CRIMINAL APPEAL NO. 180 OF 2005- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.)	**STANLEY ANTHONY MREMA Vs. REPUBLIC (Appeal from the Conviction and Order of the High Court of Tanzania at Arusha- HC Criminal Sessions Case No. 36 of 1999-Massati, J.**	Offence of murder contrary to section 196 of the Penal Code- sentenced to suffer death by hanging. Cognizance of a settled principle of law that motive can be considered when weighing the prosecution case [see, for instance, **R** v **K. Tindikawe (1940) 7 EACA 67].** established facts are not consistent with the existence of malice aforethought- Cognisant of the case of **R** v **D. H. Retief** (1941) 8 EACA 71 where it was held that as a general proposition drunkenness is no excuse for a crime and that insanity whether produced by drunkenness or otherwise is a defence to the crime charged.- -It was further held

		therein that if insanity is not established, killing by a drunken person is either murder or manslaughter. It will be murder if an intent to cause death or grievous harm is established. But if it be found that by reason of intoxication the accused was incapable of forming such intent the offence is manslaughter. Court of Appeal persuaded to believe that the appellant might have been somehow drunk and did not have the necessary intent to murder or cause grievous harm. Death resulting from a fight- see also **Juma G. Timbulu** v **R,** Criminal Appeal No. 27 of 1991 and **Moses Chichi** v **R,** [1994] TLR 222 on the issue.- Appeal is allowed by

		substituting the conviction for murder with one for manslaughter. The sentence of death is set aside.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 180 OF 2005

STANLEY ANTHONY MREMA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Order of the High Court of Tanzania at Arusha)

(Massati, J.)

dated the 30th day of June, 2005
in
HC Criminal Sessions Case No. 36 of 1999

JUDGMENT OF THE COURT

26 October & 30 November 2007

RUTAKANGWA, J.A.:

The appellant was convicted as charged of the offence of murder contrary to section 196 of the Penal Code, by the High Court sitting at Arusha. He was sentenced to suffer death by hanging. Dissatisfied with the conviction and sentence, he has lodged this appeal.

Acting through Mr. Kimomogoro, learned advocate, the appellant has filed three grounds of complaint against the entire High Court decision. They are as follows:-

> *"1. The learned trial judge erred in law in his summing up of the case, in failing to bring to the attention of the gentlemen assessors the question of intoxication.*
>
> *2. The learned trial judge erred in law in holding that the previous misunderstanding between the accused and the deceased was the probable motive for the attack.*
>
> *3. The learned trial judge erred in law in failing to hold that the prosecution failed to establish malice aforethought beyond reasonable doubt".*

To facilitate an easy appreciation of the inherent force in these grounds of appeal we have found it necessary to set out briefly the facts of the case as presented in the High Court.

The prosecution called five witnesses at the appellant's trial. Their evidence was to the effect that the deceased, one Emmanuel Solomoni Ijengo, who was the husband of Beatrice E. Solomoni, (PW2) was the landlord of the appellant. The three lived in one house at Mbauda area of Arusha Municipality. During the term of his tenancy the appellant exhibited a conduct which did not please the deceased. In the **first** instance he was not paying the house rent timely and regularly. **Secondly**, he was an habitual drunkard and used to come home very late at night. This led the deceased to complain to their ten cell leader, one Joseph Lucas (PW1) who conducted mediation sessions between the two more than twice.

On 2nd October, 1998, shortly after midnight, PW2 and her husband were rudely awakened by noises emanating from the appellant's room. The couple got out of bed. They both went out of their room, and PW2 went to the toilet leaving the deceased urging

the appellant to stop shouting. Then PW2 decided to go and call her brother in law, one Obedi Solomoni Ijengo (PW3) who was living nearby. By the time PW2 and PW3 got to the deceased house, they found the deceased lying down. The appellant was standing nearby holding a piece of spring. PW3 snatched the said spring from the accused. PW2 raised an alarm and some people, including PW1 assembled. The deceased, who had bruises and a swelling on the head, was taken to hospital while the appellant was surrendered to the police. The deceased told No. E 8178 P.C. Sezari (PW4) that he had been hit with a spring by the appellant.

The deceased was treated and discharged the same night. However, the deceased's condition worsened at dawn. He was rushed back to hospital where he was admitted but died later in the afternoon. Dr. Wasia Moshi of Mount Meru Government hospital conducted a postmortem examination on the deceased body. He opined that the cause of death was ***"assault leading to head injury".*** The report on postmortem examination was tendered in evidence as exhibit P2.

In his defence, the appellant disputed neither the death of Emmanuel Solomoni Ijengo nor its cause. He told the trial High Court that on the material night he lacked sleep. Then he heard a knock on his bedroom door which was instantly forced open to let in two people. He struggled with them, holding firmly one of them. They fell down. Some people gathered including PW2. PW2 got hold of an iron bar with which she accidentally hit the deceased as she was aiming at him. He accordingly denied causing the death of Emmanuel S. Ijengo.

The three assessors who assisted the learned judge in trying the case were not unanimous. While two of them returned a guilty verdict, the third one advised that the appellant be acquitted.

In his judgment the learned judge rejected the appellant's explanation on how the fatal injury was inflicted on the deceased. Having been impressed by PW2 as a truthful witness he exonerated her, and with good reasons, from the liability the appellant had attempted to transfer to her. We are satisfied that he was entirely justified in doing so.

Having rejected the appellant's defence the learned trial judge, on the basis of the evidence of PW2 and particularly PW3 (which was not disputed by the appellant) and the dying declaration of the deceased to PW4, held that the prosecution had proved the case beyond a reasonable doubt. Hence the conviction.

Mr. Kimomogoro argued that from the evidence of PW1 it was clear that the appellant was an habitual drunkard. Proceeding on this premise he impressed upon us that judging by his conduct as gathered from the evidence of PW2 (making unusual noises) and PW3 (who found him standing near the deceased holding the piece of spring), it could be reasonably inferred that the appellant was drunk on the material night. Mr. Kimomogoro further informed us that the appellant was no longer denying causing the death of the deceased.

With this concession in mind, Mr. Kimomogoro pressed us to hold that it was an error for the learned trial judge not to direct the assessors on the probability of the appellant having been drunk on that night. That the appellant was proved to have lied, did not

absolve the trial judge from ascertaining from the entire evidence that the appellant might have had a legal defence which would have reduced the offence of murder to that of manslaughter, he maintained. To support his argument he referred us to the case of **Tunutu s/o Mnyasule** v **R** [1980] TLR 204.

On the second ground of appeal, Mr. Kimomogoro submitted that it was wrong for the learned trial judge to impute ill motive in the particular circumstances of this case. The *appellant* was in his own room shouting and had the deceased not followed him there, he would not have met his death through that assault, he maintained.

On the basis of these arguments Mr. Kimomogoro urged us to hold that the appellant caused the death of the deceased without malice aforethought. He accordingly prayed that the conviction for murder be quashed and the death sentence be set aside, and substitute therefore a conviction for manslaughter contrary to section 195 of the Penal Code.

Mr. Juma, learned State Attorney, who represented the respondent Republic did not resist the appeal. He outrightly

conceded that it was not proved that the appellant killed the deceased with malice aforethought.

For Mr. Juma, the element of malice aforethought in the killing of the deceased was negatived by the appellant's defence which led to an inescapable inference that there was a fight or a struggle between the deceased and the appellant prior to the infliction of the fatal injury. If that was the case, he submitted, the appellant ought to have been convicted of the lesser offence of manslaughter. He cited the case of **Moses s/o Chichi** v **R** [1994] TLR 222 to bolster up his argument.

We have carefully scrutinized the entire evidence on record with a judicial mind. We cannot convince ourselves that the appellant in this appeal is hoping against hope. Evidence that the appellant was an habitual drunkard who used to get home late after his drinking sprees was let in by the prosecution. It was also the prosecution which led evidence to prove that on the material night, at late hours, the appellant was conducting himself abnormally in his room. There was evidence that after the appellant had hit the

deceased he neither ran away nor made attempt to hide the assault weapon. He remained there alone with the weapon in his hands and his injured landlord until the prosecution witnesses arrived at the scene. Since nobody witnessed the appellant hit the deceased, if he had any ill motive he would have disposed of the spring and returned to his room.

We are aware that it is a settled principle of law that motive can be considered when weighing the prosecution case [see, for instance, **R** v **K. Tindikawe** (1940) 7 EACA 67]. However, we are settled in our minds that going by the reasons given by Mr. Kimomogoro, motive was not appropriately invoked in this case. We are increasingly of the view that the established facts are not consistent with the existence of malice aforethought. The appellant might have been drunk as usual. It does not add up that a person in full control of his mental faculties would wake up in the dead of night and alone in his room begin to make noises disturbing other peoples' tranquility.

In the case of **R** v **D. H. Retief** (1941) 8 EACA 71 it was held that as a general proposition drunkenness is no excuse for a crime and that insanity whether produced by drunkenness or otherwise is a defence to the crime charged. It was further held therein that if insanity is not established, killing by a drunken person is either murder or manslaughter. It will be murder if an intent to cause death or grievous harm is established. But if it be found that by reason of intoxication the accused was incapable of forming such intent the offence is manslaughter. **Retief's** case was cited and followed by this Court in **Saidi Kipanga Pole** v **R**. Criminal Appeal No. 28 of 1991. Having considered the entire evidence and all the circumstances in this case we are persuaded to believe that the appellant might have been somehow drunk and did not have the necessary intent to murder or cause grievous harm. This aspect of the case, then, ought to have been considered by the learned trial judge and a direction to that effect given to the assessors.

Even if the appellant was not drunk, he had another probable good defence to the charge of murder, which was never considered by the learned trial judge. We agree with Mr. Juma on his

submission that from the evidence on record it is more than probable that a fight between the deceased and the appellant preceded the infliction of the fatal blow. This is evident from the evidence of the appellant. He categorically stated that he was fighting with two invaders who had burst into his room. That the deceased went to the appellant's room and might have knocked on the door is obvious from the evidence of PW2.

PW2 testified, in an evasive manner in our view, that when they were awakened by noises of the appellant she requested the deceased to escort her to the toilet. Then she went on to say:-

> *"….. As we were going out my husband urged Stanley to keep quiet. Stanley opened the door and continued to make noises. I decided to summon my brother in law who was living nearby. He is Obedi Solomoni. I woke him up ….."*

The evidence of PW2 is silent on what prompted her to go and call PW3. Mere noises of the appellant could not have been the cause. If she could not go to the toilet alone unless accompanied by

the deceased, what happened to give her courage to go out and cover a distance of over 60 meters to enlist the help of PW3? It was something more than the appellant's noises. The appellant and the deceased were actually engaged in a fight. In the course of the fight the appellant hit the deceased on the head causing him to suffer injury on the head which at first sight appeared to be superficial. That is why the deceased was treated and discharged immediately.

If the appellant inflicted the fatal blow in the course of a fight, as we honestly believe, then as correctly argued by Mr. Juma, he ought to have been found guilty of the offence of manslaughter. See the decisions of this Court in **Juma G. Timbulu** v **R,** Criminal Appeal No. 27 of 1991 and **Moses Chichi** v **R,** [1994] TLR 222 on the issue. In the case of **Juma Timbulu** (supra) this Court said:

> *"Given the possibility that the death occurred in the course of a fight, along with the fact that the appellant was then in drink, we are a bit uncertain that the appellant's assault was accompanied by a murderous intent ….."*

In **Tunutu's** case (supra) the Court was more unequivocal. It held that where death occurs as a result of a fight an accused person should be found guilty of the lesser offence of manslaughter and not murder.

We reaffirm what was stated by this Court in the above two cases. Had the learned trial judge directed the assessors and himself on this fact he definitely would have held that the assault on the deceased ***"was not accompanied by a murderous intent"***, i.e. malice aforethought. We accordingly allow this appeal by substituting the conviction for murder with one for manslaughter. The sentence of death is set aside. Considering the fact that the appellant has been in custody for exactly nine years now, we impose a sentence of three (3) years imprisonment from the date of conviction, i.e. from 30th June, 2005. It is so ordered.

DATED at ARUSHA this 8th day of November, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR

Delivered under my hand and Court Seal in Open Court/Chambers at

..... this ..... day of ..... 2007.

.....
DEPUTY REGISTRAR