out to ascertain the brightness of the moonlight. On *mens rea* and malice aforethought, it was submitted that the trial court failed to take into account that the appellant was drunk and intoxicated. Counsel submitted that the evidence on record showed that the deceased did not die immediately he was hit on the forehead; he was taken to hospital and discharged; he had told DW 2 that he was suffering from malaria and this constituted a new intervening condition. Finally, the appellant submitted that his constitutional right was violated as he was held in custody for over 40 days without being charged and brought before a court of law.
10. The State opposed the appeal with the submission that the trial court properly conducted the proceedings and the trial was well managed. That the appellant was given the opportunity to put his defence and he called one witness DW 2. It was submitted that to supply defence statements to the prosecution was not an abuse of court proceedings. Mr. Ongige further submitted that the doctor who performed the post mortem was competent and qualified and he gave his professional qualifications to the trial court. He submitted that the evidence of the prosecution was consistent and the testimony of PW 1 and PW 2 was corroborated by the post mortem report. It was submitted that the appellant had the intention of killing someone and fulfilled this by throwing the stone which hit and caused the death of the deceased. On violation of the appellant's constitutional rights, it was submitted that the proper forum to raise the issue was judicial review proceedings and not in a criminal trial.
11. We have considered the submissions by both the appellant and the State. This being a first appeal, we are reminded of our primary role as the first appellate court namely, revisiting the evidence that was tendered before the trial Judge, analyzing the same independently and then drawing conclusions bearing in mind the fact that we neither saw nor heard the witnesses and make an allowance for that. See the case of ***Muthoka and another versus Republic, (2008) KLR 297***. ***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. In ***Suleiman Juma alias Tom – v- R, Criminal Appeal No. 181 of 2002***

(Msa.), this Court stated that where the life of an individual is at stake, the

prosecution must be extremely careful not to bring evidence that is less than watertight.

13. The appellant contends that his fundamental rights under **Section 72 (3) (b)** of the old **Constitution** were violated in that he was held for over 40 days before being arraigned in a court of law. This is not a novel point taken in appeal and we find it has no merit. A delay in arraigning a suspect in court 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. In ***Julius Kamau Mbugua – v- R, Criminal Appeal No. 50 of 2008***, this Court stated that***"the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, and Section 72 (6) expressly provides that such breach is compensatable by damages.***

14. The appellant contends that the circumstances under which it was alleged that **PW 1 Sampson Mutembei** and **PW 2 Joses Thuranira** recognized him were not free from error. That the Honourable Judge did not evaluate the intensity of the lamp that was on the window of the kiosk and no evaluation was made as to how bright the moon was. In the case of ***Wamunga vs. Republic (1989) KLR 424*** it was stated that:

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

15. In the instant case, **PW 1 Sampson Mutembei** testified that he knew the appellant who was his customer. This is a matter of recognition. On the other hand **PW 2 Joses Thuranira** testified that when he heard someone shouting that he will kill somebody, he looked at the person and saw the appellant approaching. This is an issue of identification. Both PW 1 and PW 2 stated that there was bright moonlight and there was a lamp at the window of the kiosk. Evidence of visual identification should always be approached with great care and caution **(see *Waithaka Chege – v- R, {1979} KLR 271)***. Greater care should be exercised where the conditions for a favourable identification are poor. (***Gikonyo Karume & Another – v – R, {1900} KLR 23)*.** Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. **(See *Abdalla bin Wendo & Another – v- R, {195} 20 EACA 166; Wamunga – v- R {1989} KLR 42; and Maitanyi – v- R, 1986 KLR 198)*.** Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

16. In the instant case, the Honourable Judge in evaluating the evidence of identification and moonlight stated that PW1 and PW 2 were both able to see and recognize the appellant with the aid of moonlight and the lamp at the kiosk. PW 1 and PW 2 described the intensity of the moonlight as bright and the position of the moon as positioned directly on top. The lamp was positioned at the window of the kiosk and the appellant was within 3 metres from PW 1 and PW 2.

17. On our part we have re-evaluated the testimony of PW 1 and PW 2 and we are satisfied that the Honourable Judge did not err on the issue of identification and recognition of the appellant. We are satisfied that PW 1 was able to recognize the appellant as he was his customer and he testified that the appellant was the person who threw the stone and that hit the deceased on the forehead. In

Anjononi & Others vs. Republic, (1976-80) 1 KLR 1566 at page 1568 this Court held,

> ***"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

18. We are satisfied that the identity of the appellant as the person who threw the stone was established beyond reasonable doubt through recognition by PW 1 and corroboration by PW 2.
19. A ground of appeal raised in this case is that PW 4, Thiakulu Cyprian Mwirabua, who performed the post mortem on the body of the deceased, was not competent as he was a medical doctor and not a pathologist. This issue was not raised before the trial court and the appellant never objected to PW 4 giving his testimony. The record herein shows that prior to giving his evidence, PW 4 testified as to his qualifications. We are constrained to state that at this appellate stage, we cannot impugn the qualifications of the medical doctor when no objection was raised before the trial court. This ground of appeal fails.

We now turn to issue of *mens rea* and malice aforethought. PW 1 testified that the appellant was making noise as he was walking and he seemed to be drunk and was quarrelling with himself. PW 2 Joses Thuranira testified that he thought the appellant was drunk as drunkards behave the same way the appellant was behaving. In the case of ***Boniface Muteti Kioko and Willy Nzioka Nyumu – v – R (1982-88) 1 KLR 157*** one of the holding is:

> ***"It is 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".***

20. 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."***

21. In the instant case, both PW 1 and PW2 testified that the appellant appeared drunk. It is our considered opinion that had the trial court addressed its mind to this aspect of the testimony of PW1 and PW2; he could have arrived at a different conclusion in relation to malice aforethought. We note that intoxication was not raised as a defence before the trial court. However, it is the duty of the trial court to evaluate the entire evidence on record and satisfy itself if the ingredients of the offence as charged have been established and proved. We are satisfied that from the evidence on record, doubt exists as to whether the appellant had the requisite malice aforethought for the offence of murder. We are however convinced that it was the appellant who inflicted the fatal blow that killed the deceased. There is adequate evidence from eye witnesses that the appellant threw the stone which hit the deceased on the forehead; the post mortem report shows that the cause of death is directly related to the wounds caused by the stone.
22. The trial Judge erred in not considering whether the appellant had the requisite *mens rea* for the offence in view of the testimony that he appeared drunk. In our view, the benefit of doubt as to whether the appellant was drunk as to negative the intent to kill or cause grievous harm goes to the appellant. The offence of manslaughter was established.
23. 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 hereby convicted of manslaughter and sentenced to 10 years imprisonment from 6th December, 2005 when he was first arraigned before court.

Dated and delivered at Meru this 5th day of December, 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