IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, KOROSSO, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 538 OF 2017

SIJALI S/O SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Hon. F.N. MATOGOLO, J.)

Dated 13th November, 2017
in
Criminal Session Case No. 74 of 2012.

.....

JUDGMENT OF THE COURT

10th & 31st August, 2020

LILA, JA:

The appellant, Sijali Shabani, was arraigned before the High Court of Tanzania sitting at Dar es Salaam for the offence of murder contrary to section 196 of the Penal Code, Cap. 16 Vol. I of the Revised Edition 2002 (the Penal code). The information laid by the prosecution alleged that on 11th day of March, 2012 at about 18.30hrs at Makole Village within Bagamoyo District and Coast Region he murdered one Amina Ally. He was convicted as charged and a mandatory sentence of death by hanging was meted upon

him. Aggrieved, he has now come by way of an appeal to this Court protesting his innocence.

The brief facts of the case that led to the appellant's arraignment, conviction and sentence are not complicated. According to Shabani Ismail (PW1), the appellant was his brother in-law having married the deceased who was born of his paternal uncle. That their marriage was blessed with two issues, a male and a female. On the fateful day and time, when PW1 and his brother one Nuru were on the way back home from their farm, which is located far away from the village they lived, they came across the deceased who was in her farm burning grasses. The deceased also left for home and joined them but as she was walking slowly she was left behind by PW1 and his companion. On their way home the two who were pushing their bicycle on a steep slope area met the appellant moving in the opposite direction holding a machete and a yellowish bag. Interested to know where the appellant was heading to at that time; PW1 asked him where he was going in late hours of the day. The appellant replied that he had some activities to attend to. No sooner had the two moved about 70 paces, PW1 heard the deceased shout for help "Kaka njoo unisaidie nakufa". PW1 rushed back and witnessed the appellant inflicting fatal cuttings on the deceased,

twice on the head and on the hand, with a machete. He called Nuru and they found the deceased in her last moments. PW1 sent Nuru to report the matter at the village. Among the villagers who responded to the cry at the deceased's house following the information relayed by Nuru was Juma Mathias (PW2). Juma Mathias then left to where the deceased body was where he found PW1 and helped him to carry the body home. Search for the appellant in the forest was mounted but was unsuccessful. However, on the third day, PW2 assisted by one Bahati managed to arrest the appellant in the forest where they were sawing timber when they were eating after the appellant had emerged from the forest and approached them looking for water. They tied him up with a rope, beat him up and later handed him to the police.

Bahati Paul (PW3) told the trial court that he worked with the appellant in timber sawing in the forest. He said on the material date he was with the appellant in the forest and after work they left for home and on the way they found the deceased at her farm burning grasses. The appellant asked for water from the deceased and was given. They then left to the village whereat they parted ways. Sometimes later, he was informed of the death of the deceased and he went to the scene where he found the deceased assaulted.

He joined the search team and, together with PW2, managed to arrest the appellant who had a machete on his waist. He however said it was normal for persons in the village to walk with machete.

Another witness who gave evidence for the prosecution was one D 388 D/SSGT Pascal (PW4) who visited the scene and drew a sketch map (exhibit P2). He said the sketch map was in respect of the deceased one Pilly Ally Semiano. Victor Bamba (PW5) was the Medical Doctor who examined the deceased body. His finding was that the deceased had two cut wounds on the fore head and on the right arm caused by sharp object. He opined that death was caused by loss of blood resulting to anemia. He filled his findings in the Post Mortem Report (exhibit P1).

Tumaini Geoffrey (PW6), then a primary Court Magistrate stationed at Chalinze Primary Court, was the last prosecution witness and is the one who recorded the appellant's extra-judicial statement. Admissibility of it was objected to by the appellant through his defence counsel one Mr. Sosten Mbedule. During trial-within-trial at page 48 of the record of appeal it was admitted as exhibit. P1 and was read aloud in court. The objection was overruled. When trial of the main case resumed and during his testimony, PW6 tendered the statement as exhibit and this is what the court said:-

*"**Court:-***

Extra-judicial statement is admitted as exhibit P3.

The same was read aloud in court by PW6."

In his affirmed defence, the appellant flatly distanced himself from the accusation. He claimed that on 6th or 7th March, 2012 he, alone, went to his farm which is over ten (10) kilometers and it takes about three hours walk. He never returned until 13/3/2012 when he was arrested by PW2 and PW3 while eating in his hut in the farm. He denied killing the deceased and even knowing her. He said his wife was one Pili Ally. As for the recording of the extra-judicial statement, he said the same was recorded after he was threatened with a pistol by a policeman called Akiba to confess killing the deceased lest he would shoot him before being taken to the justice of the peace and also during the recording Akiba was outside the window looking at him.

At the conclusion of the trial, as indicated above, the appellant was found guilty, convicted and sentenced as above.

The appellant's quest to prove his innocence is ostensibly reflected in the grounds of appeal fronted in the memorandum of appeal and two supplementary memoranda of appeal which comprised a total of twenty (20)

grounds of complaints. For a reason soon to be apparent we shall not recite them all verbatim.

At the hearing of the appeal, the appellant who was connected to the Court through video facilities had the services of Mr. Nehemia Nkoko, learned advocate, whereas the respondent Republic enjoyed the services of Ms. Angelina Nchalla, learned Senior State Attorney and Ms. Jacquiline Werema, learned State Attorney.

Before advancing his arguments in support of the appeal, Mr. Nkoko intimated to the Court that he was abandoning all the grounds of appeal save for the three grounds of appeal contained in the supplementary memorandum of appeal lodged on 12/5/2020 and grounds 3, 5 and 6 of the substantive memorandum of appeal. Consequently, he argued only on six grounds but which may be condensed into five grounds as hereunder paraphrased:-

1. *That the learned trial judge erred in law and fact in convicting the appellant based on Exh. P3 (Extra – judicial statement) which was irregularly recorded and the evidence of PW6 was illegally called to be a witness of the prosecution while he was not listed among the intended witness by prosecution during committal*

proceedings hence violating the provisions of section 246 (2) and 289 (1) of the CPA (Cap 20 R. E 2002).

2. *That the learned trial judge erred in law and facts in convicting the appellant relying on post mortem (Exh. P1) and sketch map (exh. P.2) which were unprocedurally tendered by public prosecution.*
3. *That the first learned trial judge erred in law by convicting the appellant while the weapon alleged to have been used by the appellant to kill the deceased was not tendered in court."*
4. *That failure to call Jumanne and Nuru entitled the learned trial judge to draw an adverse inference against the prosecution case.*
5. *That the learned trial judge erred in law and facts by relying on exhibit P.2 (a sketch map) while the name of the deceased mentioned is Pili d/o Ally."*

Submitting in respect of ground one (1) of appeal, Mr. Nkoko argued that PW6 was not among the would be prosecution witness listed and whose substance of his evidence was read during committal proceedings in terms of section 246(1)(2) of the Criminal Procedure Act, Cap. 20 of the then Revised Edition 2002 (the CPA) hence his appearance in court and testify was subject to issuance of a reasonable notice in writing to the accused or his advocate to add a witness in terms of section 289(1)(2) of the CPA. He

argued that as that was not done the evidence of PW6 was irregularly received in court hence his evidence and exhibit P3 which he tendered should be expunged from the record of proceedings.

In the same vein, arguing in respect of ground two (2) of the supplementary grounds of appeal, Mr. Nkoko urged the Court to expunge from the record of proceedings both the evidence and exhibit P1 tendered by PW5 as he was also not listed as one of the prosecution witnesses and the substance of his evidence was not read out during committal proceedings and no notice to call additional witness was issued to either the accused or his advocate.

Regarding ground three (3), Mr. Nkoko argued that the prosecution evidence was shaky on account of failure to produce in court as exhibit the machete allegedly used by the appellant to cut the deceased to death and found in possession of the appellant at the time of his arrest. He submitted that while PW1 said he saw the appellant cutting the deceased with the machete, PW2 and PW3 said the appellant was arrested while having the machete on his waist and handed to the police. In addition, Mr. Nkoko argued that even the trial judge, in his judgment, deduced malice aforethought from the nature of the weapon used to cut the deceased, the

machete. On that account it was his view that production in court of the machete was crucial. In the absence of the machete, Mr. Nkoko argued, there remains no evidence that the deceased was cut with the machete and therefore malice aforethought could not be established.

Arguing further on the issue whether malice aforethought was established, the learned counsel for the appellant submitted that the appellant was arrested at his farm whereat he ate food with PW2 and PW3 who arrested him, he did not escape and even PW3 said it was just normal in that village for one to walk armed with a machete. He argued that the appellant's conduct was inconsistent with the behavior of a guilty person. He accordingly submitted that malice aforethought was not established.

Submitting in respect of ground four (4), Mr. Nkoko submitted that one Jumanne and Nuru mentioned by both PW2 and PW4 to have been with PW1 on the fateful day hence crucial witnesses to corroborate what PW1 had told the court were not called to testify. He urged the Court to draw adverse inference on the prosecution case. Arguing further, Mr. Nkoko stated that PW1 being the one found with the deceased at the scene of crime, based on the principle that one who was last to be seen with the deceased is presumed to be a murderer unless he offers an acceptable explanation, was a suspect.

Turning to ground five (5) of appeal, Mr. Nkoko faulted the learned trial judge for acting on the evidence by PW4 and the sketch map (exhibit P2) to convict the appellant for two reasons. **First**; that it was not read aloud in court to allow the appellant understand the contents. **Second**; that it made reference to one Pili Ally Semiono as the deceased as opposed to the charge and evidence led by the prosecution witnesses which consistently referred to Amina Ally as being the one who was murdered. On that account, Mr. Nkoko emphatically submitted that it is doubtful whether the one who was killed is the one named in the charge. In totality, that casts doubts on the whole prosecution case against the appellant, Mr. Nkoko submitted. He therefore urged the Court to allow the appeal, quash the conviction, set aside the sentence and order the appellant be released from prison.

Lastly, in terms of Rule 4(2)(a)(b) of the Tanzania Court of Appeal Rules (the rules), Mr. Nkoko sought leave of the Court to raise an issue not part of the grounds of appeal which he discovered in the due course of perusing the record a few moment before the hearing of the appeal. The issue concerned failure by the learned trial judge to address the gentlemen assessors on vital points of law involved in the adjudication of the case. That

prayer was not objected to by Ms. Nchalla. We accordingly granted him leave to do so.

Addressing the Court in support of the new issue he had raised, Mr. Nkoko referred the Court to page 101 of the record where the learned trial judge in very clear words informed the gentlemen assessors that they were to opine on matters of facts not law as they are exclusively in the domain of the court. Mr. Nkoko stressed that the trial judge explicitly stated that issues of law are matters not of the assessors concern. That, according to Mr. Nkoko, amounted to not involving the assessors in the trial. He contended that although the learned trial Judge in his judgment determined the case after considering and determining various legal issues involved in the case such as corroboration, defence of *alibi*, identification, extra-judicial statement and malice aforethought, such vital points of law were not addressed to the assessors to enable them give a rational and focused opinion on the guilt or otherwise of the appellant. He was however unable to propose the effect but he simply prayed for the appeal to be allowed.

On her part, Ms. Nchalla, readily agreed with Mr. Nkoko that PW5 and PW6 were not among the witnesses listed and whose substance of their respective evidence read out during committal proceedings. She also

conceded that no notice to add them as witnesses was issued to either the appellant or his advocate. She, however, bearing in mind that the postmortem report and extra-judicial statement tendered by such witnesses were tendered and read out in court, the error of calling such witnesses was not fatal. She, however, took a U-turn when the Court referred her to pages 48 and 73 of the record of appeal which indicated that the extra-judicial statement was admitted and read out in court during trial-within-trial and not when the trial resumed with assessors.

The learned Senior State Attorney also shared views with Mr. Nkoko that the learned trial judge wrongly barred the assessors from giving their opinion on legal issues and in the summing up notes he did not sufficiently appraise the assessors on the vital points of law involved in the determination of the case as pointed out by Mr. Nkoko so as to enable the assessors to give a rational and focused opinion on the guilt or otherwise of the appellant. She was therefore agreed that the infraction was fatal hence the trial was vitiated. The consequences, she stated, is that the whole trial was a nullity for not involving the assessors. She was, however, quick to implore the Court to order a retrial since there is strong evidence by PW1 who eye-witnessed the incidence of the victim being cut with a machete by

the appellant. Even, Ms. Werema who chipped in to rescue the seemingly sinking ship was, at first, of the same view. However, upon the court's prompting whether the prosecution will not take steps to rectify the anomalies pointed out above in respect of the witnesses and exhibits, she gave up and proposed, in the circumstances, the appeal be allowed and the appellant be set at liberty.

In the determination of this appeal, we wish to start with grounds one (1) and two (2) of the grounds of appeal. The appellant's complaints in these grounds hinges on the fact that PW5 and PW6 were not listed and the substance of their respective evidence were not read out during the committal proceedings in terms of section 146(1) of the CPA and their appearance in court and testify was subject to the prosecution serving the accused or his advocate a notice to add a witness in terms of section 289(1)(2) of the CPA. We have perused both the committal proceedings of the inquiry court and those of the trial court and we are satisfied that PW5 and PW6 were not among the listed prosecution witnesses and the substance of their respective evidence was not read out during committal proceedings. We accordingly agree with both learned counsel that their inclusion in the list of witnesses and their being allowed to testify was irregular since no

notice to add them was issued by the prosecution before they testified. This infraction is fatal as we held in in a number of decided cases. Just to mention one, in the case of **Hamis Meure Vs. Republic,** [1993] TLR 213 at 217, the Court stated:-

> *"It having been accepted by the prosecution and the judge himself that PW2 did not feature in the record of committal proceedings, he should not have been allowed him to give evidence in contravention of the provisions of section* 289 *which are mandatory. "*

It was therefore wrong, in the present case, for the trial judge to allow PW5 and PW6 to testify in court. By doing so, he contravened the mandatory provisions of sections 246 (2) and 289 (1) and (2) of the CPA. Hence, we expunge their respective evidence including exhibits P1 and P3 from the record of proceedings. We accordingly allow the two grounds of appeal.

Next for consideration is ground three (3) of the memorandum of appeal in which Mr. Nkoko faulted the learned trial judge for acting on the evidence by PW4 and the sketch map (exhibit P2) to convict the appellant. We also agree with both learned counsel that exhibit P2 was not read aloud in court to allow the appellant and assessors understand the facts contained in it. Both counsel were of the same view when we drew their attention to

the manner the extra-judicial statement was received and admitted in evidence by the trial court as exhibit P3. It was their view it ought to have been read out aloud in court when the trial with assessors resumed. It is fairly settled that once an exhibit is cleared for admission and admitted in evidence, it must be read out in court. We are reinforced in that position by our holding in the case of **Sunni Amman Awenda vs. Republi**c, Criminal Appeal No. 393 of 2013 (unreported) in which the documents in question were a cautioned statement and extra-judicial statement which were not read out, and the Court succinctly stated that:-

> *"We need to point out that both the cautioned statement and extrajudicial statement had a lot of details and immensely influenced the decision of the court... to have not read those documents in court deprived the parties, the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mistrial."*

We accordingly agree with both counsels that exhibit P2 and P3 were irregularly admitted into evidence. We would add that the purpose for which a document is admitted and read out during trial-within-trial ends with the

closure of such proceedings that is when the ruling is delivered. For such a document to form part of the evidence in the main case, it should be again tendered for admission and must be read out in court after it is admitted. The rationale is not hard to find. Trial-within-trial is conducted in the absence of assessors. So, any document tendered and admitted in the course of that trial is admitted and read out in the absence of assessors. Assessors are thereby denied the opportunity to hear and understand the content of such document. Trial-within-trial is concluded by a ruling either permitting or refusing admission of a document. Thereafter trial of the main case resumes with assessors. In the event the ruling is to the effect that the disputed document is admissible, such document is to be admitted and the court is obliged to cause it to be read out in court in the presence of assessors so as to enable them understand the facts contained in it. That way the assessors are enabled to later on during summing up to give a focused opinion in respect of that document. That said, the learned judge strayed into error by assuming that by the extra-judicial statement (exhibit P3) having been admitted and read out during trial-within-trial it was sufficient. The gentlemen assessors were thereby denied the right to know the contents of

that document. We therefore expunge both exhibits P2 and P3 from the record of proceedings.

Another issue related to the sketch map (Exhibit P2) is that it made reference to one Pili Ally Semiono as the deceased as opposed to the charge and evidence lead by the prosecution witnesses which consistently referred to Amina Ally as being the one who was murdered. As rightly conceded by the learned State Attorney, in the absence of acceptable explanation, it casts doubt in the prosecution case if the person allegedly murdered is the one referred in the charge. We have seriously examined the record and we have been unable to find a speck of evidence explaining away the discrepancy. So, even if exhibit P2 would have survived the wrath of being expunged from the record of proceedings, yet, it would have the effect of leaving the Court at cross-roads not knowing who, exactly, was murdered. That doubt would have benefited the appellant.

Admittedly, the learned State Attorney had very little to argue in respect of ground four (4) of appeal. She agreed with Mr. Nkoko that neither Jumanne nor Nuru was called to testify by the prosecution in support of PW1 hence explain away the doubt that PW1 was a suspect. She also conceded that PW1 was the only person who was found with the deceased at the scene

of crime. The rule governing drawing of an adverse inference was well expounded in the case of **Azizi Abdallah vs. Republic** [1991] TLR 71 where the court stated that:

> *"The general rule and well known rules is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

[See also **Peter Mabara vs Republic**, Criminal Appeal No. 242 of 2016 (unreported)]

We have perused the record and it has come to our knowledge that Jumanne who is referred to as Ustadhi Jumanne by PW2, played no any substantive role in the case. He was among those who turned up to the deceased's residence after the wind about the deceased's death had spread over in the village and he was the one who informed PW2 and PW3. He could not therefore have any information or material evidence on the occurrence. As for one Nuru, PW1 was explicitly clear that he was with him when the deceased cried for help and he left him with the bicycle when he rushed to

see what had befallen the deceased. According to PW1, Nuru arrived at the scene when the deceased was at her last moment hence he did not witness what happened to the deceased. All that he would tell is that he found PW1 at the scene of crime. Such evidence has no any bearing with the deceased's cause of death and the responsible person. His evidence was not material to the prosecution case. Based on the legal proposition above, this was not a fit case for the learned judge to draw an adverse inference to the prosecution.

We now turn to consider the issue raised by Mr. Nkoko in Court regarding failure by the trial judge to appraise the assessors on matters of law so that they may be able to give a focused opinion. We start with what the learned judge stated at page 101 of the record:-

> ***"Ladies and gentleman assessors;***
> *Understandably; the role of court assessors is to act as judges of facts. Thus I will take you through some issues of fact to consider leaving to me the legal aspect which I will consider in composing judgment of the court."*

Following the above expression of the learned judge, in the summing up, he did not address or explain to the assessors any of the points of law involved and on which the determination of the case based.

The issue that calls for our determination is therefore whether the course taken by the learned judge was proper?

In terms of section 265 of the CPA, it is imperative that all criminal trials before the High Court should be with the aid of assessors. As to what the learned judge should do at the conclusion of trial and the role of assessors, the provisions of section 298(1) of the CPA gives a direction. That section provides:-

> *"When the case for 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, and shall record such opinion".*(Emphasis added)

In view of the above exposition of the law, the aim of summing up to assessors is to enable the assessors assist the court in the just determination of the case by giving a focused opinion. The law does not restrict which matters should be addressed to the assessors in the summing up. It is for that reason that the Court has insisted that the assessors should be addressed and directed on both matters of fact and the vital points of law involved in the determination of the case. To have an effective and focused opinion, the Court has declined to treat the need to sum up to assessors as

discretion as the law seems to provide by using the word "may", and has insisted that such a practice is mandatory. That stance has been explicitly stated by the Court in the case of **Mulokozi Anatory vs Republic**, Criminal Appeal No. 124 of 2014 (unreported) where it was held that:-

> *"...we wish first to say in the passing that though the word "may" is used implying 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, trial judges sitting with assessors have invariably been summing up the cases to assessors..."*

In the instant case, we entirely agree with the concurrent views of the learned counsel of both sides that the learned trial judge strayed into error when he barred the assessors from giving opinion on matters of law involved in the determination of case. He even fell into serious error by not summing up and addressing the assessors on vital points of law. It is evident that while in the judgment the appellants' conviction was founded on extra-judicial statement, malice aforethought, identification and corroborative evidence, such vital points of law were not explained and elaborated to the assessors in the summing up notice by the trial Judge. More so, he discussed

and dismissed the appellants' defence of *alibi*. The explanation of these vital points did not feature in the summing up notice. Instead, it is vivid that the trial Judge simply gave a general summary of the case and then engaged the assessors to give their opinion.

The assessors' opinions are reflective of the deficiencies we have endeavored to demonstrate above. On this, we would let the record speak itself. This is what the assessors were recorded to have opined to the trial court:-

> ***"1st Assessor: Benard Ntumba:***
> ***In this case the Republic has managed to prove the offence against the accused for the following reasons:***
>
> ***1)*** *Shabani Ismail witnessed while accused assaulting the deceased using the machete. It was at 5:00pm-6:00pm where there was ample light.*
>
> ***2)*** *The Doctor established that the deceased was cut with pangas which accused also admitted to have cut the deceased.*
>
> ***3)*** *In the Extra-judicial Statement the accused admitted to have cut the deceased although he said he was angered. In his defence, the accused*

gave a weak defence. He was just complaining to have been threatened by the Police Officer, the accused defence is not true. I find the accused guilty of murder. That is all.

***Signature:1st assessor Sgd**:- 26/10/2017.*

2nd assessor- Mwanaasha Juma

Honourable Judge, I am not far from the opinion of the first assessor. The report of the Doctor named that the deceased was cut with the panga, the accused in his Extra-judicial Statement admitted to cut the deceased. I see the accused guilty of the offence he is charged. That is all.

***Signature: 2nd assessor Sgd**:- 26/10/2017.*

3rd Assessor- kulthum kambi:

Honourable Judge, I agree with the other assessors and I find the accused guilty of murder. The adduced evidence has proved the offence against him. I therefore find him guilty as charged. That is all.

***Signature: 3rd Assessor-Sgd**: 26/10/2017.*

Definitely, the quoted opinions have no any bearing with the vital points of law considered by the learned trial judge and on which the appellant's conviction was founded as reflected in the trial judge's judgment. That is a clear indication that the assessors were not completely directed on

vital points of law on which the case was decided. The resultant effect is that the trial is taken to have not been with the aid of assessors. That position was cemented in the Court's decision in the case of **Tulubuzwa Bituro vs Republic** [1984] TLR 264 where the Court stated that:-

> *"...in a criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is non-direction to the assessors on a vital point..."*

The obtaining consequences of a criminal trial in the High Court not being conducted with the aid of assessors as imperatively stipulated under section 265 of the Penal Code is that the trial is rendered a nullity. That stance was explicitly stated by the Court in the case of **Abdallah Bazaniye and Others vs Republic** [1990] TLR 42 to be that:-

> *"...We think that the assessor's full involvement as explained above is an essential part of the process that its omission is fatal, and renders the trial a nullity."*

[See also **Said Mshangama @ Senga vs Republic**, Criminal Appeal No. 8 of 2014 (unreported)].

What then is the just way forward? This is the question that hinges on the door for our immediate resolve.

We think the above issue need not strain our minds so much. Counsel for both sides are agreed that this is not a fit case to order a re-trial hence the appellant's appeal should be allowed and an order be made that he be released from prison. We entirely agree with them. The guiding factors to be considered in determining whether an order of re-trial should be made were propounded in the often cited decision by the defunct East African Court of Appeal in the case of **Fatehali Manji vs Republic** [1966] E. A. 341). In that case it was stated that:-

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

The principles stated in the above decision were followed by the Court in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported) in which the Court stated:-

> *"We are alive to the principle 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 gaps. The bottom line is that, an order should only be made where the interest of justice require."*

Given that the admission into evidence of exhibits P1, P2 and P3 and production of PW5 and PW6 were flawed as a result of which they have faced the wrath of being expunged from the record of proceeding and in particular the extra-judicial statement (exhibit P3) on which the appellant's conviction heavily relied on, we entertain no doubt that in the event an order of re-trial is made, the prosecution will seize the opportunity to rectify the anomalies to the detriment of the appellant. The judge's reliance on the extra-judicial statement (Exhibit P3) is evident in the judgment in which he reasoned that:-

> *"Besides, in his extra-judicial statement the accused basically admits to have cut the deceased on her head*

three times and on the hand. He also explained the way he fled until when he was arrested later in the forest on 13/3/2012.

The accused admitted the extra-judicial statement (Exhibit P3) was the one he made before the justice of the peace as he identified the same through his own signature. Thus the available evidence from the prosecution which also to some extent is corroborated by the accused extra-judicial statement proves that the accused did inflict cut wounds to the deceased. The said cut wounds are the cause of deceased death as certified by PW5 in the report of Postmortem, exhibit P1."

We entertain no doubt that an order of re-trial will occasion an injustice to the appellant. We accordingly refrain from endorsing that.

In sum, the trial was tainted with procedural flaws. The deficiencies in the summing up vitiated the trial. Admission of exhibits and production of PW5 and PW6 was also flawed. We accordingly invoke the powers of revision bestowed upon the Court under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition 2019 and quash all the proceedings and judgment of the trial court and set aside the sentence meted to the appellant. We allow the appeal and hereby order that the appellant be set

at liberty forthwith unless incarcerated in prison on account of another lawful cause.

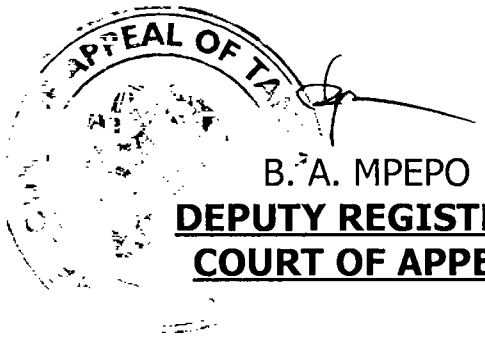
DATED at **DAR ES SALAAM** this 28th day of August, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 31st day of August, 2020, in the Presence of the Appellant in person-linked via video conference from Ukonga Prison and Ms. Joyce Nyumayo, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL