IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 146 OF 2016

1. **DAVID s/o LIVINGSTONE SIMKWAI**
2. **CATHBETH s/o LIVINGSTON SIMKWAI**
3. **FESTO s/o RABISON MGONDE**
4. **CHRISTOPHER s/o NASON SIMBEYE**
5. **JESTON s/o NASON SIMBEYE**
6. **FRANK s/o RODRICK SIMWIMBA**
7. **ANDEREA RAJABU SILOMBA**
8. **GIDION s/o GUDSON SIMWIMBA**
9. **LOVED s/o SINKALA @ EMMANUEL**

..... APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mambi, J.)

dated the 28th day of April, 2016
in
Criminal Session No. 13 of 2015

JUDGMENT OF THE COURT

19th & 27th August, 2019

MUGASHA, J.A.:

The appellants were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE: 2002. It was alleged by the prosecution that on 1st May, 2013 at Mnyuzi Village, Momba District within Mbeya Region, the appellants jointly and together did murder one Fred Mwalima, the deceased.

In order to prove its case the prosecution lined up six prosecution witnesses and tendered three documentary exhibits namely: the Report on Post Mortem Examination (Exhibit P1); the sketch map of the scene of crime (Exhibit P2) and the statement of **MLOTWA S/o EDWARD SIMWIMBA** (Exhibit P3).

In the evening of 1/5/2013 Vita Aiwelo Simkai (PW1) happened to be at a Pombe Club together with the deceased. Mecarius also went there and told the deceased that he was required at the Village Offices. As the deceased declined, he was beaten by Mecarius. Thereafter, the 1st, 4th and 5thappellants surfaced and carried the deceased by force on the pretext that they were taking him to the village office. In addition, they uttered threats to those who were around with words "*Yeyote ambaye ni mwanaume atufuate* ". PW1 retired home and on the following day, having heard people crying, he followed up the matter and saw blood stains on the ground near the village office. Later, while at the mourning area, he heard the 1st and 3rd appellants discussing about the blood seen near the village office to be either of a cow eaten by hyena and that it was possible for one to be killed and his body put in a bucket without leaving behind traces of blood. The deceased's brother Julius Ikson Mwamlima (PW2) recounted to have left the deceased at the Pombe Club when he

went to the farm to collect maize and that it is one Helena who informed him on what had befallen the deceased. He also made a follow up and found traces of blood near the Chairman's Office. As the deceased did not return home, on the following day, relatives mounted a search and saw traces of blood stains leading to the river bank where the deceased's body was ultimately found and exhumed after digging out a heap of soil. The body was slashed on the neck and shoulder. According to PW2, prior to his death the deceased had a court case with 1st, 5th, 8th and 9th appellants whereby the deceased was alleged to have stolen sardines. The matter was reported to the Village Executive Officer, Festo Rabinson Mgide (PW3) by village executive council members: (Kaponda, Athumani Simbito, and Nemes Simwimba) who did not mention the names of the culprits. However, PW3 who reported the matter to the Police mentioned Msenga Simbeye and Mecarius as suspects who grabbed the deceased at the Pombe Club. Jeston Nason Simbeye the village chairman who testified as PW5, recounted to have learnt about the disappearance of the deceased from the deceased's brother PW2. He also saw the blood stains on the ground near the village offices and took part in the mounted search of the deceased's body. PW5 recounted that, it is PW2 who mentioned Fredy, David Simkwai, Jeston and Simbeye as the assailants though it took twelve (12) days to arrest the appellants.

The investigator P5517 DC Joseph Emmanuel Ndiyela (PW6) went to the scene with, among others, the OCCID and Doctor Adrian Biseko. He recounted to have known what had befallen the deceased from WEO at Msangano who claimed that the deceased was taken by eleven (11) people from the Pombe Club and was never seen again until when his lifeless body was recovered on Nkana river banks. According to PW6 he was initially given a name which was withheld for security reasons. However, PW6 did not mention the name and subsequently he engaged PW4 who mentioned the appellants to be responsible for the killing of the deceased. PW6 also recorded the statement of Mlotwa Edward which was tendered as exhibit P3 because the witness could not be found to give an oral account on the fateful incident to the effect that, he was at the Pombe club when the assailants grabbed the deceased. Alice Titus Siyame **(**PW4), who was not at the scene of the Pombe club, came to know about the fateful incident from PW5. According to PW4, he suspected the appellants to be the killers because **One**, he had a court case with them which ended in their favour whereby the deceased was his witness. **Two,** a day before the deceased's body was recovered, the 1st appellant had threatened him that: "*mwenzako amelala kwa Lazaro bado wewe*" vide the deceased's mobile phone.

The appellants denied each and every detail of the prosecution. Each of the appellant raised a defence of *alibi* to the effect that, none of them was at the scene of crime. Persuaded by the prosecution account the trial court convicted all appellants and sentenced them to suffer death by hanging.

Aggrieved, the appellants have appealed to the Court challenging the decision of the trial court on the grounds which we have conveniently condensed into two main grounds namely:

1) The trial was flawed with procedural irregularities which vitiated the trial.
2) The charge was not proved beyond reasonable doubt.

To prosecute the appeal the appellants had the services of Mr. Victor Mkombe, Ms. Mary Mgaya and Mr. Tasco Luambano, all learned counsel. The respondent had the services of Ms. Prosista Paulo and Ofmedy Mtenga, both learned State Attorneys.

In addressing the first main ground of complaint, the appellants faulted the trial court in basically four fronts: **Firstly,** PW1 and PW5 adduced evidence at the trial without being sworn which was in violation of the provisions of section 198 of the Criminal Procedure Act [CAP 20 RE. 2002]. On that account, it was argued that, such evidence was invalid and

wrongly acted upon to convict the appellants and as such, it deserves to be expunged. **Secondly**, the statement of Edward Mlotwa was tendered and admitted in the evidence without due regard to the provisions of section 34 B (2) of the Evidence Act CAP 6 RE.2002. Thus, it was wrongly acted upon to ground the conviction of the appellants and as such it deserves to be expunged for lacking evidential value. **Thirdly**, the trial was vitiated because apart from having influenced the assessors with his own views, the trial judge did not address them on the vital legal aspects relating to circumstantial evidence and the defence of *alibi*. **Fourthly**, at the close of the prosecution case, the trial judge did not comply with the provisions of section 293 (1) of the CPA because having concluded that a *prima facie* case was not made out against two accused persons, all appellants put forth their defence and at the end, the trial judge proceeded to convict them. This was argued to be a fatal irregularity which prejudiced the appellants. To back up the propositions, we were referred to the cases of: **KATO SIMON VICENT CLEMENCE VS REPUBLIC**, Criminal Appeal No. 180 of 2017 and **DIRECTOR OF PUBLIC PROSECUTIONS VS PETER KIBATALA**, Criminal Appeal No. 4 of 2015 (both unreported).

As to the second main ground of appeal, it was submitted that since there is no direct evidence on the manner surrounding the killing incident,

the trial court wrongly concluded that the circumstantial evidence linked the appellants with the offence due to the contradictory account which fell short of proving the charge beyond reasonable doubt. It was further argued that, in view of the invalid account of PW1 and PW5 who were not sworn before adducing evidence, if expunged, the remaining evidence of PW2, PW3, PW4 is hearsay and it does not link the appellants with the killing incident. Besides, it was pointed out that, the trial judge wrongly acted on suspicion of PW4 who was categorised as a crucial witness while he was not present when the deceased was allegedly taken from the Pombe Shop as recounted by the PW1 whose evidence is invalid and there was thus no proof that the appellants were last persons to be seen with the deceased.

In the alternative, it was argued that, even if the evidence of PW1 is to be sustained, his evidence on visual identification required corroboration which was not the case and it cannot stand on its own. Therefore, it was wrongly acted upon by the trial court to convict the appellant. To support this proposition the case cited was that of **HASSAN JUMA KANENYERA AND ANOTHER VS REPUBLIC** (1992) TLR 100.

Furthermore, the trial court was faulted for not resolving the contradictory prosecution account as to who exactly took the deceased

from the Pombe Club as between Cathbet and Mecarious who is not among the appellants. Finally, it was contended that, the trial judge acted on extraneous matters not backed by the record as reflected at pg. 146 of the record.

In whole it was concluded that, the charge was not proved against the appellants. On the probing by the Court on the propriety or otherwise of the rejection of defence of *alibi,* it was argued that, such evidence did impeach the prosecution's account apart from the scene of crime not being specific to be either where the body was discovered or at the village.

On the other hand, the learned State Attorneys conceded to the procedural irregularities pointed out by the defence. In addition, the learned State Attorney submitted that, the 1st, 5th and 6th appellants were not sworn before adducing their evidence. She referred to us the cases of **ELIKO SIKUJUA AND ANOTHER VS. REPUBLIC**, Criminal Appeal No. 367**, MT 101296 OMARI MWINCHANDE VS. REPUBLIC**, Criminal Appeal No. 71 of 2016, **WILLY JENGELA VS. REPUBLIC**, Criminal Appeal No.17 of 2017, **PETRO KAKOLE @ KATABI VS. REPUBLIC**, Criminal Appeal No. 71 of 2015 (all unreported) and **MURIMI VS. REPUBLIC**, 1967 EA 542.

In view of the procedural irregularities, initially, the learned State Attorneys preferred a retrial. However, after a brief dialogue with the Court

on the propriety or otherwise of the retrial, the learned State Attorney conceded that it is not worthy in the absence of watertight evidence to hold the prosecution's case. It was pointed out that, in the entire evidence the 7th and 8thappellants were not mentioned whereas the alleged blood traces were not subjected to scientific examination to establish if it was human blood and that of the deceased or otherwise. Besides, the learned State Attorney contended that, the alleged voice identification over a mobile phone in respect of the 1st appellant is alleged by PW4 is weak in the absence of proof from the mobile company concerned that on 2/5/2013 the deceased's mobile phone was used to make calls.

Having carefully considered the grounds of complaint, the submissions of learned counsel and the record before us, we have to determine the propriety or otherwise of the trial and if the charge was proved against the appellants at the required standard. Before doing so, it is crucial to state that, this being a first appeal is in the form of a re-hearing. Therefore, this being the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. (See **D. R. PANDYA VS. R** (1957) EA 336 and **IDDI SHABAN @ AMASI VS. R**, Criminal Appeal No. 2006 (unreported).

Both counsel are at one that the summing up to assessors was irregular because the trial judge influenced the assessors and he did not direct them on vital points of law. Section 265 of the CPA mandatorily requires that all criminal trial before the High Court must be conducted with the aid of assessors. It reads as follows:

> *"All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit."*

In that regard, in terms of section 298 (1) of the CPA, after the close of the prosecution and that of the defence, the trial Judge must sufficiently sum up the evidence of both sides in the case to the assessors, who are thereafter required to give their opinion. In the case of **WASHINGTON S/O ODINDO VS. REPUBLIC** [1954] 21 EACA 392 the essence of the opinion of assessors was emphasised as follows:

> *"The opinion of assessors can be of great value and assistance to the trial judge but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of opinion of assessors is correspondingly reduced."*

Therefore, the assessors must be properly informed so as to make rational and independent opinion as to the guilt or otherwise of the accused person. In this regard, in the course of summing up, a trial judge should as far as possible desist from disclosing his views or making remarks or comments which might influence the assessors in one way or another in making up their minds about the issues being left with them for consideration. In the case of **MT. 101296 MWINCHANDE AND 4 OTHERS VS. REPUBLIC** (supra) the Court was confronted with a scenario whereby the trial judge had influenced assessors with his own views which were not canvassed in the evidence. The Court held that, the trial was vitiated having relied on the case of **ALLY JUMA MAWEPA VS. REPUBLIC, (1993) TLR 231** which emphasized among other things, the following:

> " *The assessors should be made to give their opinions independently, based on their own perception and understanding of the case after the summing up; the Judge makes his views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case.";*

In the matter under scrutiny, we have noted that, in the course of summing up, from page 72 to 73 of the record, the trial judge addressed the assessors as follows:

" This case is mainly based on evidence produced and testified before this court. In summing up I will only dwell in few areas. As you may recall from the evidence, the deceased was brutally slaughtered and killed by eleven persons, nine of whom have appeared before this court..." On the evening of death of the deceased, the accused persons had earlier forcibly arrested and took away the deceased claiming that they wanted to send the deceased to the village office to answer his case against their co-accused David Simkwai."

In our considered view, we think these directions were clearly expressing the judge's own findings of fact on the evidence and had nothing to do with wanting to get the assessors' opinion, but bent on influencing them to agree with him. With respect, it was wrong for the judge to have made his impressions known to the assessors. (See **LUSABANYA SIYANTENI VS. REPUBLIC** (1980) (TLR). We therefore agree with the learned counsel that, the trial judge misdirected the assessors during the summing up.

Moreover, it was a concern by learned counsel for the parties that the trial judge in his summing up to the assessors did not direct the assessors on vital points on circumstantial evidence and the defence of

alibi. This also had the adverse effect on the trial as the assessors were not otherwise of the appellants as they were not opportune to know what entails circumstantial evidence and the defence of alibi.

As to the propriety or otherwise of the admission in evidence of exhibit P3, at page 39 of the record of appeal, the trial court admitted the statement of one Edward Mlotwa which was tendered by PW6 on the ground that the witness could not be found. However, section 34 B (2) of the Evidence Act which lays down the conditions to be complied with before the statement is admitted by the trial court (as it) stipulates:

> *(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*
>
> *(2) A written statement may only be admissible under this section–*
>
> *(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably*

practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

It is a mandatory requirement of the law that, for a statement to be admitted in court in lieu of oral direct evidence, under section 34 B (1) all conditions stipulated in subsection 2 (a) to (f) must cumulatively be complied with. (See **MHINA HAMIS VS REPUBLIC**, Criminal Appeal No. 83 of 2005 (unreported) and **FRED STEPHANO VS REPUBLIC**, Criminal Appeal No. 65 of 2007 (unreported). In the case at hand, the law was violated. We are fortified in that accord because initially, the prosecution did not serve exhibit P3 the adverse party under paragraph (d) before tendering it as evidence and hence the appellants could not exercise the right conferred under paragraph (e) if they wished to object to the tendering of such statement. Another aspect watering down exhibit P3, is that the statement was verified by the police officer who was a mere recorder and not the maker of the statement and thus, not qualified to make the verification required by law.

In the premises, with due respect, the trial judge misdirected himself in admitting exhibits P3 because section 34 B (2) (a) to (f) was not

complied with to the letter. It is our considered view that, the law ought to have taken its course regardless of the failure by the learned defence counsel to raise objection against the tendering of the exhibit. Besides, the entire procedure should have been reflected in the record for the Court to see to it if the law was complied with.

Pertaining to not swearing of witnesses before they gave their testimonial account, the trial court was faulted as PW1 and PW5 were not sworn before they adduced evidence at the trial. It is a requirement of the law that, evidence of any witness in a criminal trial must be given on oath or affirmation. This is a statutory requirement provided under section 198 (1) of the CPA which states:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

In **MWITA SIGORE @ OGORA VS REPUBLIC,** Criminal Appeal No. 54 of 2008 (unreported) the Court emphasized on the essence of a witness being examined upon oath or affirmation and the consequences of non-compliance as follows:

> *" ...failure to administer oath or affirmation on a witness in a criminal trial, excepting cases under*

section 127 (2) of the TEA, would go against public policy, and is a threat to the liberty of the persons facing criminal charges. For that reason, we think the provision of section 198 (1) of the CPA is mandatory and its noncompliance entails fatal consequences."

It is evident that PW1 and PW5 were not sworn before they gave evidence as reflected at pages 13 and 32 respectively of this record. This was a violation of the mandatory requirements of section 198 (1) of the CPA. Consequently, such account has no evidential value and as such, we agree with the learned counsel and accordingly expunge the evidence of PW1 and PW5 from the record.

It was further contended that, after the close of the prosecution case the trial court did not comply with section 293 (1) and (2) of the CPA which regulates the modality to be complied with where the trial court is satisfied that the prosecution has or has not made out a case against the accused person (s) before calling such accused to give their evidence in defence or otherwise. Subsection (1) provides as follows:

" *When the evidence of the witnesses for the prosecution has been concluded, and the statement, if any, of the accused person before the committing court has been given in evidence, the*

court, if it considers after hearing the advocates for the prosecution and for the defence, that there is no evidence that the accused or any one of several accused committed the offence or any other offence of which, under the provisions of section 300 to 309 of this Act he is liable to be convicted, shall record a finding of not guilty.

Subsection (2) is to the effect that:

"When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, shall inform the accused person of his right–

(a) to give evidence on his own behalf; and

(b) to call witnesses in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights."

In the case of **MURIMI VS REPUBLIC 1967 E.A 542,** the Court of Appeal for East Africa dealt with the issue on the propriety of the trial court proceeding with the trial where the prosecution evidence has not established a prima facie case which was sufficient to have justified the trial magistrate requiring the appellant to enter defence. The Court, among other things, held:

> *"The magistrate should have acquitted the appellant as the prosecution had failed to make out a case sufficient to require the accused to enter a defence."*

This in line with section 230 of the CPA which provides as follows:

> *"If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person".*

It is clear that in terms of section 230 of the CPA that, where the prosecution has not made out a case against the accused person sufficiently to require the accused person to make his defence, the trial

court shall dismiss the charge. Under similar circumstances, in the case of a trial before the High Court, it is required to make a finding of not guilty where there is no evidence that the accused or any one of several accused committed the offence or any other offence. This is the essence of making a ruling as to whether there is a case to answer or not.

Taking inspiration from section 230 of the CPA, and in view of the similarity in the subsequent procedure to be followed where a case is not made out against the accused by the prosecution, after the High Court makes a finding of not guilty, consequently it has to acquit the accused person and mention the respective name for avoidance of any doubt. For those found to have a case to answer, they must be addressed in terms of section 293 (2) of the CPA before proceeding to make their defence and the manner in which they elect to do so.

In the matter at hand, after the close of the prosecution case, at page 41 of this record the following transpired:

"Court:

> *The evidence adduced by the prosecution has established a prima facie case against two accused."*

However, the two accused were not mentioned. Thereafter, the trial Judge addressed the appellants in terms of section 293 (2) of the CPA and all of them proceeded to give their evidence and ultimately, they were all convicted. This was with respect, irregular because those found with no case to answer were wrongly not acquitted and convicted. Failure to comply with the mandatory requirements of the law was a serious omission which occasioned a miscarriage of justice on the appellants as none of them knew his predicament as to guilt or otherwise after the trial court's that a *prima facie* case was established against some of them.

Another area where the trial Judge was faulted is having relied on extraneous matters to convict the appellants. At page 111 of this record, the trial judge made a following finding:

> " *The other witness namely Joseph Sinkala (PW5) the village chairman of Mnyuzi village during May 2013 when the incident happened testified that, on 01st May, 2013 he was at the Pombe club until 18.00 hrs when he was called to go to school with Cathbert Simkwai (2nd accused) who was chairman of the school committee. He said that at around 18.45 hrs he and Cathbert Simkwai left school and each went separate way. Cathbert Simkwai said he was going to his home. PW5, went to his home and*

then back to the pombe club to buy kerosene. As he reached the pombe club was so quiet so early than usual."

Apparently, we have gathered that, this finding is not backed by the evidence on record. In **PETRO KAKOLE @ KATABI VS REPUBLIC,** (supra). the Court was confronted with a similar scenario whereby, while the Psychiatrist's report on the mental status of the appellant was not at any time adduced into the evidence, the trial court without bringing such fact to the attention of the defence counsel, acted on the report and made a finding that the appellant was sane at the time of commission of the offence. The Court thus held:

"To the extent that the report was not tendered in evidence, it remained an extraneous matter, unworthy of reference to establish any fact in issue. That being so, it was improper for the learned Judge to gloss over the report which was, so to speak, not a matter of the evidence."

In the case under scrutiny, it was irregular for the trial judge to rely on extraneous matters as it was not a matter of the evidence and such, the appellants were convicted on the evidence which was not before the trial court.

In view of the pointed out procedural irregularities, we agree with the learned counsel that the trial was flawed. Ordinarily, this would have been remedied by ordering a retrial. However, having carefully scrutinized the evidence on record we are hesitant to follow that course and we shall give our reasons.

As to whether the prosecution proved a charge against the appellants, what surrounded the occurrence of the offence is basically circumstantial evidence. In this regard, if an accused is alleged to have been the last person to be seen with the deceased, in the absence of plausible reasons to explain away the circumstances leading to the death, he or she will be presumed to the assailant. Thus, the circumstantial evidence must be such as to produce moral certainty, to the exclusion of every reasonable doubt as it was emphasized in the case of **SIMON MUSOKE VS REPUBLIC,** [1958] 1 E.A.715 the Court of Appeal for East Africa among other things, held:

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

In the matter under scrutiny, having expunged exhibits P3, the statement of Edward Mlotwa who could not be found, the evidence of PW1 and PW5 who were not sworn before giving their evidence, the remaining evidence of PW2, PW3 and PW4 who were not eye witnesses is insufficient to sustain the conviction of the appellant. Whatever they were told about the commission of the offence is hearsay evidence which is uncorroborated and has no evidential value. Moreover, the suspicion by PW2 and PW4 that the appellants might have killed the deceased because of the alleged court cases as between the deceased and the appellants, PW4 and the appellants where the deceased was a witness of PW4, did not link the appellants with the killing of the deceased. We say so because suspicion, however grave cannot be a ground to convict. Besides, the PW4's account that, after the demise of the deceased the 1st appellant used the deceased's mobile phone to threaten PW4 is highly suspect in the absence of evidence from the mobile company that, on 2/5/2013, the deceased's mobile phone made a phone call to and in particular to PW4.

All said and done, we are satisfied that there is no evidence necessitating ordering a retrial or else that could be utilised by the

prosecution to fill in the evidence gaps which will defeat the purpose of a retrial. We thus, allow the appeal and order the immediate release of the appellants unless if they are held for another lawful cause.

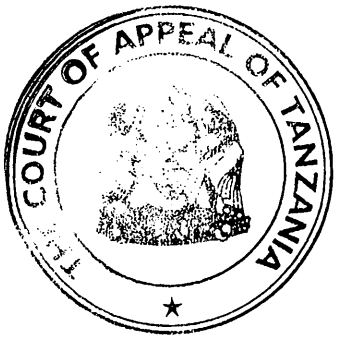
DATED at **MBEYA** this 26th day of August, 2019.

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 27 day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and Dr. Tasco Luambano assisted by Ms. Mary Mgaya for the appellants is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL