IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 13 OF 2017

1. ANTHONY MATHEO @ MINAZI
2. OSWARD MICHAEL } ..... **APPELLANTS**
3. MAPINDUZI ALEX KAMPOLU

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)
(Levira, J.)

dated the 29th day of November, 2016
in
Criminal Sessions Case No. 97 of 2014

.....

JUDGMENT OF THE COURT

21st & 27th August, 2019

NDIKA, J.A.:

This is an appeal by Anthony Matheo @ Minazi, Osward Michael and Mapinduzi Alex Kampolu, (the first, second and third appellants respectively) seeking the reversal of the judgment of the High Court of Tanzania at Mbeya (Levira, J.) dated 29th November, 2016 by which they were condemned to death upon being convicted of murder.

The prosecution initially alleged that on 7th June, 2013 at Itelefya Village within Mbozi District in Mbeya Region the appellants jointly and together murdered Julius s/o Petro @ Kalimba, who we shall from this time forth refer to as the "deceased." The appellants having denied the aforesaid allegation,

a full trial ensued in the course of which the prosecution lined up six witnesses and tendered four pieces of documentary evidence – a sketch plan of the scene of the crime, a post-mortem examination report, a picture of the deceased's body and a cautioned statement allegedly made by the third appellant (Exhibits P.1 – P.4). In opposition, the appellants testified on oath but produced no other witnesses. It is noteworthy that in the course of trial, on 5th May, 2016 after PW3 Focus Thadeo had testified, the information was amended, with leave of the trial court, to change the date of the alleged murder to 6th March, 2013 in lieu of the initial date of 7th June, 2013.

A summary of the case that led to the appellants being convicted of murder is as follows: PW1 Augenia Chambo, the deceased's mother, recounted that in the night of 6th March, 2013 she retired to sleep at the home of her younger brother, PW2 George Desa, around 23:00 hours. Also present at that home were her younger sister, Marietha, and PW2's wife, Schola. That temporary sleeping arrangement necessitated PW2 to spend the night at the nearby home of PW1 along with the deceased and PW3 Focus Thadeo.

According to PW1, around 23:00 hours six burglars stormed into the home where she was sleeping. They demanded to see her as they called out her clan name, Nakalengo. All of a sudden, the second appellant started beating her with a machete. With the aid of light from a torch locally known

as *mchina taa* which was mounted at the roof inside the house, PW1 recognized three of the six robbers who she said were the three appellants. PW1 and her companions cried out for help but no one responded. A short while later, the robbers left that home and moved to the next house, about fifty metres away, where PW2 and PW3 slept along with the deceased. PW1 recounted hearing thereafter from that house frantic cries for help, *"tunakufa! tunakufa!",* literally meaning "we are dying! we are dying!" A few hours later in the morning she saw her son's lifeless body, at the scene, severely mutilated and soaked in blood.

PW2's tale was to the effect that three robbers broke into PW1's house where he was sleeping along with PW3 and the deceased. At that time the bedroom was illuminated by light from *mchina taa* stuck at the roof inside the house. He recognised two of the robbers as being the first and second appellants, who he knew well as fellow villagers but the other intruder was a stranger to him. The bandits demanded to see the deceased asserting that they had to kill him. Two of the robbers set upon the deceased soon after finding him in the bedroom, slashing him repeatedly with a machete on the chest, forehead and back while the second appellant was holding a torch. The bandits also assaulted PW2 and PW3 before vanishing from the scene. Later on, around 02:00 hours, PW2 rushed to the home of the Village Chairman, Festo Augustino (PW4) and reported the incident, accusing the first and second

appellants as the assailants. PW3's evidence tallied with that of PW2, except for his claim that he only recognised the second appellant, the other two bandits being complete strangers to him.

On the part of PW4, he confirmed to have learnt from PW2 of the incident a few hours after it had occurred. He said PW2 claimed to have seen and recognised the three appellants as the perpetrators of the crime. He alerted the police at Kamsamba Police Station who, then, dispatched a police investigator and a clinician to the scene that very morning.

Both Dr. Leonce Manda (PW5), an Assistant Medical Officer from Kamsamba Health Centre, and No. E.6859 D/Cpl. Charles arrived together at the scene at 10.00 hours in the morning of 7th March, 2013. PW5 conducted an autopsy on the deceased's body, which he found in a bedroom lying in bed. The deceased's body revealed multiple cut wounds all over. The cause of death was certified as being severe haemorrhage as per the post-mortem examination report – Exhibit P.2. There was a slight confusion on the actual date on which the report was made and issued but there was no serious disputation on the incident and cause of the death of the deceased. Given the circumstances, the question at the trial was whether the appellants were responsible for the deceased's violent death.

At the scene, PW6 drew a sketch plan of the area (Exhibit P.1) and took a picture of the deceased's body (Exhibit P.3). On 10th May, 2013, he interrogated the third appellant and recorded his cautioned statement (Exhibit P.4). In that statement, the third appellant confessed to the murder and implicated his two co-appellants. Rather ominously, PW6 did not say how all the three appellants were arrested.

When the appellants were put on their defence, they flatly denied the accusation against them and raised alibis. While the first appellant averred that he was in Iyanda Igonda in Sumbawanga at the material time, the second appellant claimed to have been at his home in Kilandu before he went fishing in River Momba. The third appellant, on his part, adduced that he stayed put with his wife at his home in Mpona village and that he never visited the scene of the crime that fateful night. Besides, the third appellant retracted the confessional statement attributed to him (Exhibit P.4) saying that he was beaten up and forced to sign it at the police station.

Following the learned trial Judge's summing up at the conclusion of the cases for the prosecution and defence, the assessors who sat with her returned a unanimous verdict that all the appellants were involved in "killing the deceased Julius." The learned trial Judge, then, went ahead and convicted the appellants of murder and condemned them to death.

Briefly, in her decision, the learned trial Judge, having reviewed the evidence on record in the light of the relevant case law on visual identification, she held that based on the eyewitness evidence of PW2 and PW3, the first and second appellants were positively recognised at the scene as the assailants who hacked the deceased to death. As regards the third appellant, the learned trial Judge found that even though he was not identified at the scene he was sufficiently implicated by his confessional statement (Exhibit P.4), which she found to have been made voluntarily. As regards the appellants' defences of alibi, she found no reason to accord any weight to them primarily on the ground that the appellants "showed no efforts of calling" their neighbours as witnesses to support their cases. On the final question whether the deceased was killed by the appellants with malice aforethought, the learned trial Judge held, at page 139 of the record, that:

> *"I have considerably scanned the evidence on record. I find that there is no reason to depart from what the gentlemen assessors opined. The evidence on record reveals that the accused persons slaughtered the deceased with a machete and vide the photograph which was tendered and admitted before this court, it is evident that the accused person inflicted heavy injuries around the neck of the deceased. Above all the facts reveal that after such killing the whereabouts of the three accused persons remained in vain. Therefore,*

by considering all the circumstances, it calls my mind that the three accused persons had the intention of causing death to the deceased."

Feeling aggrieved by the outcome of their trial, the appellants initially lodged separate Memoranda of Appeal raising various complaints. Subsequently, with the assistance of their learned counsel, Mr. Mika T. Mbise and Ms. Joyce M. Kasebwa, the appellants lodged a joint supplementary Memorandum of Appeal in substitution of the previous memoranda. The said supplementary memorandum raises four points of complaint as follows:

1. The learned trial Judge erred in the manner of summing up the case to the assessors.
2. The learned trial Judge applied a wrong procedure when conducting a trial-within-trial.
3. The High Court erred in holding that the appellants were properly identified at the scene of the crime given the totality of the evidence on the record.
4. The learned trial Judge erred in the manner of dealing with the defences of alibi raised by the appellants.

At the hearing of the appeal before us, Mr. Mbise and Ms. Kasebwa appeared for the appellants whereas Ms. Rhoda Ngole, learned Senior State

Attorney, joined forces with Ms. Xaviera Makombe, learned State Attorney, to represent the respondent Republic.

In his oral argument at the hearing of the appeal, Mr. Mbise adopted the contents of the written submissions that he had lodged in support of the appeal and then urged us to allow the appeal.

Briefly, on the first ground of appeal, it was submitted that the learned trial Judge's summing up was materially vitiated by misdirections and non-directions on vital points of law on circumstantial evidence, hearsay evidence, the defence of alibi and murder as killing with malice aforethought as they related to the facts of the case. Citing section 265 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) requiring that trials before the High Court must be conducted with the aid of assessors as elaborated in the decisions of the Court in **Tulubuzya Bituro v. Republic** [1982] TLR 264 and **Chrisantus Msingi v. Republic**, Criminal Appeal No. 97 of 2015 (unreported), the learned counsel contended that the trial was, in effect, one without the aid of assessors, hence a nullity.

As regards the second ground, it was submitted that the learned trial Judge applied a wrong procedure in conducting a trial-within-trial to determine the voluntariness of the cautioned statement (Exhibit P.4) which had been objected. In the approach employed by the court, the onus of disproving the

voluntariness of the statement was placed on the third appellant. On account of this procedural infraction, it was urged that the confession be expunged from the record as it prejudiced the assessors and the learned trial Judge relied upon it in her judgment.

Coming to the third ground, the learned counsel for the appellants contended that on the totality of the evidence on record, conditions at the scene were not favourable for a proper identification of the killers. It was argued that since the incident occurred at night, with PW2 and PW3 unaware of what was to happen, that the encounter with the robbers lasted within a span of four to five minutes, that PW2 and PW3 failed to describe the attire of the perpetrators and that the robbers used a torch to identify the deceased, their victim, implying that the bedroom had no light from the *mchina taa* as had been alleged, a proper identification or recognition of the culprits could not be made. It is further submitted that PW2's evidence that he recognised at the scene only two of the three robbers (that is, the first and second appellants) contradicted with that of PW4, the Village Chairman, who said that PW2 mentioned to have recognised all the three appellants at the scene.

On another front, the evidence visual identification was attacked in that there was an unexplained delay in arresting the appellants. This was rather baffling, it was contended, in view of the claim that the appellants were clearly

recognised at the scene and that they were known residents of the locality. The police investigator (PW6), it was further argued, gave no explanation of the delay, while he acknowledged that some of the appellants were apprehended a year after the incident.

On the final ground, the trial court was criticized for according no weight to the appellants' defence of alibi on the ground that they gave no notice of intention to rely on such defence in terms of section 194 (4) of the CPA and that they failed to call any of their relatives to testify in support of their respective alibis. It was contended that the change of the date of the deceased's killing from 7th June, 2013 to 6th March, 2013 following the alteration of the information, with leave of the trial court, midway in the course of the trial was unfair as it created confusion and disoriented the appellants in their bid to establish their alibis which were obviously inextricably connected to the date the alleged offence was committed.

Concluding, the learned counsel for the appellants urged us to nullify the trial proceedings and the decision thereon. In addition, they pressed that the appellants be released from prison custody given the paucity of the evidence on record and on authority of the decisions in **Fatehali Manji v. Republic** [1966] EA 341, **Selina Yambi & Others v. Republic**, Criminal Appeal No. 94 of 2013 (unreported); and **Salum & Another v. Republic**, Criminal Appeal

No. 119 of 2015 (unreported) cited in the case of **Athanas Julius v. Republic**, Criminal Appeal No. 498 of 2015 (unreported).

Replying on behalf of the respondent, Ms. Makombe supported the appeal on the basis of the first and second grounds of appeal. On the first ground, she was of the same mind as her learned friends that the summing up was irregular and that it rendered the trial a nullity. Referring to various parts of the summing up notes, she pointed out non-directions on direct evidence, circumstantial evidence and malice aforethought as well as a misdirection in respect of the defence of alibi. Citing the case of **Samwel Gitau Saitoti @ Saimoo @ Jose & Two Others v. Republic**, Criminal Appeal No. 275 of 2015 (unreported), she urged us to hold the trial a nullity.

The learned State Attorney was also in accord with her learned friends on the complaint that the learned trial Judge took a wrong approach in conducting the mini-trial on the retracted cautioned statement by shifting to the third respondent the onus of disproving its voluntariness. She relied upon the cases of **Seleman Abdallah & Two Others v. Republic**, Criminal Appeal No. 384 of 2008; and **Ngwala Kija v. Republic**, Criminal Appeal No. 233 of 2015 (both unreported). She also raised to our attention another disconcerting feature; that the trial record, at pages 35 and 45, indicates that the assessors were not required to retire before the mini-trial commenced, implying that they

participated in that mini-trial and, in the process, they were prejudiced. In view of these infractions in the conduct of the trial-within-trial, she submitted that there was in the eyes of the law no trial-within-trial conducted on the objected confessional statement, rendering the said statement liable to be expunged.

As regards the outcome of the appeal, Ms. Makombe urged us, in view of the defective summing up, to nullify the entire trial proceedings and the decision thereon and then proceed to quash the convictions and set aside the sentences against the appellants. She also accepted her learned friends' submission that there was insufficient evidence to warrant a retrial of the appellants. Accordingly, she urged that the appellants be released.

We have examined the record of appeal and given due consideration to the submissions of the learned counsel on both sides and the principles of case law relied upon. We propose, at first, to deal with the second ground and then we will revert to the first ground of appeal.

Addressing the complaint on the conduct of the trial-within-trial, we agree with the learned counsel on both sides that the learned trial Judge took a wrong approach. The record of appeal bears out that the third appellant was required to give evidence as "PW1", as shown at page 45 of the record of appeal, to prove why he was disputing the admissibility of the confessional statement, while the prosecution, whose witness featured as "DW1", became

the defence side", as indicated at page 51, presumably assuming no burden of proof. That approach, no doubt, contravened section 27 (2) of the Evidence Act, Cap. 6 RE 2002, which expressly states that:

> *"The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution."*

By shifting the burden of proof, the trial court denied the third appellant the benefit of hearing in advance the details or facts on how the statement was recorded for him to confront the statement and cast doubt on its voluntariness.

That apart, we also agree with Ms. Makombe that the trial record shows that the assessors did not retire throughout the conduct of the trial-within-trial, which they should have done in order to protect them from being possibly prejudiced by hearing the evidence that might afterwards be held inadmissible. The imperative that assessors must not participate in any mini-trial was re-emphasised by the Court in the case of **Ngwala Kija** (supra), cited to us by Ms. Makombe, wherein the Court referred to a decision of the erstwhile Court of Appeal for Eastern Africa in **Kinyori Karuditi v. Reginam** (1956) 23 EACA 480 setting out the procedure for conducting such a mini-trial.

In view of the two infractions as we have discussed and found, we are constrained by the law to find that there was in the eyes of the law no trial-

within-trial conducted on the admissibility of the objected cautioned statement. We thus allow the second ground of appeal and expunge the cautioned statement (Exhibit P.4).

We now turn to the complaint on the manner the summing up to the assessors was done.

We should begin by stating that it is of necessity under section 265 of the CPA that criminal trials before the High Court must be conducted with the aid of at least two assessors. In addition, a trial Judge sitting with assessors is required by section 298 (1) of the CPA to sum up the case to the assessors before inviting their opinion. The said provision stipulates thus:

> *"When the case on both sides is closed,* ***the judge may sum up the evidence*** *for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion."* [Emphasis added]

We have added emphasis to the above phrase "the judge may sum up the evidence" to stress the settled position that it is a mandatory duty on the trial Judge to sum up the case to the assessors even though the word "may" used in that phrase ordinarily connotes discretion. Indeed, the Court has reaffirmed that position in a string of cases, **Mulokozi Anatory v. Republic**,

Criminal Appeal No. 124 of 2014 (unreported) being one of them. In that case, the Court held that:

> *"We wish first to say in passing that though the word 'may' is used implying that it is not mandatory for the trial judge to sum up the case to the assessors* ***but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act*** *that all trials before the High Court shall be with the aid of assessors,* ***the trial judges sitting with assessors have invariably been summing up the cases to the assessors.***" [Emphasis added]

It is the duty of the presiding Judge, when summing up, to explain all the vital points of law in relation to the relevant facts of the case – see **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (unreported) and **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014 (unreported). In the case of **Hatibu Ghandi & Others v. Republic** [1996] TLR 12, the Court elaborated, at page 32, that:

> *"We do not think a trial judge is required to state all details of the case in his summing up. If he does so, it would cease to be a summing-up.* ***It is sufficient if he states the substance or gist of the case on both sides in a manner which enables the assessors to give their opinions on the case in***

general, and on any particular point that the trial judge needs their opinion." [Emphasis added]

It is instructive that the Court, in the case of **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported), having noted that the learned presiding Judge omitted to address the assessors in a murder trial on the voluntariness of a confessional statement and applicability of the defence of alibi, reiterated that:

> *"There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on* ***'all vital points of law.'*** *There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments."*

By way of emphasis, we feel bound to reiterate the imperative that a summing up of the substance or gist of the case should not influence the assessors one way or the other. In this regard, the Court, in **Ally Juma Mawepa v. Republic** [1993] TLR 231, made it clear that:

> *"... when summing up to assessors* ***the Trial Judge should as far as possible desist from disclosing his own views, or making remarks or comments*** *which might influence the assessors one way or the*

> *other in making up their own minds about the issue or issues being left with them for consideration.* ***The summing up should be unbiased and impartial such that it leaves the assessors to make up their own minds independently****. For instance where, as in this case, the accused had given conflicting accounts of the circumstances surrounding the killing, the Trial Judge should sum up and explain the conflicting accounts to the assessors without showing his own opinion or inclination one way or other;* ***to make known his own views, as he did, as this stage would be going too far****."* [Emphasis added]

Applying the above statement of principles to the instant case, we agree with the learned submissions of the counsel that the learned trial Judge's summing up to the assessors was noticeably irregular. In the first place, we agree with Ms. Makombe that at page 83 of the record the learned trial Judge mentioned "malice aforethought" as an essential element of the offence of murder but she gave no guidance on it. It is thus unsurprising that the assessors unanimously returned a seemingly casual verdict that appellants were all involved in "killing the deceased Julius", without stating whether the killing was committed with the requisite *mens rea* for it to amount to murder. Secondly, we agree with both learned counsel that at page 101 of the record the summing up reveals a clear misdirection thus:

> *"Among the six prosecution witnesses only two of them were with the deceased at the material time. These are PW2 and PW3.* ***PW1 gives evidence which is direct; her evidence is more circumstantial****. The law in circumstantial evidence is well settled that the court cannot rely on such evidence unless it is watertight.* ***PW4 and PW5's evidence is hearsay evidence; the law requires the court to rely on hearsay evidence to ground conviction. The evidence of PW6 corroborated the evidence of PW2 and PW3 to some extent****."* [Emphasis added]

The characterization of PW1's evidence as being both direct and circumstantial was a clear misapprehension of the evidence. So was the portrayal of the evidence of PW4 and PW5 (the Village Chairman and the medical witness who examined the deceased's body) as being "hearsay." As rightly submitted by Mr. Mbise, the direction that *"the law requires the court to rely in hearsay evidence to ground conviction"* was likely to have injected confusion to the assessors. So was the guidance that *"The evidence of PW6 corroborated the evidence of PW2 and PW3 to some extent"* because the evidence of PW6, a police investigator, could not corroborate the evidence of PW2 and PW3 who claimed to be eyewitnesses to the alleged murder.

Finally, we are also in accord with both learned counsel in their submission that the learned trial Judge committed a further misdirection,

revealed at page 102 of the record, on her guidance to the assessors on the defence of alibi relied upon by the appellants that:

> *"Although the law is very clear that it is not the duty of the accused person to prove their innocence but,* ***whoever wants to rely on this defence has the duty to prove the same****."* [Emphasis added]

It is trite that an accused person relying on an alibi is under no obligation to prove such defence although he would reasonably be expected to call as witness the person he was with at the time of the event – see, for example, **Sijali Kocho v. Republic** [1994] TLR 206.

By dint of the infractions committed in the summing up as we have found, we are compelled by the law to hold that the appellants' trial was unfair; for, it cannot be said with certainty that the assessors were not prejudiced by the misdirections and non-directions alluded to above. It is, therefore, our view that the trial was no better than one conducted without the aid of assessors contrary to the dictates of section 265 of the CPA. The trial was inescapably a nullity. We thus find merit in the first ground of appeal, which we allow. As a result, we nullify the entire proceedings of the High Court and the judgment thereon.

On the way forward, we would ordinarily have ordered that the appellants be retried but having considered the principles governing retrials,

examined the evidence on record and taken account of the concurrent submissions of the learned counsel on each side, we are, as we shall demonstrate, of the decided view that such course would be injudicious.

At first, we alive that the principles governing retrials as stated in the mid-1960s in **Fatehali Manji** (supra) and reiterated by the Court in its numerous decisions such as those cited by Mr. Mbise – **Selina Yambi & Others** (supra), **Salum Salum & Another** (supra) and **Athanas Julius** (supra) – preclude a retrial where there was insufficient evidence in the original trial. Further, a fresh trial would be unwarranted if it may end up giving the prosecution an unfair advantage of bridging the gaps even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. To be sure, in **Selina Yambi & Others** (supra), the Court reiterated that much as it held:

> *"We are alive to the principles governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps. The bottom line is that, an order should only be made where the interests of justice require."*

In our view of the matter, we agree with the learned counsel that the evidence on the trial record was insufficient to sustain a conviction against the

appellants. First, on the totality of the evidence, conditions at the scene were unfavourable for a positive identification of the killers. It should be observed here that PW1's claim that she saw and recognised the appellants at the home she spent the fateful night is of little value; she did not witness the killing of the deceased at the scene. Our focal point is, therefore, the evidence by the two eyewitnesses, PW2 and PW3. It is doubtful that these two made a positive identification since the incident occurred close to midnight; that the encounter between the two witnesses and the robbers was sudden lasting a short span of time; that the robbers used a torch to identify the deceased, their victim, making it likely that the bedroom had no light from the *mchina taa* contrary to what the two witnesses alleged; and that the two witnesses failed to describe the attire of the culprits. The prosecution case was further weakened by an inconsistency between PW2's evidence that he recognised at the scene only two of the three robbers (that is, the first and second appellants) and the testimony of PW4, the Village Chairman, who said that PW2 mentioned to him to have recognised all the three appellants at the scene. It is worth recalling that PW3, on his part, said he did not see the first and third appellants at the scene except the second appellant.

Secondly, we go along with Mr. Mbise's contention that the unexplained delay in arresting the appellants questions the probity of the claim that the appellants were recognised at the scene. As none of the witnesses said that

the appellants disappeared from the village after the incident, we ask ourselves, if, as known residents of the locality, the appellants were recognised at the scene and mentioned to the authorities, why were they not apprehended promptly? It is on record that while the first appellant was arrested on 6th April, 2013, about a month after the incident, the second appellant was nabbed almost a year later (on 13th February, 2013) while the third appellant's arrest occurred more than a year after the incident (on 6th April, 2014). We had expected the police investigator (PW6) to explain away this delay. He did not do so despite acknowledging that "some of the appellants" were apprehended a year after the incident. Similarly, PW4, who was the only village functionary to testify at the trial, gave no account in that regard. This sorry state of affairs waters down the cogency and reliability of the evidence of the identifying witnesses, for, we see no plausible explanation why the appellants could not have been arrested promptly if they were identified by PW1 at her home and later by PW2 and PW3 at the scene. In the same manner that an unexplained delay to name a suspect after an incident must put a judicious and cautious court to inquiry, an unexplained delay in apprehending an allegedly recognized suspect should raise eyebrows – **Marwa Wangiti & Another v. Republic** [2002] TLR 39. It is, as a result, our finding that the evidence of visual identification on record proffered by PW1, PW2 and PW3 was not watertight to found a conviction against any of the appellants. In the premises, we are of

the firm view the instant case is not a fitting occasion to order a retrial of the appellants.

The upshot of the matter is, therefore, that we quash and set aside the respective convictions and sentences against the appellants. We order that the appellants, Anthony Matheo @ Minazi, Osward Michael and Mapinduzi Alex Kampolu, be released from prison forthwith unless they are detained there for some other lawful cause.

DATED at **MBEYA** this 26th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and Ms. Mary Mgaya holding brief of Ms. Joyce Kasebwa for the appellants is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL