IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA J.A., MWANGESI J.A., And WAMBALI J.A.)

CRIMINAL APPEAL NO. 36 OF 2017

1. JULIUS CHARLES
2. DISMAS ALOYCE LYIMO } ..... **APPELLANTS**

VERSUS

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

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(Moshi, J.)

Dated the 4th day of December, 2015
in
Criminal Sessions Case No. 3 of 2015

JUDGMENT OF THE COURT

20th March & 2nd April, 2020

WAMBALI, J. A.:

Julius Charles and Dismas Aloyce Lyimo, the first and second appellants respectively were charged and convicted of the offence of murder contrary to section 196 of Penal Code [Cap. 16 R.E. 2002] (the Penal Code). Each appellant was sentenced to death by hanging.

The information which was laid against the appellants at the High Court of Tanzania at Arusha was to the effect that, the appellants on 17th November, 2013 at Ming'enyi Village within Hanang District in Manyara

Region murdered Elihuruma Joseph @ Apolo. According to the record of appeal, after the information was read over and the appellants were required to plea, each appellant denied the allegation.

Consequently, to prove its case the prosecution fronted thirteen witnesses, some of whom tendered exhibits, namely, the second appellant's cautioned statement and extrajudicial statement, the sketch map and the postmortem report. The said exhibits were admitted as P1, P2, P3 and P4 respectively.

In essence, the substance of the prosecution evidence was that the first appellant, a turn boy and the second appellant, a driver of a truck agreed with the deceased to travel together from Kahama to Arusha. It was not disputed at the trial that before they departed from Kahama the truck was loaded with 158 bags of rice which belonged to the deceased and had to be offloaded at Arusha as the final destination.

However, as it turned out, while the first and second appellants managed to reach Arusha, the deceased was found dead at Ming'enyi Village in Katesh District Manyara Region, some few meters off the main road from Singida to Babati. According to the prosecution witnesses, the deceased body was found with a wound on the head which was believed to have been inflicted by the assault of the appellants. The Post Mortem

Report (exhibit P4) and the evidence of Doctor Charokiwa Rajab Msangi (PW11) concluded that the cause of death was due to severe bleeding that was caused by the wound inflicted on the head. It was thus firmly contended by the prosecution that the deceased's death was unnatural and it was none other than the appellants who were responsible for his death.

In their spirited defence each appellant exonerated himself from responsibility arguing that they parted ways with the deceased at Majengo in Arusha where the bags of rice were also offloaded.

Nevertheless, at the conclusion of the trial, the learned trial Judge (Moshi, J.) believed the prosecution evidence and found the defence evidence not to have raised doubts to dislodge the circumstantial evidence. She was convinced that the said evidence conclusively pointed out that the appellants were the last persons to be seen with the deceased and therefore they were fully responsible of causing his death. The learned trial Judge also found that the evidence left no doubt that the appellant had common intention in killing the deceased. Consequently, each appellant was convicted and sentenced to suffer death by hanging as intimated above.

The trial court's decision did not please the appellants, hence the present appeal. Initially, each appellant lodged a memorandum of appeal

comprising of seven grounds of appeal. Essentially, the grounds in the memoranda of appeal are almost similar. At this juncture, based on the grounds of appeal, we deem it appropriate, to reproduce hereunder a paraphrased form of the relevant grounds thus:-

1. *That the trial court erred in law and fact for convicting the appellants on the evidence that they were the last persons to be seen with the deceased.*
2. *That the trial court erred in law and fact to convict the appellants on the uncorroborated evidence of the prosecution.*
3. *That the trial court erred in law and fact to convict the appellants based on the broken chain of circumstantial evidence.*
4. *That the trial court erred in law and fact to convict the appellants while in totality the prosecution did not prove the case.*
5. *That the trial court erred in law and fact to convict the first appellant while the prosecution did not tender the cautioned statement and extrajudicial statement to show that he admitted to have committed the offence of murder. (This is specific for the first appellant)*

6. *That the evidence of PW12 was wrongly admitted in evidence contrary to the requirement of the law. (This is specific for the second appellant*)

As it transpired, when each appellant was assigned a counsel to represent him at the hearing of the appeal in view of the apparent conflict of interest, Mr. John Materu, learned advocate for the first appellant lodged a supplementary memorandum of appeal comprising of two grounds of appeal and premised on the following complaints:-

"*1. That the learned trial judge erred in law in convicting the first appellant on the strength of the 2nd appellant's cautioned and extrajudicial statements which were illegally admitted at (sic) in evidence.*

2. *That, the learned trial judge erred in law and in fact in holding that the appellants had common intention to commit the offence of murder and that the first appellant participated in committing the offence."*

At the hearing of the appeal, Mr. Materu learned advocate who appeared for the first appellant, sought leave of the Court, which was granted, to compress ground I in the supplementary memorandum of appeal and ground 6 in the original memorandum of appeal. Mr Materu

also compressed ground 2 in the supplementary memorandum of appeal with the rest of the grounds in the original memorandum of appeal. In essence, after compressing the grounds, the major complaint in ground 2 is that the prosecution did not prove that the first appellant was responsible for the offence of murder of the deceased.

On the other hand, Mr. Ismael John Ayo, learned advocate who appeared to represent the second appellant adopted the same sequence of compressing the grounds of appeal into two.

Basically, after a brief discussion between the Court and counsel for the parties, it was agreed to have two grounds. First, that the cautioned and extrajudicial statements of the second respondent were illegally admitted in evidence. Second, that the prosecution did not prove through circumstantial evidence that the appellants killed the deceased on the fateful day as alleged in the information.

On the adversary, the respondent Republic through the services of a consortium of two learned Senior State Attorneys and one learned State Attorney, namely, Ms. Sabina Silayo, Ms. Naomi Mollel and Ms. Tuseje Samwel respectively, strongly opposed the appellants' appeal.

It was strongly submitted on the first ground of appeal, on behalf of the first appellant by Mr. Materu that, the extrajudicial statement which was tendered by Ms. Joyce Elias Musiba (PW12) and admitted by the trial court as exhibit P3 contravened the law. Mr. Materu argued that although the counsel for the first appellant objected to the admission of exhibit P3 on allegation that he was tortured by the police and therefore, it was involuntarily given, the trial Judge admitted it in a surprise ruling as reflected at page 80 of the record of appeal without conducting a trial within a trial to determine its voluntariness. To support his argument, he referred us to the decision of the Court in **Godfrey Ambros Ngowi v. The Republic**, Criminal Appeal No. 13 of 2017 (unreported). In the event, Mr. Materu impressed on us to expunge exhibit P3 from the record of appeal.

With regard to the admission of the cautioned statement (exhibit P4) of the second appellant, Mr. Materu submitted that the procedure which was adopted by the trial Judge in conducting a trial within a trial was highly irregular. Exemplifying his contention, Mr. Materu stated that during a trial within a trial, the trial judge started to record the evidence of the defence (the second appellant) and then the witness for the prosecution responded. In the circumstances, the learned counsel argued that the proper

procedure was for the prosecution which alleged that the exhibit was voluntarily given to start and the appellant would have responded to the allegation. To support his argument on this irregularity, Mr. Materu referred the Court to the decision **in Anthony Matheo@ Minazi and Others v. The Republic,** Criminal Appeal No. 13 of 2017 (unreported). Mr. Materu concluded his submission in respect of the first ground by urging us to find that the procedure of admitting exhibits P3 and P4 was irregular and therefore, the same should be expunged from the record.

As regards ground 2 on whether the prosecution proved the case against the first appellant beyond reasonable doubt, Mr. Materu contended that the circumstantial evidence which was relied upon by the trial court to base the first appellant's conviction was disjointed and inconclusive to support the finding of his guilty.

In his submission in support of this ground, the learned counsel criticized the trial Judge for finding that the first and second appellants were the last persons to be seen with the deceased and therefore, they were responsible for his death. Similarly, Mr. Materu disagreed with the trial Judge's finding that there was common intention by the appellants to commit the offence of murder. In this regard, he strongly maintained that

section 23 of the Penal Code, could not apply in the circumstances of the evidence which was fronted by the prosecution against the appellants.

The learned counsel firmly believed that in view of the evidence in the record of appeal, the only finding which can be reached by the Court against the first appellant is that he is not guilty of the offence of murdering the deceased.

On the other hand, Mr. Materu argued that even if the Court does not accept his argument that exhibits P3 and P4 should be expunged from the record of appeal, still the first appellant cannot be convicted of murder. His argument was premised on the fact that the second appellant in his extrajudicial statement (exhibit P3) implicated the first appellant to have been involved in pulling the body of the deceased from the scene of the crime to some few metres off the main road. In his view, this connection alone could not make the first appellant guilty of murder. Besides, Mr. Materu contended that the first appellant was not mentioned by the second appellant in his cautioned (exhibit P4). Mr. Materu also differed with the reasoning of the trial Judge that the first appellant escaped after the incident until when he was arrested. He submitted that the first appellant did not escape as he was arrested at Kahama after he returned from the journey from Arusha on 25th November, 2015 which was hardly seven

days after the alleged murder of the deceased. In his considered view, it was not proper for the trial Judge to have concluded that the conduct of the first appellant in escaping for sometimes after the incident demonstrated his involvement in the commission of the offence of murder.

In the circumstances, Mr. Materu spiritedly implored us to find that the first appellant is not guilty of murder, allow his appeal and set him at liberty.

On his part, Mr. Ayo who appeared for the second appellant basically associated himself with the submission of his learned friend Mr. Materu on the first ground concerning the improper admission of exhibits P3 and P4. The learned counsel therefore did not wish to add anything substantial to Mr. Materu's submission. He similarly adopted the prayer that exhibits P3 and P4 be expunged from the record of appeal resulting in allowing the first ground of appeal.

With regard to the second ground of appeal, Mr. Ayo firstly, acknowledged that the evidence which was relied upon by the trial court to convict the second appellant was purely circumstantial. To this end, he firmly maintained that the circumstantial evidence in the record of appeal did not irresistibly establish that the second appellant was fully responsible for the alleged killing of the deceased.

Mr. Ayo submitted further that the chain of events allegedly linking the second appellant with the offence of murder was highly broken and disconnected to the extent of rendering the credibility of the prosecution witnesses unreliable. In addition, Mr. Ayo criticized the trial Judge in relying on the evidence of Moshi Ramadhani (PW5), whose evidence was contradictory concerning the time of departure at Kahama by the appellants and the deceased en route to Arusha. Essentially, his submission on this issue is that while PW5 testified that the appellants and the deceased left Kahama at 3am, the appellants in their defence testified that they kicked off their journey from Kahama at 4am.

The learned counsel for the second appellant further contended that the evidence on how many bags of rice were loaded in the truck was contradictory. In his argument, while PW5 testified that they loaded 158 bags of rice, Lameck Msuya (PW7) who transported the bags of rice in his truck from Arusha to Moshi (PW7) stated that he saw 159 bags of rice. This was also stated by the second appellant, he argued.

Indeed, he submitted that the evidence of PW7 that the bags of rice were offloaded at Deo Camp at Moshi is not compatible with the evidence of the appellants who maintained that they offloaded the said bags of rice at Majengo Arusha.

In the circumstances, Mr. Ayo submitted that the apparent contradictions in the prosecution's evidence should be resolved in the second appellant's favour. In totality, Mr. Ayo firmly submitted that if the prayer to expunge exhibits P3 and P4 is accepted by the Court, there remains no impeccable evidence in the record of appeal to link the second appellant with the offence of murder. The learned advocate, therefore, concluded by urging us to find that the prosecution did not prove the case against the second appellant beyond reasonable doubt, allow the appeal and set the second appellant at liberty.

On the part of the respondent Republic, Ms. Silayo who led the consortium of learned State Attorneys started by conceding that exhibits P3 and P4 were irregularly and illegally admitted into evidence by the trial court. She thus agreed with the submissions of the learned counsel for the appellants that the respective exhibits be expunged from the record of appeal. It is noted that Ms. Silayo did not wish to go into details of the circumstances which led to the procedural irregularities complained of by the appellants' counsel.

However, Ms. Silayo courageously argued that even if the said exhibits are expunged, still there is ample evidence to prove that the appellants committed the offence of murder.

Expounding on her stance, Ms. Silayo stated that there is no dispute that the appellants and the deceased travelled together from Kahama on expectation of reaching Arusha as the final destination. She submitted further that there is ample evidence that while the appellants reached Arusha together; the deceased did not make it as he met his death at Ming'enyi Village within Hanang District, Manyara Region on the way to Arusha. She thus requested us to disregard the appellants' defence that the deceased managed to reach Arusha where he offloaded his bags of rice at Majengo. Moreover, she submitted that the appellants' defence was heavily challenged by the mother of the deceased one Leah Apolo (PW4) who managed to communicate with the second appellant concerning the whereabouts of the deceased after she was informed that the deceased left Kahama on 17th November, 2013 but until 19th November, 2013 he had not been seen in Arusha. Ms. Silayo contended that although the second appellant stated that they left the deceased at Arusha, but PW4's effort to trace him in most possible known places in Arusha were barren of fruits. The learned Senior State Attorney argued further that PW4's attempt to communicate with the second appellant through his mobile phone after she did not manage to see the deceased at Arusha was futile as it was unreachable. In the premises, Ms. Silayo contended that the conduct of the

second appellant in not getting back to PW4 to ascertain the whereabouts of the deceased demonstrated that he knew what had happened and participated in committing the crime. To bolster her argument, Ms. Silayo made reference to the decision of the Court in **Mathayo Mwalimu and Another v. The Republic,** Criminal Appeal No. 147 of 2008 (unreported).

In addition, the learned Senior State Attorney submitted that the evidence of PW5 who arranged for loading of the bags of rice and saw the appellants leaving together with the deceased from Kahama to Arusha with 158 bags of rice left no doubt that the difference on the issue of the time when they started the journey was immaterial and so is the difference on number of bags carried. In essence, she submitted that the alleged contradiction is minor and cannot shake the prosecution case. She therefore, implored us to find that the complaint of the appellants on this issue is baseless.

Ms. Silayo also submitted further that the evidence of PW7, a truck driver who transported the bags of rice from Arusha to Majengo in Moshi at the request of the second appellant strengthened the prosecution case that the deceased did not reach Arusha and that his property was taken and sold by the second appellant. She emphasized that the second appellant went together with PW7 to Majengo Moshi and offloaded the said bags of

rice at Deo Camp as instructed by him and was paid Tshs. 90,000/= for that trip as they had agreed during their negotiation.

In her further submission, Ms. Silayo contended that the evidence of PW7 was corroborated by Gabriel Felix Remoy (PW8), the cousin of the second appellant. In her argument PW8 testified and affirmed that he was called by the second appellant who informed him that he was on the way from Kahama and he had his rice to sell and asked him to find a buyer. PW8 was the one who escorted the second appellant to store the bags of rice at his sister's house in Moshi, she emphasized.

In the circumstances, the learned Senior State Attorney concluded that the chain of events connecting the appellants as the last person to be seen with the deceased were so linked to the extent of giving credence to the conclusive circumstantial evidence which was properly relied by the trial court to convict the appellants of the offence of murder. In the premises, she pressed us to dismiss the appeal.

From the forgoing submissions of counsel for the parties, we propose to begin our deliberation with the first ground of appeal on the improper admission of exhibits P3 and P4.

Counsel for the parties are in agreement that exhibits P3 and P4 were improperly admitted into evidence contrary to the requirement of the law. We think this issue need not detain us. We, however, wish to emphasize that in a criminal trial, as the Court has stated in several decisions, where an objection is raised by an accused on the admission of cautioned statement or extrajudicial statement, the trial Judge has a duty to conduct a trial within a trial and come to a conclusion as to whether it should admit it or otherwise. It follows that the procedure which was adopted by the trial Judge in the present case of simply delivering a short ruling to the objection and admitting the document as exhibit P3 was, with respect, improper.

On the other hand, we are settled that the procedure which was applied by the trial Judge in a trial within a trial to determine the admissibility of exhibit P4 by giving the first opportunity to the objecting party (the second appellant) to begin giving evidence in support of his objection instead of allowing the prosecution to submit on whether the objection was valid or otherwise was similarly procedurally irregular.

In the event, we entirely agree with the learned counsel for the parties that the said exhibits cannot be validly relied in evidence.

Consequently, we expunge exhibits P3 and P4 from the record of appeal. In the result, we allow this first ground of appeal.

The next question which emanates from the second ground is whether after expunging exhibits P3 and P4 there is sufficient evidence to ground conviction of the appellants.

Counsel for the parties submitted divergent views on the issue. Whereas those for the appellants maintained that upon expunging exhibits P3 and P4 from the record of appeal there is no remaining evidence to ground conviction on the appellants, those on the respondent Republic side held firm position that the circumstantial evidence in the record of appeal tendered by the prosection irresistibly points to the guilty of the appellants.

At this juncture, since we are settled that the proof of this case on the guilt of the appellants essentially depends on circumstantial evidence, we think it is appropriate to, albeit briefly discuss the principles underlying this area of the law.

It has been emphasized by the Court time without number that the law on circumstantial evidence is that, it must irresistibly lead to the conclusion that it is the accused and no one else committed the crime (see

Shabani Abdallah v. The Republic, Criminal Appeal No. 127 of 2003 (unreported).

Indeed, in **Simon Msoke v. The Republic** (1958) E. A. 715 at 718 the defunct East Africa Court of Appeal held among others that:

> *"... In a case depending conclusively upon circumstantial evidence, the court must, before deciding upon a 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 guilty".*

It is noteworthy that earlier on in the decision of **Lezjor Tepe v. The Reginum** (2) [1952] AC 480 which was also referred in **Msoke's case**(supra), the Privy Council had stated at page 489 that:

> *"... It is also necessary before drawing the inference of the accused's guilty from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference".*

It is further instructive to note that in **Elisha Ndalahwa v. The Republic,** Criminal Appeal No. 51 of 1999 (unreported) the Court observed that **Musoke's** case settled the applicable law on circumstantial evidence. Apparently, the decision in **Musoke** has been followed and expounded by the Court in many other decisions. For instance, in **Seif**

Selemani v. The Republic, Criminal Appeal No. 130 of 2005 (unreported), the Court stated that:-

> *"Where the evidence against an accused person is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred. In other words, the inference must irresistibly lead to the guilty of an accused person".*

(See also the decision of the Court in ***Nkeshimana John @ Diodone v. The Republic,*** *Criminal Appeal No. 229 of 2005(unreported).*

Applying the settled principles of law to the present case, we are of the view that the chain of circumstances leading to the inference that the appellants committed the offence of murder can be traced from the following links in the prosecution evidence.

Firstly, the evidence of PW5 left no doubt that the appellants and the deceased left together at Kahama enroute to Arusha in a truck with registration No. T. 347 AYX which was commonly identified by its owner's name as *"JK Fusso".* It is not disputed that the driver of that truck was the second appellant and the first appellant was a turn boy.

At the trial, it was the firm evidence of PW5 that the trio left Kahama on 17th November, 2013 at 3am after he assisted them to load the bags of rice at Mohamed Mark's Mill on 16th November, 2013. PW5 testified that he was surprised on 26th November, 2013 when he heard that the deceased did not reach Arusha because he died on the way and that the truck was back at Kahama but the driver (the second appellant) was not seen. It was a further testimony of PW5 that upon that information he told his colleagues that they should report the incident to the police station so that they can apprehend the truck, but he was told that the first appellant had already been arrested while the second appellant escaped.

We hasten to point out that the vital evidence of PW5 was not seriously challenged by the defence.

Secondly, the evidence of William Gidayny (PW2) was that on 18th November, 2013 at 12.30am he went to Balandalalu (a hill area) where he sent his cattle to drink water as it was during the dry season. PW2 testified further that while he was walking towards the hill, he saw a vehicle which was packed at the main road and that he heard a person voice from a far. He added that the vehicle's rear and front lights were on. Later when he approached near the road PW2 saw a vehicle which was from Singida and

he thus stopped the cattle to let it pass and thereafter he led the cattle to cross the road.

It was also PW2's testimony that while on the way back to his home with cattle in the morning at 8.00am, he saw the Street Chairman one Jonas Gwangwa (PW1) with one woman called Rehema and when he asked them what they were doing there, he was told that there was an accident and that an unknown person had died. It is from the response of the two persons which made him to inform them that when he passed with his cattle at that place in the night, he heard a person voice and later a vehicle which was packed passed and did not stop. We have to note that PW2 remained stable when he was cross-examined by the defence concerning the story which he told the trial court during examination in chief.

From the totality of PW2's evidence, it is our considered opinion that, he pointed out to the fact that at the place where he saw the vehicle parked and later left, it is the same place where he heard a person voice and where later in the morning the deceased body was found on 18th November, 2013. PW2's testimony was corroborated by PW1 the Ming'enyi Village Street Chairman. Admittedly, the evidence of PW2 was not greatly challenged by the appellants.

Thirdly, we entertain no doubt that the evidence of PW4, the mother of the deceased renders credence to the fact that the deceased died before he reached Arusha. As correctly submitted by Ms. Silayo, PW4 made effort to know the whereabouts of the deceased and managed to contact the second appellant on 18th November, 2013 through his mobile phone who informed her that they left the deceased at Majengo Arusha. However, when PW4 made inquiries from some known persons at Arusha, she was informed that the deceased had not been seen. As it were, PW4 testified that after inquiring from some persons and relatives in Arusha, her efforts to trace the second appellant through his mobile phone to seek further clarification concerning the whereabouts of the deceased were in vain as it was unreachable. PW4 did not manage to trace the second appellant and the deceased until she was informed that the body of the deceased had been found at Ming'enyi village near the main road to Arusha from Singida.

Equally, we observe that the evidence of PW4 on this particular aspect of death of the deceased before he reached Arusha and on how she communicated with the second appellant was not seriously challenged during cross-examination. Indeed, her evidence also rendered credence to

the fact that the second appellant acknowledged to have travelled together with the deceased from Kahama on 17th November, 2013.

Fourthly, the other crucial evidence linking the chain of events is that of PW7, the driver of the truck with registration No. T. 870 AAQ who is based in Moshi but travels to several destinations in the country to transport goods belonging to businessmen. PW7 testified before the trial court that on 18th November, 2013 he was called through a mobile phone by the second appellant who was at Arusha to go and transport bags of rice to Moshi. PW7 obliged and went to Mbauda at Arusha where he found his turn boy had loaded the bags of rice and travelled to Moshi accompanied by the second appellant up to Deo Camp at Majengo where he offloaded the luggage and was paid Tshs. 90,000/= for the business. PW7 testified further that when he reached Mbauda area in Arusha the truck which was driven by the second appellant was found packed at the petrol station. PW4 insisted that the second appellant told him that the person (PW8) where they offloaded the bags of rice at Deo Camp is his relative.

From the totality of PW7's evidence, we do not need to over emphasize that our careful reading of the evidence in the record of appeal indicates that his testimony was not seriously challenged by the appellants.

Fifthly, it is not without substance to state that the evidence of PW8, the second appellant's cousin corroborated the evidence of PW7 on how the bags of rice were sent to his place in Moshi by the second appellant. PW8 testified that he operates a business of a bar and transport commonly known as Deo Camp. PW8 testified further that he was telephoned by the second appellant and informed that he was on the way from Kahama and that he had rice and thus he should find a buyer. PW8 testified further that after some discussion with the second appellant he told him that he needed a place to store his rice as he had sold part of it in Arusha. PW8 agreed to give him a place at his sister's house where he kept his spare parts. According to PW8 the second appellant went there on board a truck which was driven by PW7. PW8 confirmed that the second appellant did not go with the truck which he usually drove. This fact was also confirmed by the first appellant during cross examination where he agreed that he drove "JK Fusso" truck to Moshi which had no luggage as the second appellant went with another vehicle to send the rice. PW8 also stated that the stored rice was taken by the second appellant from his place the next day and later on the following day his wife took the rest. PW8 further confirmed that he also managed to buy four bags of rice of 50kgs each from the second appellant and paid the money to Agripina his

sister via M-Pesa. PW8 concluded his testimony by emphasizing that before the day when the second appellant send the bags of rice at his place he had never received any rice from him and that he knew him as a driver and not as a businessman selling rice.

In this regard, we are settled in our mind that the evidence of PW7 and PW8 indicate that the appellants arrived in Arusha without the deceased who they started the journey together from Kahama. Their evidence indicates that what arrived in Arusha were the deceased's bags of rice which was appropriated by the second appellant who sold the same to various persons.

In our respectful opinion, the chain of events which we have demonstrated above is so connected to make inference to the appellants guilty of the offence of murder.

We do not see any contradiction in the prosecution evidence which would have greatly affected the prosecution case as alleged by the appellants. We are however alive to the submission of the counsel for the second appellant that the difference on the departure time from Kahama to Arusha and the total number of bags of rice which were carried from Kahama and by PW7 to PW8 place. On this contention, we hasten to add that the contradiction, if any, is not material. We say so because the

difference on the time of departure from Kahama was not solely born out of the prosecution witnesses. It is PW5 who stated that the appellants and the deceased left Kahama at 3.00am, while the appellants in their defence stated that they left Kahama at 4.00am. This cannot be termed as a contradiction as the difference emanated from what the prosecution witness stated while the defence had a different version of the time. Besides, in the present case, what is important is that the trio left Kahama to Arusha on 17th November, 2013 and that the deceased body was found at the scene of the crime on 18th November, 2013 in the morning at Ming'enyi village which is along the main road from Singida to Arusha. This is the period within 24 hours in which the appellants travelled together with the deceased from Kahama to Arusha. We therefore find the complaint on the departure time baseless.

Similarly, we note that PW5 told the trial court that the deceased loaded 158 bags of rice. On the other hand, PW7 stated that he loaded 159 bags of rice from Arusha to Moshi. On our part, we hold that the contradiction is minor. The crucial point is that according to the evidence in the record the second appellant transported the deceased bags of rice from Kahama to Arusha and thereafter from Arusha to Moshi. Indeed, PW7 was not sure of the total number of the bags of rice.

We are also aware of the second appellant's defence that he transported 158 bags of rice from Kahama to Arusha. However, during cross examination, the second appellant did not challenge PW5's testimony that at Kahama he loaded 158 bags of rice belonging to the deceased.

On the other hand, we are settled that the chain of events is complemented and supported by the appellants' conduct after the incident.

It is in the record of appeal that the second appellant escaped from arrest from 26th November 2013 after he returned to Kahama from Arusha. The second appellant went into hiding at Mto wa Mbu and left the truck into the hands of the first appellant until when he was arrested on 19th January, 2014 at M-Pesa agent after he fell into a trap that was set by the police. Certainly, if the second appellant was innocent, he could not have disappeared after the incident. He could have remained at Kahama to offer any explanation to the police on the whereabouts of the deceased as he was the person who travelled with the deceased to Arusha.

The other conduct is demonstrated by the fact that from Arusha to Moshi the second appellant did not drive his usual vehicle but he hired PW7's vehicle and paid him Tshs 90,000/=. The act of entrusting the first appellant to drive his employer's vehicle from Arusha to Moshi also

demonstrated that he was avoiding to be spotted by the authorities in connection to the death of the deceased.

On the other hand, we are alive to the spirited submission of the counsel for the first appellant that on the available evidence in the record, after expunging exhibit P3 and P4, there is no further evidence to connect him with the offence of murder of the deceased.

We need to state that from the chronology of the events which we have demonstrated above, we have no hesitation to state that throughout the journey from Kahama to Arusha and back to Kahama, the first appellant did not part company with the second appellant. Even when the second appellant boarded PW7 vehicle from Arusha to Moshi, the first appellant knew what took place as he agreed to drive a truck to Moshi which was ordinarily driven by the second appellant. Indeed, from their defence, it is apparent that they left together from Moshi to Dar es Salaam and then to Kahama. The first appellant took charge of overseeing the vehicle at Kahama while the second appellant had escaped to Mto wa Mbu.

In our settled opinion, the first appellant cannot exonerate himself from knowing what transpired on the way with regard to the death of the deceased who they travelled together from Kahama. The first appellant

also, according to the evidence knew what happened to the deceased's bags of rice after he did not reach Arusha.

In the result, we respectfully decline the invitation by the learned counsel for the first appellant to find that the first appellant cannot be connected with the death of the deceased.

On the other hand, we are mindful of the counsel for the appellants that the trial Judge wrongly found their clients to have common intention in killing the deceased.

We think that the conclusion of the trial Judge on common intention cannot be valid after we have expunged exhibits P3 and P4. We do not therefore intend to discuss the application of section 23 of the Penal Code in this judgment.

However, from the chain of circumstances which we have demonstrated above, we are one with the trial Judge that the appellants cannot escape being liable for murdering the deceased because they were the last persons to be seen with the deceased at Kahama. From the evidence in the record of appeal, the appellants have not explained how the deceased did not reach Arusha and instead he was found dead at Ming'enyi village on the way where they passed together from Kahama.

In this regard, it is instructive to make reference to what the Court stated in **Mathayo Mwalimu and Another v. The Republic** (supra) with regard to the last person to be seen with the deceased thus:

> *"In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of HAMISI MNINO, like the court below, we too are satisfied that they are the ones who killed him."*

[See also the case of **Robert Edward Moring @ Kadogoo v. The Republic**, Criminal Application No. 9 of 2005 (unreported) and **Emmanuel Kondrad Yosipati v. The Republic**, Criminal Appeal No. 296 of 2017 (unreported)].

In the circumstances, from the totality of what we have discussed with regard to ground 2, we are settled that the complaint on the failure of the prosecution to prove the case beyond reasonable doubt is unfounded. We dismiss it.

Overall, considering the chain of circumstantial evidence in the record of appeal, we are compelled to agree with the observation of the defunct

East African Court of Appeal in **Samson Daniel v. Reginum** (1934) 1 EACA 46 that;

> *"Circumstantial evidence may be not only as conclusive but even more conclusive than eye witness".*

In the end, save for the order we have made expunging the cautioned and extra judicial statements from the record of appeal, the appeal stands dismissed.

DATED at **ARUSHA** this 1st day of April, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

This Judgment delivered on 2nd day of April, 2020 in the presence of Mr. Ombeni Kimaro learned counsel for the Appellants and Mr. Hangi Chang'a learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL (T)