**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUGASHA, J.A., MWANGESI, J.A., And KWARIKO, J.A.)**

**CRIMINAL APPEAL NO. 185 OF 2017**

**FRANCIS ALEX ---------- APPELLANT**

**VERSUS**

**THE REPUBLIC ---------- RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania**
**Dar es Salaam District Registry,**
**sitting at Morogoro)**

**(Dyansobera, J.)**

**dated the 29th day of May, 2017**
**in**
**HC Criminal Sessions Case No. 57 of 2009**

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**JUDGMENT OF THE COURT**

**25th & - July, & 1st August, 2019**

## MWANGESI, J.A.:

In the High Court of Tanzania Dar es Salaam District Registry sitting at Morogoro, the appellant herein was indicted for trial with the offence of murder contrary to the provisions of section 196 of the Penal Code, Cap 16 of the Laws Revised Edition of 2002 (**the Code**). It was the case for the prosecution/Republic that on the 21st day of June, 2007 at about 18: 00 Hours, at Mgata village within the District and Region of Morogoro, the appellant murdered one Jackson s/o Leopold. The appellant protested his innocence when the information was read over to him.

In order to establish the guilt of the appellant, the prosecution/Republic paraded a total number of about five witnesses namely; Theopista Thobias (PW1), Evarist Isidory (PW2), Lazarus Abias Benedict (PW3), Nicholaus Hussein (PW4) and Assistant Inspector Paschal Simba (PW5). The oral testimonies of the named witnesses were supplemented by two exhibits that is, a post mortem examination report (exhibit P1), and a sketch plan of the scene of crime (exhibit P2).

Subsequent to the trial which was conducted by the learned trial Judge, who was aided by three gentle assessors, the appellant was found to be culpable of the charged offence, and as a result, he was sentenced to the statutory penalty of death by hanging. Aggrieved, the appellant has come to this Court, armed with four grounds of grievance challenging the finding of the trial court. The first three grounds of the memorandum of appeal, were lodged by the appellant on the 6th day of January, 2018, while the fourth ground was lodged in the supplementary memorandum of appeal, which was lodged on the 16th July, 2019. They read:

1. *That, the trial Court erred in law and fact when it convicted the appellant basing on circumstantial evidence which does not form (sic) chain of events to warrant conviction of the appellant*
2. *That, the trial Judge, erred in law and fact when he convicted the appellant without considering that there was no connection of facts to prove beyond reasonable doubt that it was the appellant who was the last person to be with the deceased on the material time.*
3. *That, the trial Judge, convicted the appellant basing on grave suspicion while the law is direct that however strong the suspicion is, it cannot ground conviction.*
4. *That, the conviction of the appellant by the trial Court, was grounded on a charge or information which was incurably defective.*

Before engaging ourselves in considering the merits or demerits of the appeal, we think, it is incumbent albeit in brief, to give the facts giving rise to the decision which is the subject of this appeal, as could be gleaned from the testimonies of the witnesses who testified before the trial Court.

The tale of the facts was introduced by the testimony of PW1 the mother of the deceased, who informed the Court that at the time when the incident occurred, she was residing at the village of Mgata within the District and Region of Morogoro. On the 21st June, 2007 during evening time, while returning from shamba work in the company of her son who is the deceased, they met the appellant who was their neighbour, adjacent to their homes. From there she proceeded towards her home, while her late son remained with the appellant, with whom they moved to the appellant's home.

PW1 narrated further to the effect that, after having prepared food at her home, she went to look for the deceased so that he could go to take his dinner. Nonetheless, he was nowhere to be traced. And, when she inquired from the appellant in regard to his whereabouts, the response which she got was that he had gone to search for small birds in the banana plantation, which had been his hobby. After her efforts to locate the deceased had proved barren, she reported the disappearance of her son to PW2, who was the ten cell leader of the location.

According to PW2, after PW1 had reported to him the disappearance of her son, he summoned other members of the location and mounted a

search, which started in the bush where there were some bird traps to no avail. And, when they went to the appellant's home to inquire more on the whereabouts of the deceased, he was not cooperative in answering the questions which were put to him. Such behaviour of the appellant notwithstanding, they continued to search in the appellant's compound and in the course, they managed to spot some fresh blood trails leading to the pit latrine of the appellant. At that juncture, he the witness, resolved to go and call PW3, who was the Village Executive Officer, to go and assist them in tracing the deceased.

On his part, PW3 informed the trial Court that following the report made to him in regard to the disappearance of the deceased, he arrived at the scene of crime on the 22nd day of July, 2007 at about 05: 00 Hours. At the same he was told that a child (deceased) had gone missing under mysterious circumstances. At the material time, the appellant had been put under arrest as a suspect whereby, both of his hands and legs had been tied with a rope. He ordered for his release and together with the appellant and other villagers, they trailed the blood marks which led them to the pit latrine. When they checked inside the pit latrine, they managed to see a T-

shirt belonging to the appellant, which was blood stained. On asking the appellant about it, he gave no answer.

PW3 went on to inform the trial Court that, their further search in the compound of the appellant, enabled them to locate an area with fresh soil. When the said area was dug up, they retrieved an object wrapped with two T-shirts, one being with strips and the other one of cream colour. On being closely examined, the said object was found to be a head of human being, which had been severed from the trunk. The same was identified by PW1 to be that of his son. It was deposed further by the witness that, at a later moment the trunk of the body of the deceased, was also discovered within the same area of the Compound of the appellant, buried under the soil. Since it had been stated earlier by PW1 that before his appearance, the deceased had been left with the appellant in good health, the appellant was associated with what had befallen the deceased and hence, charged with the offence of murder.

The story from the appellant on the other hand, was to the effect that even though Mgata Village was his home village, he was not permanently staying there, because his business was being conducted at Kihonda within Morogoro Municipality. He only used to visit his home

village for some time. He narrated further that on the fateful date, he had indeed been at Mgata village, where he had gone to visit his relatives. The appellant, as well acknowledged to know PW1 as well as her deceased son, because they were related to him. On the material date that is, the 21st July, 2007 he spent the whole day working in a farm situated at Viseri area, which is a walking distance of about forty - five minutes from Mgeta village. At the same, he was in the company of his brother one Stephen Alex. They remained there until at about 18: 30 Hours, when they returned to the village. Back at the village, he remained at his home until at about 23 00 Hours, when people being led by the ten cell leader (PW2), visited his home and implicated him with the allegations that, he was behind the disappearance of the deceased, a thing which he had no any idea.

The appellant strongly distanced himself from the allegations that he was behind the death of the deceased. He as well strenuously resisted the contention by PW1 that, there was a point in time wherein he remained with her son who is now dead, because at the alleged period of time, he was at Viseri area working in the shamba with his brother. The account by the appellant was corroborated by Stephen Alex, who happened to be his brother and gave his testimony as DW2.

As earlier pointed out above, after a full trial of the case, the learned trial Judge, was convinced beyond doubt that the version from the prosecution/Republic witnesses, was cogent, and as a result convicted the appellant to the charged offence of murder and sentenced him accordingly.

At the hearing of the appeal before us, Mr. John Mnaku Bonaventura Mhozya, learned counsel, entered appearance to defend the appellant whereas, Ms. Clara Charwe, learned State Attorney, appeared to represent the respondent/Republic. In amplifying the grounds of appeal, we required the learned counsel for the appellant to start with the supplementary ground of appeal for the reason that, it was founded on a point of law of which if sustained, could dispose of the entire appeal.

On taking the floor, Mr. Mhozya submitted that, that the charge laid at the door of the appellant as reflected at page 1 of the record of appeal as well as the information appearing at pages 26 and 27 of the record of appeal, are defective for the reason that, some essential ingredients of the offence of murder were missing. He argued that according to section 196 of **the Code,** which creates the offence of murder, the offence is said to have been committed if the killing is done with malice aforethought. Since

both in the charge sheet as well as in the information, the words 'malice aforethought' do not feature, then their omission was fatal as the particulars of the offence failed to clearly inform the appellant, the ingredients of the offence which he was facing. To bolster his argument, Mr. Mhozya, referred us to our previous decision in **Mussa Mwaikunda Vs Republic** [2006] TLR 174. To that ultimate, he urged us to nullify the proceeding and set the appellant at liberty.

It was also noted from the record of appeal that, at the time when the learned trial Judge, was giving a ruling as to whether the appellant had a case to answer or not following the closure of the prosecution case, he used the following words as reflected at page 66 of the record of appeal that is:

> *"With the available evidence,* ***I am satisfied that there is evidence that the accused committed the charged offence of murder****. This finding is made under subsection (2) of section 293 of the Criminal Procedure Act."* [Emphasis supplied]

When the learned counsel for the appellant, was probed by the Court as to whether the bolded words in the excerpt quoted above, had any adverse effect to the appellant or not, his answer was in the affirmative. In

the firm view of Mr. Mhozya, the learned trial Judge, pre-determined the guilt of the appellant to the charged offence of murder before hearing his defence. He submitted further that the effect of the position exhibited by the trial Judge, was to vitiate the entire proceedings as there was no fair trial to the appellant. As a result, he urged us to nullify the proceeding. And regard being had to the time which the appellant has remained behind bars, he reiterated his previous prayer that, the appellant be set free from prison.

With regard to the other three grounds of appeal, Mr. Mhozya argued them together. He submitted that there was no witness among the five who were called by the prosecution, who claimed to have eye-witnessed the appellant murdering the deceased. As such, the conviction of the appellant was wholly based on circumstantial evidence. According to him, there were two types of circumstantial evidence relied upon by the prosecution. The first type was based on trails of blood alleged to have been found at the premises of the appellant, which according to the prosecution witnesses, was of the deceased.

Mr. Mhozya, challenged this type of circumstantial evidence arguing that there were no efforts made by the prosecution, to ascertain that the

said blood was of a human being, and more so that the said human being, was none other than the deceased. The failure by the prosecution to discharge such task in the view of the learned counsel, was a gross omission which rendered the evidence of the alleged blood, to be of no any useful purpose in establishing the guilt of the appellant to the charged offence.

The second type of circumstantial evidence according to Mr. Mhozya, was that which was fronted by PW1, to the effect that the appellant was the last person left with the deceased before his dead body was found with its head severed from the trunk. The learned counsel for the appellant strongly challenged this piece of evidence by PW1, for being untrue. He contended that there was no any point in time when the appellant was left with the deceased. The period in which PW1 alleged to have left the deceased with the appellant, the appellant was not there because by then, he was working in the shamba at Viseri as corroborated by DW2. And, in the absence of other evidence to corroborate the contention by PW1, Mr. Mhozya submitted that the learned trial Judge, was at error to act on such uncorroborated testimony of PW1. To that end, the learned counsel urged

us to find merit in the appeal and be pleased to allow it and set the appellant at liberty.

The response by the learned State Attorney, in regard to the alleged defect on the charge sheet and/or information which had been advanced by her learned friend, was to the effect that, it was unfounded. According to her, the use of the word 'murder' was sufficient to inform the appellant that, the charge which he was facing, was that of causing death to the deceased 'with malice aforethought', which are the words used under section 196 of **the Code**. In her view, the word murder could not be used together with the words malice aforethought.

In regard to the quest raised by the Court concerning the ruling of the trial Judge as reflected at page 66 of the record of appeal, Ms. Charwe, was at one with her learned friend that there was indeed, pre-determination of the guilt of the appellant by the trial Judge, the effect of which rendered the proceedings a nullity. Arguing on the way forward, the learned State Attorney submitted that, since on their part they sincerely believed that there was strong evidence to support the prosecution case, she implored the Court to order for retrial before another Judge, with a different set of assessors.

When probed by the Court as to whether the available circumstantial evidence, justified an order of retrial which she was seeking, the learned State Attorney, conceded to the fact that there was failure by the prosecution, to ascertain as to whether the blood found at the compound of the appellant was of a human being or not. Nevertheless, she was of the firm view that the omission was not fatal because, there was other strong evidence from PW1, who had left the appellant with the deceased before he met his death and that, the appellant failed to give plausible explanation as to what did actually befall the deceased before meeting his death. Under the circumstances, the appellant had to be held culpable to the charged offence of murder as rightly held by the trial Judge. Basing on such cogent evidence, she sought for an order of retrial.

In a brief rejoinder, Mr. Mhozya insisted that, since it had been conceded by his learned friend that, there was deficiency in the evidence relied upon by the prosecution in establishing the guilt of the appellant, the same had nothing to do with procedural irregularity, so as to justify her prayer for an order of retrial. He therefore reiterated his prayer for nullification of the proceeding and setting the appellant at liberty.

We have three crucial issues to deliberate and determine in the light of what was submitted from either side above. They are, **first**, whether the charge/information placed at the door of the appellant was defective. **Second,** whether there was pre-determination of the guilt of the appellant by the learned trial Judge. **Third,** whether there was ample evidence from the prosecution to implicate the appellant to the charged offence of murder.

We propose to commence with the first issue, which is in regard to the propriety of the charge sheet/information. To be in a better position of appreciating it, we take the liberty of reproducing the information which was placed before the appellant, which reads as hereunder:

> ***"STATEMENT OF OFFENCE***
>
> *Murder contrary to section 196 of the Penal Code Cap. 16 of the Laws Revised Edition of 2002.*
>
> ***PARTICULARS OF THE OFFENCE***
>
> *Francis s/o Alex on the 21st day of June, 2007 at Mgata village within the District and Region of Morogoro, did murder one Jackson s/o Leonard."*

In his challenge to the particulars of the information which was read over to the appellant as quoted above, the learned counsel for the appellant referred us to the provisions of section 196 of the Penal Code, which creates the offence of murder bearing the following wording that is:

> *"Any person who, with malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder."*

The view of Mr. Mhozya was that, the use of the word 'murder' in the particulars of the offence, without inserting the words 'malice aforethought', did not convey a proper information to the appellant so as to understand correctly that, he was facing an offence of having intentionally killed a fellow human being. With due respect to the learned counsel, we are unable to sail with him in the same boat. The word 'murder' is defined in the Wikpedia to mean:

> *"an unlawful killing of another human without justification or valid excuse especially, the unlawful killing of another human with malice aforethought."*

Under the Encyclopedia Britannica, murder has been defined to mean:

> *"The unjustified killing of one person by another, usually distinguished from the crime of*

*manslaughter by the element of malice aforethought."*

What we gather from the foregoing definitions of the word 'murder', is the fact that 'malice aforethought' is a component of 'murder'. The same therefore means that, where a person is charged with the offence of murder, it simply means that, he is alleged to have killed another person with malice aforethought, as contrasted from the one who is alleged to have killed another person without intention, who in short would be charged with the offence termed 'manslaughter'. So while 'murder', is the short term used to refer to the killing with malice aforethought, conversely 'manslaughter', is the short term used to refer to the killing unintentionally. In that regard, if we were to go by the proposition advanced by the learned counsel, and state that the offence of murder was committed with malice aforethought, it would amount to nothing other than tautology, that is, saying of the same thing twice over in different words.

On the basis of what has been adumbrated above, we hold that, the situation in the instant appeal is distinguishable from the one discussed in **Mussa Mwaikunda Vs Republic** (supra), which was relied upon by Mr. Mhozya, where essential ingredients of the particulars of the offence had

been omitted. Consequently, the submission by the learned State Attorney that, the use of the word 'murder' in the information was sufficient and nothing more is sustained and thereby, answering the first issue in the negative.

The second issue is whether there was pre-determination of the guilt of the appellant by the learned trial Judge. Both learned counsel were in agreement that, in stating in his ruling that he was satisfied that the appellant had committed the offence of murder before hearing the evidence of the appellant in his defence, the trial Judge predetermined the guilt of the appellant. We on our part, share the concurrent observations made by the learned counsel from either side.

The cherished principle in criminal trials is that, the presiding Judge or magistrate, has to observe a high degree of impartiality lest he occasions unfair trial. And, to what is meant by an impartial/neutral and fair trial, we think, an excerpt from our previous holding in **Alex John Vs Republic,** Criminal Appeal No. 129 of 2006 (unreported), sheds some light when we stated that:

*"To us, a neutral and fair court, is one which all things being equal, is prepared to hear and actually hears all sides before it decides. As far as Tanzania is concerned, the due process of rights, are adequately enshrined in Article 13 and 17 of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time."*

In view of the above stipulation, there is no gainsaying that, the act by the learned trial Judge to hold that the appellant was guilty before he was heard in his defence evidence, was indeed a violation of his constitutional rights and rendered the trial against him to be flawed. The situation in the instant matter was further worsened by the fact that, the trial against the appellant was being conducted with the aid of assessors, who could easily be swayed by the statement made by the learned trial Judge in his ruling. The Court had an occasion of encountering a situation of some similarity to this one in **MT 81071 PTE Yusuph Haji @ Hussein Vs Republic,** Criminal Appeal 168 of 2015 (unreported), where the learned trial Judge had pre-determined the mental status of the appellant before committing the offence which he stood charged with. In nullifying the proceeding of the trial Court, the Court held in part that:

*"Thus all things being equal, we are fully satisfied that as a result of the fundamental flaws which characterized the hearing of the case, the appellant did not get a fair hearing. That being so, we find ourselves constrained to nullify the entire proceeding and set aside the conviction and sentence in the exercise our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 of the Revised Laws."*

See also: **Davido Qumunga Vs Republic** [1993] TLR 120, **Jackson Monga Vs Republic,** Criminal Appeal No. 145 of 2009 (unreported).

In line with what we held in the previous cases as exemplified above, we are enjoined in the present appeal to follow suit. We therefore answer the second issue in the affirmative. As the trial against the appellant was not fair on account of not being accorded a fair hearing, we invoke the revisional powers bestowed on us under the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 Revised Edition of 2002, to nullify the proceeding of the trial Court and set aside the conviction and the sentence of death by hanging which was meted to the appellant.

The subsequent question which crops from the foregoing position is as to what should be the way forward. While Mr. Mhozya impressed on us to simply nullify the proceedings and set the appellant at liberty, Ms. Charwe on the other hand, implored us to order for a retrial.

Ordinarily, where the proceedings of the trial court have been nullified on appeal, the common practice and procedure is to order for a retrial. Nonetheless, there are some factors which have to be considered before an order of retrial is made. The holding in the case of **Paschal Clement Branganza Vs Republic** [1957], enlightens on some of the factors that have to be considered when it was stated that:

> *"Under normal circumstances, we would have ordered retrial. However, it is settled law that a retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."*

Further guidance which in our view did sum up the criteria for ordering a retrial or not, was given in **Fatehali Manji Vs Republic** [1966] EA 343, when the Court stated that:

*"In general, a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set side, because of insufficiency evidence or for purposes of enabling the prosecution to fill the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the court from which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered. Each case must depend on its own facts and circumstances and an order of retrial should only be made where the interest of justice require."*

Upon dispassionately scrutinizing the entire evidence from either side of the appeal before us, we were able to note that there was no direct evidence from any prosecution witness, to implicate the appellant to the charged offence. That being the case, the conviction of the appellant was entirely based on circumstantial evidence. We are alive to the position of law in regard to circumstantial evidence that to ground conviction, it has to irresistibly point to the guilt of the appellant. See: **Elisha Ndalange Vs Republic**, Criminal Appeal No. 51 of 1999 and **Mathias Bundala Vs Republic**, Criminal Appeal No. 64 of 2004 (both unreported), just to mention but a few.

In the appeal at hand, the evidence against the appellant was basically founded on two types of circumstantial evidence. The first type was based on trails of blood allegedly found at the compound of the appellant. The said evidence was however, discarded by the learned trial Judge and rightly so in our view, for the reason that no efforts had been made by the prosecution to ascertain that the said blood was of a human being, and more so of the deceased.

The second type of circumstantial evidence came from PW1, which was actually the one relied upon by the learned trial Judge, in holding the appellant culpable to the charged offence of murder, because he was the last person to be seen with the deceased while alive. This piece of evidence was however strenuously challenged by the learned counsel for the appellant, a challenge which we associate ourselves, that such version by the witness was sufficiently resisted by the appellant, in a testimony that was corroborated by DW2. It is our considered view that, no serious effort was made by the learned trial Judge, in weighing the pieces of evidence from either side before reaching at the conclusion he made.

Be that as it might, our overall evaluation of the evidence on record, has failed to convince us that, it might come out with a conviction in case an order of retrial for the appellant is made. The third issue is therefore, answered in the negative that, there is no cogent evidence to justify an order of retrial. All said, we order that the appellant be set at liberty forthwith unless he is otherwise being held for some other lawful cause.

Order accordingly.

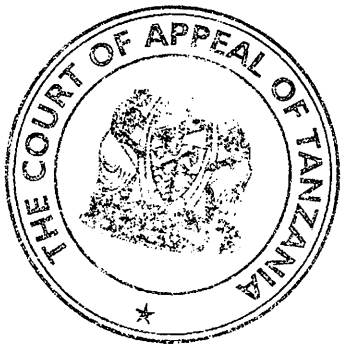
**DATED** at **DAR ES SALAAM** this 30th day of July, 2019.

S.E.A. MUGASHA
**JUSTICE OF APPEAL**

S.S. MWANGESI
**JUSTICE OF APPEAL**

M.A. KWARIKO
**JUSTICE OF APPEAL**

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




B. A. MPEPO
**DEPUTY REGISTAR**
**COURT OF APPEAL**

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**(Appeal from the judgment of the High Court of Tanzania**

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**sitting at Morogoro)**

**(Dyansobera, J.)**

**dated the 29th day of May, 2017**

**in**

**HC Criminal Sessions Case No. 57 of 2009**

**ORDER**

**In Court this 1st day of August, 2019**

**Before: The Honourable Madame Justice, S. E. A. Mugasha, Justice of Appeal**
**The Honourable Mr. Justice, S. S. Mwangesi, Justice of Appeal**
**And; The Honourable Madame Justice, M. A. Kwariko, Justice of Appeal**

**THIS APPEAL** coming on for hearing on this 25th day of July, 2019, in the presence of the appellant in person represented by Mr. John Mnaku Bonaventura Muhozya, learned Advocate and Ms. Clara Charwe, learned State Attorney for the Respondent / Republic **AND UPON HEARING** the parties when the appeal was stood over for Judgment and this appeal coming for Judgment this day.

**It IS ORDERED THAT,** the proceedings of the trial Court is nullified, conviction and the sentence of death by hanging which was meted to the appellant are set aside.

**IT IS FURTHER ORDERED THAT**, the appellant be set at liberty forthwith unless he is otherwise being held for some other lawful cause.

**DATED at DAR ES SALAAM** this 1st day of August, 2019.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**

Extracted on 1st day of August, 2019.