IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 313 OF 2015

CHRIZANT JOHN..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Judgment of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

Dated the 26th day of June, 2015
in
Criminal Session No. 55 of 2014

JUDGMENT OF THE COURT

18th & 24th February, 2016

MMILLA, J. A.:

Chrizant John was arraigned before the High Court of Tanzania at Bukoba for the offence of murder contrary to section 196 of the Penal Code Cap 16 of the Revised Edition, 2002. He was alleged to have murdered Agatha w/o John. He was tried, convicted and sentenced to the mandatory death sentence. He was aggrieved, hence the present appeal to this Court.

The background facts of the case were fully and clearly set out by the learned trial judge, but we feel that it is indispensable to recap them, albeit very briefly, especially in so far as they are relevant to this appeal.

On 2.1.2010 at around 6.00 pm, Veronica d/o John (PW1) and her mother, Agatha w/o John (the deceased) were in their family house at Ilemela

village in Muleba District. Around that time, the appellant arrived at their house armed with a machete and asked: **"Mbwa za hapa ziko wapi?"** Literally translated it meant "**Where are the dogs which belong here?"** As PW1 turned to look at him, the appellant attacked her in the head with the machete. He then turned to, and attacked the deceased who was seated near PW1. Again, the machete landed in the deceased's head thereby inflicting a big wound. Upon that, PW1 rushed to the house of the village chairman and informed him of the tragedy that befell them and named Chrizant John, her brother, as the person who perpetrated the savage attack. Fortunately, the hamlet chairman too appeared. She informed him as well that Chrizant John attacked her and her mother, and that her mother was no more. From there she returned to the scene of crime. The alarm that was raised attracted several people to the scene of crime.

The court was also informed of the dispute over a piece of land between the deceased and the children of her two co-wives, that is the sisters and brothers of the appellant. The matter was filed in the District Land and Housing Tribunal and the deceased won the case. Execution of the decree was set on 4.1.2010, but the decree holder was killed two (2) days before that day, that is on 2.1.2010. It is on this basis that PW1 concluded that could be it was the reason why he attacked them.

The then Village Executive Officer of Ilemela village one Elizeus Tirwabahoine (PW2) reported the incident to the police after which he proceeded to the scene of crime. He said he saw the deceased, and that she had a deep cut wound in the head.

Upon receiving information of that incident, on 3.1.2010 PW3 A/Insp. Angelo, accompanied by Inspector Saleh, F.224 DC Hamisi and PW4 Doctor Florance Kayungi, proceeded to the scene of crime. He inspected the scene of crime, had the autopsy conducted by PW4 and drew the sketch map of the scene of crime. Also, he went to the home of the suspect but did not find him. He found however, that he was at large. He recorded statements of some of the witnesses and returned to Muleba Police Station. Efforts to trace the suspect commenced.

On 18.4.2011 PW3 received information that the suspect was seen in his village at Ilemela. They organized themselves and went to the appellant's home on 19.4.2011 at midnight and succeeded to arrest him. He was subsequently charged with murder.

On his part, the appellant protested his innocence. He said on 2.1.2010 around 3:00 pm, he and his friend one James Washangira left for the Islands where they were regularly engaging in fishing and returned on 21.3.2011. He

contended therefore that PW1 invented a huge lie that he executed the said killing.

On the day of hearing of this appeal the appellant who was also in attendance, was represented by Mr. Aaron Kabunga, learned advocate, while the respondent Republic had the services of Mr. Hashim Ngole, learned Principal State Attorney. His stand was clear that he was supporting conviction and sentence.

Two sets of memoranda of appeal were filed in this regard; the first one was filed by the appellant himself on 27.1.2016, and the second set was filed by Mr. Kabunga on behalf of the appellant on 16.2.2016. At the commencement of hearing, Mr. Kabunga prayed to abandon the grounds which were filed by the appellant, thus remaining with the second set thereof. We granted the prayer.

The grounds of appeal which he filed on 16.2.2016 were as follows:-

1. That the honourable trial judge of the High Court erred in law when he convicted the appellant in an unfair trial which violated the mandatory provisions of section 293 (2) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 **(the CPA).**
2. That the honourable trial judge of the High Court erred in law when he proceeded with the defence case while there was no court order to close the prosecution's case.

3. That the honourable trial judge of the High Court erred in law to receive and admit exhibits P.1 and P.2 in evidence without the same being shown to the appellant and/or read over to him.
4. That the honourable trial judge of the High Court erred when he relied on the evidence of visual identification of PW1 who was an incredible and unreliable witness.
5. That the honourable trial judge of the High Court erred for failure to accord weight the defence case advanced by the appellant.

The submissions of counsel for the parties were very brief but exceedingly strong and focused. Mr. Kabunga tackled them seriatim, and his learned friend, Mr. Ngole followed suit.

Submitting on the first ground of appeal, Mr. Kabunga contended that after the closure of the prosecution case, the trial judge of the High Court did not inform the accused the rights obtaining under section 293 (2) of the CPA as he ought to have done. He submitted that the omission was fatal because it prejudiced the appellant in a big way, such that it was not curable under section 338 of the CPA. He relied on the cases of **Maria Paskali v. Republic**, Criminal Appeal No. 18 of 2006, CAT and **Melkizedeki Mkuta v. Republic**, Criminal Appeal No. 17 of 2006, CAT (both unreported). He urged the Court to allow this ground.

As regards the second ground, Mr. Kabunga stated that the trial High Court judge erred when he proceeded with the defence before indicating that

the prosecution was closed. He contended that the omission offended the provisions of section 293 (1) of the CPA which directs that defence will follow after the close of the prosecution case. He however, while conceding that his client was not prejudiced, asked the Court to remind judges and magistrates to follow the law.

The third ground dwelt on exhibits P.1 and P.2 (the post mortem report and sketch map respectively) which Mr. Kabunga said were tendered and admitted in court as evidence without showing them and reading them in court to give him the chance to know their contents. On this point, he relied on the case of **Kanuda Ngasa @ Kingolo Mathias v. Republic,** Criminal Appeal No, 247 of 2006, CAT (unreported). He requested the Court to expunge those exhibits.

In the fourth ground of appeal, Mr. Kabunga's main concern was the credibility and reliability of the evidence of PW1. He submitted that PW1 was not a truthful witness, and that her evidence regarding identification ought not to have been believed and relied upon. Depending on the case of **Chacha Pesa Mwikwabe v. Republic**, Criminal Appeal No. 254B of 2010, CAT (unreported), Mr. Kabunga stressed that the trial court ought to have satisfied itself that there were no possibilities of mistaken identity before it relied on the evidence of PW1, but it did not do so.

M. Kabunga pin-pointed a number of areas tending to show that PW1 was untruthful, hence an incredible and unreliable witness. That includes her uncertainty in respect of the time when the appellant allegedly executed the fatal attack on her and her deceased mother; the exact words which the attacker allegedly uttered, that is whether she said ***"Mbwa za hapa ziko wapi,"*** or that ***"Mbwa za hapa zipo?."*** Similarly, Mr. Kabunga submitted that at first PW1 said she and her mother were alone at the time of the attack, whereas she later on said when cross examined by the third assessor that there were neighbours. In Mr. Kabunga's submission, that raises doubt because none of them were called to testify. Similarly, Mr. Kabunga contended that she lied when she said she reported the incident to the village and hamlet chairpersons because none of them were called to testify. Further, PW1 testified that the appellant threatened PW6 Doroster Bukambo when he saw her in the farm in dispute but the latter did not support her claim. Mr. Kabunga concluded that the trial court ought to have resolved those contradictions in favour of the appellant, and declare PW1 a liar. He referred the Court to the case of **Maseru Mwita @ Maseke & another v. Republic**, Criminal Appeal No. 63 of 2005. He pressed the Court to allow this ground.

The fifth ground of appeal alleges that the trial court did not accord deserving weight to the defence case advanced by the appellant. Mr. Kabunga

submitted that the trial court did not assign reasons on why it discarded or disbelieved the defence evidence. He cited to us the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 363 in which the Court held that every witness is entitled to be believed unless there are cogent reasons to the contrary. He submitted that the testimony by the appellant that he respected the deceased and had no any dispute with her ought to have been taken into consideration.

Over all, Mr. Kabunga requested the Court to hold that the evidence as a whole was insufficient, weak and unreliable. He pressed the Court to allow the appeal.

On his part, Mr. Ngole submitted on the first ground of appeal that failure by the trial court to comply with section 293 (2) of the CPA was not a fatal omission because the deserving rights were conveyed to the appellant by his advocate. He relied on the case of **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006, CAT (unreported) in which the Full Bench of this Court stated that the important thing in such circumstances is whether injustice can be said to have resulted. He submitted therefore that the cases of **Melkizedeki Mkuta v. Republic** (supra) and **Maria Paskali v. Republic** (supra) were distinguishable. He pressed the Court to dismiss this ground.

As regards the second ground of appeal, Mr. Ngole conceded that the court did not indicate that the case was marked closed. He submitted however, that there is no such requirement under section 293 (1) of the CPA. More important, he contended, even where it was to be said it was an omission, it cannot be said that it occasioned miscarriage of justice. He asked the Court to dismiss this ground too.

The third ground queries that the trial court wrongly received and admitted exhibits P.1 and P.2 in evidence without the same being shown to the appellant and/or read over to him. Mr. Ngole submitted that this complaint too is baseless because the Republic called PW4 Florence Kayungi, the doctor who had conducted autopsy, and that the evidence of that witness dwelt on exhibit P1. He said the witness explained in detail the deceased's cause of death and were given a chance to cross-examine her. So also is the question of the sketch map because PW3 Insp. Angelo was called to testify and explained the contents of that document. In the circumstances, Mr. Ngole contended that the case of **Kanuda Ngasa @ Kingolo Mathias v. Republic** (supra) is distinguishable. He asked the Court to find this ground baseless.

Coming to the fourth ground, Mr. Ngole was forceful that PW1 was a truthful, credible and reliable witness. He submitted that PW1 told the trial court that the attack took place at 6.00 pm before sun set. He also pointed out

that PW2 said he received information of Agatha's death around 7.00 pm, meaning that deceased's death occurred before that time. He similarly referred the Court to the evidence of PW7 who said at page 31 of the Court Record that PW1 informed them of that incident at 6.00 pm when there was still day light. As such, he submitted, the conditions at the scene of crime were favourable for correct identification. He referred the Court to page 64 of the Court Record in which the trial judge put the aspect quite clearly to the gentlemen and lady assessors, so also the responses of the assessors on pages 65 and 66 of that record.

On the complaint that there was contradiction regarding PW1's account on the words purported to have been uttered by the appellant, Mr. Ngole said the difference was very little, and at most it was a question of semantics.

There is one more point on which Mr. Ngole depended on; he said that PW1 named their assailant at the earliest opportunity, which he said is an all important factor. He cited the cases of **Marwa Wangiti Mwita and another v. Republic** [2002] T.L.R. 39 and **Sijali Juma Kocho v. Republic** [1994] T.L.R. 206. He stressed that PW1 was a credible witness. He referred us to the case of **Salum Ally v. Republic**, Criminal Appeal No. 106 of 2013, CAT (unreported) in which the Court expressed the factors to be taken into consideration in deciding whether or not any particular witness is credible.

Mr. Ngole contended also that the evidence of PW2 that if execution was going to be carried out there would be bloodshed is equally important because it threw light on why the killing happened. So, regardless of the fact that the appellant was not a party to the case before the District Land and Housing Tribunal, the fact that he escorted his sisters to the office of PW2 at which he uttered those words is clear evidence that the matter disturbed him as well. This is especially so when it is taken together with his utterance that ***"Mmemwandaa nani kupika wali"*** which, in Mr. Ngole's submission connoted that all was not well. Mr. Ngole added that even, the appellant's statement to PW6 that ***"Unatafuta nini kwa shamba"*** was a sort of rebuke because he could not have asked PW6 if he was least concerned with that farm as he purports. He urged the Court to dismiss this ground too

Mr. Ngole submitted in respect of the fifth ground that the appellant's defence was considered but the trial court rejected it because it did not create any doubt. He referred the Court to pages 92 and 93 of the Court Record. Aware though that the appellant had no such duty, Mr. Ngole wondered why the appellant did not call James Washangira to concretize his defence of alibi. He cited the case of **Sijali Juma Kocho v. Republic** (supra). Mr. Ngole prayed the Court to dismiss the appeal in its entirety.

In a brief rejoinder Mr. Kabunga asked the Court to regard the statement ***"Unatafuta nini kwa shamba"*** as having been more friendly than threatening as purported by his learned friend Mr. Ngole. This is especially so, he submitted, when the testimony of PW6 at page 28 is taken into consideration when she said the appellant was not wrong to ask her why she was in that shamba.

We have carefully gone through the proceedings and judgment of the trial court, the grounds of appeal and the able submissions of learned counsel for the parties. Like they did, we desire to discuss them in the order they appear.

The first ground centre on the provisions of section 293(2) of the CPA which stipulates the rights of the accused person after being found by the trial court that the accused has a case to answer. We begin by stating that the broad purpose of that section is essentially to let the accused know that he has the right to defend himself. That includes the manner in which to do so, as well as the right to call witnesses, if any.

In our present case, the appellant's rights obtaining under section 293 (1) of the CPA were communicated to him. At page 35 of the Court Record his advocate was recorded to have said that:-

"Mr. Kabunga – Defence counsel

My Lord the accused will give sworn evidence and we have one witness. However I pray for a brief adjournment so that I can communicate with my client . . ."

This being the position we agree with Mr. Ngole that the cases of **Melkizedeki Mkuta v. Republic** (supra) and **Maria Paskali v. Republic** (supra) are distinguishable. We are saying so because in **Melkizedeki Mkuta's** case, the conclusion was arrived at after the Court sided with the appellant's advocate that his client's rights under that section were completely ignored which is different from what transpired in the present case. On the other hand, the case of **Maria Paskali** is distinguishable because no facts were provided which influenced the Court into reaching the conclusion that the omission was fatal and resulted into unfair trial. We thus find and hold that no injustice was occasioned in the circumstances of the present case – See the case of **Bahati Makeja v. Republic (supra)** where the Full Bench of this Court stated at page 7 that:-

"It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned.

In the current matter there was no injustice occasioned in any way at all. ***It is palpably clear to us that the learned Judge must have addressed the accused person in terms of s. 293 of the CPA and that is why the learned advocate stood up and said that the accused person is going to defend himself on oath.*** *But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply."* [Emphasis provided].

As such, the first ground is devoid of merit and we dismiss it.

The second ground should not unnecessarily detain us. While we appreciate that the trial court did not indicate that it marked the case closed, we hasten to say that actually that is not one of the requirements under section 293 (1) of the CPA that the trial court must record that the prosecution case is marked closed, though we think it is good practice to indicate as such. At any rate, the omission did not occasion any injustice to the appellant because the trial was carried to its conclusion and the appellant defended himself. Save for the remark we have made, this ground too is baseless and we dismiss it.

The third ground of appeal challenges that the trial court wrongly received and admitted exhibits P.1 and P.2 in evidence without the same being shown to the appellant and/or read over to him.

We begin by appreciating, as did Mr. Ngole that the Court Record is silent on whether exhibits P1 and P2 were shown and/or read to the appellant at the time they were tendered and admitted in court. The rule in such situations is that where any document is tendered and admitted in court as an exhibit without being shown or read in order to afford him chance to know its contents, such omission is fatal and may attract the Court to expunge them - See the cases of **Sumni Amma Awenda v. Republic**, Criminal Appeal No. 393 of 2013 and **Sprian Justine Tarimo v. Republic,** Criminal Appeal No. 226 of 2007 (both unreported).

In the circumstances of the instant case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayungi, the doctor who conducted deceased's autopsy, and because the evidence of that witness capitalized on exhibit P1 and he explained in detail the deceased's cause of death, also that his advocate was given chance to cross-examine her, it cannot be accepted that the appellant was denied opportunity to know the contents of exhibit P1. So also is the question of the sketch map because PW3 Insp. Angelo was called to testify and clarified/explained the contents of that document. In

the premise, we agree with Mr. Ngole that the case of **Kanuda Ngasa @ Kingolo Mathias v. Republic** (supra) is distinguishable because such steps were not taken in that case. Thus, this ground too lack merit and is dismissed.

In the fourth ground, Mr. Kabunga strenuously leveled attacks on the testimony of PW1 which he said was not worth a belief. He pointed out three aspects; **one** that the conditions at the scene of crime were not favourable for positive identification; **two** that her testimony was full of contradictions which were not resolved by the trial court; and **three** that she was not a credible witness. The question we asked ourselves is; were the conditions at the scene of crime favourable for positive identification?

The law on visual identification is settled. There are several decisions made by this Court which emphasized that the evidence of visual identification is of the weakest kind and no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight - See **Waziri Amani v. Republic**, [1980] TLR 250 and **Raymond Francis v. Republic,** [1994] TLR 100 and **Chacha Pesa Mwikwabe v. Republic** (supra).

In our present case, the evidence of PW1 was that the appellant arrived at the deceased's house at 6.00 pm and immediately launched the

attack. This witness said at that time around the sun had not yet set, therefore that she clearly saw and identified their attacker, especially so because he was a person familiar to her because he was her younger brother as they shared their father – See the case of **Eva Salingo and others v. Republic** [1995] T.L.R. 220. We similarly go along with Mr. Ngole that the testimony of PW1 that there was still sunlight was corroborated by PW7 who stated that PW1 informed them of that incident at 6.00 pm. He was clear that at that time there was light because the sun had not set. So also the evidence of PW2 who testified that he received information about Agatha's death around 7.00 pm, which meant the incident, occurred sometime before that time. We also agree with Mr. Ngole that the door of their "teitei" house was wide open because it could not have been possible for PW1 and her mother to shell beans in darkness, therefore that the light extended in their house enabling her to identify the appellant.

Mr. Kabunga submitted that according to the geographical environment of Kagera region at that time around in January, it was already dark. Mr. Ngole refuted that assertion and referred us to the opinion of the assessors after the trial judge's guidance to them on the

point during summing up. We agree with Mr. Ngole. At page 64 of the Court Record, the judge said:-

> "Gentle assessors you also heard the defence with regard to identification whether the accused was properly identified. There is the issue of light inside the house whether there was ample light to enable proper identification you have heard the witness describing the nature of the house where the deceased as well as PW1 were assaulted. But also there is issue of light of the sun and at what time sunset.
>
> Gentle assessors I am sure you are familiar with the geographical environment of Kagera region and Muleba District in particular as at what time the sun sets and when darkness begins especially in the month of January. For this I expect you to advice me accordingly."

In response to that point the gentle **assessors opined in common at pages 65 and 66 that at about 6.00 pm there was still ample light and the sun had not set, therefore that PW1 properly identified the accused.**

Another point is that when PW1 went to report the incident to the village chairman and PW7, she readily named Chrizant John as the person who attacked them. In our view, that was consistent with her

reliability – See **Marwa Wangiti and another v. Republic** (supra) in which the Court stated at page 43 that:-

> *". . . The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry . . ."*

On the basis of the above evidence from PW1 which was corroborated by PW2 and PW7, also when the opinions of the assessors are taken on board, we agree with Mr. Ngole that the condition at the scene of crime was conducive for positive identification.

Next to be considered is the allegation that the evidence of PW1 was characterized with contradictions which eroded her credibility. As already pointed out, the said contradictions related to either contradiction in respect of her own evidence or her evidence ***vis a vis*** that of the other witnesses.

We wish to state the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not

always make a blow by blow mental recording of an incident. As such, contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case. In **Dikson Elia Nsamba Shapwata & another v. Republic,** Criminal Appeal No. 92 of 2007, CAT, (unreported) the Court said that:-

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter".*

It would seem to us that the complained of contradictions in the present case are minor ones. The first allegation is that PW1 was not sure of the exact words that the attacker uttered, that is whether she said ***"Mbwa za hapa ziko wapi,"*** or that ***"Mbwa za hapa zipo."*** A look at the complaint in this regard attracts us to agree with Mr. Ngole that the difference of these two sets of words is very little; at most it is a question of semantics. If at all, it was a negligible contradiction.

The other complaint that PW1 said at first she and her mother were alone at their home at the time of the attack whereas she later on said in cross examination by the third assessor that there were neighbours. This was similarly not a serious contradiction. After all, Mr. Kabunga did not suggest nor did the facts suggest any prejudice that was caused thereof. In short, the complaint by Mr. Kabunga that the evidence of PW1 was loaded with unresolved contradictions has no substance at all. We accordingly reject them.

We now embark to discuss the issue whether PW1 was an incredible witness as submitted by Mr. Kabunga.

We crave to express first the general view that questions of credibility of witnesses, the weight of their evidence and sufficiency of evidence cannot be determined by rules of thumb. It depends largely on common sense, logic and experience. In **Salum Ally v. Republic** (supra) the Court said:-

> "... on whether or not any particular evidence is reliable depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness' testimony is plausible or is in harmony with the preponderance of

probabilities which a practical and informed person would readily recognize as reasonable in the circumstances pertaining in a particular case. The test any credible evidence is supposed to pass were best summarized by the Court in the case of **Abdalla Teje @ Malima Mabula v. Republic, Cr. Appeal No. 195 of 2005, CAT** (unreported) as follows:-

(i) Whether it was legally obtained,

(ii) Whether it was credible and accurate,

(iii) Whether it was relevant, material and competent, and

(iv) Whether it meets the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or strength or believability."

The above principle will guide us in the present case on the point.

Mr. Kabunga complained in this regard that PW1 was not a credible witness because there were aspects which showed that she was a liar. For example, Mr. Kabunga alleged that PW1 lied when she said she reported the incident to the village and hamlet chairpersons but those two officials were not called to testify. Also, he said that PW1 lied when she said the appellant threatened PW6 Doroster Bukambo when he saw her in the farm in dispute

because the latter did not support her on the point. It is on this basis that he invited us to find that PW1 was a liar, thus incredible.

We hurry to point out that we are not a shed convinced that PW1 lied that she reported the incident to the village and hamlet chairpersons, or when she said the appellant threatened PW6. Firstly, the prosecution had called PW7 who was the hamlet chairman and he testified in court that indeed PW1 informed him and the village chairman that the appellant attacked them at their family house. Thus, the allegation by Mr. Kabunga is baseless.

On the other hand, the fact that PW6 did not support PW1 that the appellant threatened the former at the time the latter found her in the shamba in dispute is not well grounded because PW6 testified that upon being asked "Unatafuta nini kwa shamba" she felt bad and left. As submitted by Mr. Ngole, PW1 did not err in saying that PW6 was threatened. As such, it cannot be said PW1 was a liar to induce the Court to doubt her credibility as suggested by Mr. Kabunga. After all, these are trivial matters, to say the least. Thus, we are convinced that PW1 was a truthful, believable and reliable witness. This complaint too is baseless.

Over all, we find and hold that we have no reasons to fault the findings of the trial court regarding the credibility of Veronica John. In the circumstances, the fourth ground too lack merit and we dismiss it.

We now proceed to tackle the fifth ground. The complaint in this ground is that his defence was not accorded weight it deserved.

In essence, the appellant's defence before the trial court was that he was not at his home village at 6.00pm on 2.1.2010 when the incident leading to the death of Agatha w/o John occurred. He alleged to have left on that same day at 3.00 pm for the Islands where he and his friend James Washangira used to engage in fishing activities. Mr. Ngole did not agree with his learned friend Mr. Kabunga that the appellant's defence was not considered. We agree with him. The appellant's defence was considered by the trial court but was rejected. At page 92 to 93 of the record the trial court stated that:-

> *"...The accused alleged to have left Ilemela village on Monday dated 02/01/2010, but in (the) 2010 calendar, January had no Monday dated 02/01/2010, that date was Saturday. It was submitted by the learned state attorney that earliest Monday of January 2010 was 04/01/2010. Then he left two days after the incidence (sic) but if he left on 02/01/2010 then it was on the date the incidence (sic) occurred. The accused stated that in his defence which import (the) defence of alibi. But (as) it was rightly argued by the learned state attorney, the accused did not fulfill the legal requirement of filing a*

prior notice that he will rely on the defence of alibi, Pursuant (sic) to S. 194 of the Criminal Procedure Act Cap. 20 RE. 2002, although as a matter of law the accused need not to prove his alibi. If the accused left Ilemela village to the islands, for fishing on Monday it is obvious that he was present at Ilemela village on 02/01/2010 as well as on 03/01/2010 the date (the) deceased was buried but he did not attend."

In short, the trial court said it did not believe his defence of alibi because it did not cast any doubt on the prosecution case. We are entirely in agreement with that court.

Even, while we appreciate that the appellant had no duty of proving his defence of alibi, we are however, of the settled mind that since he named his friend one James Washangira to have accompanied him to the Islands, he ought to have called him to testify on his side in order to boost up his defence – See the cases of **Tongeni Naata v. Republic** [1991] T.L.R. 54, **Sijali Juma Kocho v. Republic** (supra) and **Otto Kalist Shirima v. Republic,** Criminal Appeal No, 234 of 2008. To have not done so left his defence weak and unbelievable.

The appellant similarly stated in his defence that he had no cause to kill the deceased because he respected her very well and had no conflict or any grudges against the deceased and PW1.

We are not going along with Mr. Kabunga on this point because there are aspects which indicate that the appellant was not truthful in saying that he was in harmony with the deceased and PW1. Firstly because he himself said at page 37 of the Court Record that the previous house in which the deceased and PW1 were living fell and had to be rebuilt. At the time when their house had fallen, the two were staying in the house of the appellant's mother built of bricks. After their house was rebuilt they refused to immediately go back to their ***"teitei"*** house. The appellant said he had to force them to vacate from his mother's house something which angered the deceased and as a result they disliked him. Therefore, he cannot be heard to say he was in harmony with the deceased and PW1.

On the other hand, there was a dispute between the members of the family over the shamba which was in the deceased's possession and use. As already pointed out, that shamba was a subject of the case before the District Land and Housing Tribunal. Evidence had it that the deceased won the case and at the time of her death she was awaiting execution to be carried out which was sat on 4.1.2010. According to PW2, though the

appellant was not a party to that case, there was a time when he and her sisters went to his office and objected for execution to take place. At page 16 of the Court Record the appellant is recorded to have told PW2 that if the objection was not honoured on the date of the execution, there was going to be bloodshed. This explains why in the evening on the day of the incident before 6.00 pm he asked PW1 ***"Mmemwandaa nani kupika wali"*** which was interpreted to mean all was not well. This line of defence too was considered but rejected. Thus, the fifth ground too lack merit and we dismiss it.

Remaining is the question of malice. We do not hesitate to say that malice was very clear on the face of the evidence of the prosecution basically because the fatal wound was inflicted with the use of machete which no doubt was a lethal weapon. Besides, the said machete landed on the head which was a venerable part of the body. In our firm view, that constituted malice aforethought - See the case of **Enock Kipela v. Republic** Criminal Appeal No. 150 of 1994, CAT (unreported) in which the Court said that:-

> *"....usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any*

used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

In conclusion, we find that this appeal as a whole is devoid of merit and we dismiss it in its entirety.

Dated at **Bukoba** this 23rd Day of February, 2016.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL