IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO. 84 OF 2020

1. **MARTIN s/o FABIANO.....1st APPELLANT**
2. **BIBIANA d/o JOSEPH.....2nd APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Tanga)

(Mkasimongwa, J.)

dated the 5th day of April, 2019
in
HC Criminal Session Case No. 7 of 2018

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JUDGMENT OF THE COURT

21st September, & 0,2020

SEHEL, J.A.:

The body of Leandry s/o Geay ("the deceased") was exhumed on 7th June, 2014 in the presence of Kompapa villagers amongst them being John Sule (PW2), the street chairman. As to how the deceased met his death, there are two different versions. The first version is that of the prosecution whereby it was alleged in the High Court of Tanzania, sitting at Tanga ("the trial court") that Martin s/o Fabiano and Bibiana d/o Joseph (hereinafter referred to as the

1st and 2nd appellants, respectively) on March, 2014 at Kompapa in Mswaki village within Kilindi District, Region of Tanga did unlawfully kill the deceased.

It was the evidence of Tasila Israel (PW1), the wife of the 1st appellant, that in March, 2014 she was at home sleeping. At around 03:00pm her husband returned and woke her up. He was accompanied by the 2nd appellant, the wife of the deceased. He asked her for a helping hand to bury the body of Leandry Geary (the deceased) whom the two had killed. She refused. Upon her refusal, the two went to bury the body in an unused pit latrine located at the deceased's farm but there was insufficient soil. Therefore, the appellants returned to the home of the 1st appellant to collect more soil for burying the deceased. She said, as it was during the night and it was dark, they used a torch to collect soil from the 1st appellant's pit latrine to the deceased's farm.

In the next morning, PW1 confronted the appellants and asked them if their secret would remain safe. They told her that nobody would know unless she revealed it. She promised them that she would not disclose it to anybody. Indeed, she remained quiet for almost two months until on 6th June, 2014 when she was forced to reveal the secret she had kept. On that date at around 08:00 pm the 1st appellant severely burnt Pandael Daniel, the daughter of PW1. On that night, PW1 did not raise any alarm because she said, she was scared. She had to wait till the following morning after the 1st appellant left to

work, when she went to report the incident to her neighbour one, Petro. She also requested Petro to call the street chairman, PW2.

When PW2 arrived and saw the injured child, he asked PW1 the reason for her being silent. It was at this point when PW1 revealed the secret she kept for the past two months. She replied to him that she feared that she could be killed by her husband just like he had killed Leandry Geay. Having heard that accusation, PW2 went to collect the 1st appellant who was at that time working at the farm. He brought him back home and put him under arrest. According to PW2, a lot of people gathered at home waiting impatiently for the 1st appellant to arrive. They tried to question him but he only admitted to have injured the child with no more. On a further questioning he requested for elders to be called. Three elders, Petro Masai, Augustino Lori and Paulo Ilonga were called. After they had discussed with the 1st appellant, the elders informed the crowded people that the 1st appellant confessed to have killed Leandry Geay together with the 2nd appellant sometime in March, 2014.

At that time, the 2nd appellant was at the church. The two elders were sent to bring her at that gathering. When she was brought there, she was interrogated by two elder women. She completely denied and said she knew nothing about what happened to her husband.

PW2 reported the matter to Mkuyu Police station but he was told by Inspector Daud Joseph Kipula (PW5) to ascertain the allegation by making a follow up on the place where the deceased's body was buried. According to PW2, the 1st appellant took them to an abandoned pit latrine and dug it. Thereat, they saw a human's skeleton and clothes. Having seen the remains, they reported back to PW5.

Upon receipt of that information, PW5 started his journey to Kompapa Village. He was accompanied by a medical Officer from Kwinji Dispensary, one Nicholaus William Mohamed (PW3). They arrived there at around 05:00 pm. He was shown the pit latrine. The appellants were already under arrest by the villagers. PW5 asked PW2 as to how they came to know about the incident and the place. He was told that they were so informed of the event by the 1st appellant who led them to the pit latrine.

PW5 asked the 1st appellant if at all it is true. According to the evidence of PW5, the 1st appellant admitted and told him that he killed him because he had a land dispute with the deceased and the 2nd appellant was not in good terms with the deceased. According to PW5, the 1st appellant gave details on how they killed the deceased that; the appellants conspired to kill him and on one night, sometime in March, 2014 when the deceased returned home drunk

and he was asleep, the 2nd appellant called the 1st appellant who came with his machete and cut the deceased on his neck. Thereafter, they went to bury the body in the pit latrine.

PW5 asked the 1st appellant to excavate the pit latrine and there they found and removed a human being remains which had started to decompose. He drew a sketch map which was admitted without objection as Exhibit P3.

According to PW3 who examined the remains, after his examination he found that the remains were of a human being as there was a skull, body and finger skeletons of a human being. He thus concluded in his Report on Post Mortem Examination which was admitted without objection (Exhibit P1) that the skeletons were of a human being.

The appellants were arrested and taken to Mkuyu Police Station and charged with murder. Later, on 11th June, 2014, the 1st appellant was taken to the Justice of Peace one Zacharia Justine Dikwe (PW4). PW4 recorded his extra judicial statement which was admitted as Exhibit P2, without objection.

The other version of the story comes from the defence side whereby the 1st appellant associated the death of the deceased with bad luck. He told the trial court that the deceased was his neighbour. In March, 2014, a date which

he could not recall he was at his farm working. Thereafter, the deceased appeared and threatened him with an axe. He said, they were not in good terms because the deceased had trespassed into his land. On that day, the 1st appellant was heavily drunk and he had a machete. After being threatened, he ran away but in the mid way and in an attempt to defend himself, he turned back, suddenly his machete slashed the deceased's neck. The deceased swerved into unused pit latrine and sunk in the waste water. He returned home and kept quiet until one day when he was drunk he revealed the secret to his wife that he had cut the deceased with a machete.

As to how he came to be arrested, he said, it was due to the misunderstandings between him and PW2. To some extent, the 1st appellant corroborated the evidence of PW2 that it was PW2 who went to collect him from the farm and that when he arrived at home, he saw many people gathered waiting for him. He was put under arrest and was tortured for him to show the place where he buried the deceased body. As he feared for his life, he took them to the place where the deceased tumbled in the pit latrine but he denied to have killed with an ill motive.

The 2nd appellant, on her part, totally denied any involvement. According to her, the husband was staying at his second wife for the past two months and she never bothered to look for him as she lost contact with him.

The lady and gentleman assessors returned a verdict of guilty. They were of the opinion that the 1st appellant admitted in his extra judicial statement and the evidence of PW1 and PW2 showed that he intentionally killed the deceased with the help of the 2nd appellant.

The trial court concurred with the assessors that the 1st appellant confessed before PW4 and in his defence evidence that he killed the deceased. It also found credence in the evidence of PW1, PW2, PW4 and PW5 and held that the confessional statement that led to the discovery and exhumation of the deceased body was nothing but the truth. Hence, it overruled the plea of intoxication and bad luck advanced by the 1st appellant in his sworn defence evidence. It also found that the allegation of torture alleged by the 1st appellant in securing his extra judicial statement was an afterthought.

On the involvement of the 2nd appellant, the trial court believed the evidence of PW1 that on the material day the 2nd appellant in company with the 1st appellant approached PW1 for her assistance in disposal of the

deceased's body. It further held that there was a confession of the co-accused which incriminated the 2nd appellant.

With those findings the trial court was satisfied that the prosecution established its case against the appellants beyond reasonable doubt. The appellants were therefore convicted as charged and sentenced to death by hanging.

Dissatisfied with both conviction and sentence, they each filed their separate memorandum of appeal. The 1st appellant advanced sixteen (16) grounds of appeal followed by a supplementary memorandum of appeal lodged by Mr. Warema Kibaha Singano, learned advocate who was assigned the brief to represent the 1st appellant. The six (6) grounds raised in the supplementary memorandum of appeal and argued by Mr. Singano during the hearing are reproduced hereunder:-

1. *That, the trial judge erred in law and fact when he convicted and sentenced the appellant without considering that to rely on circumstantial evidence there must be a chain of events but the case at hand lacked such requirement.*
2. *That, the trial judge erred in law and fact for relying his conviction on extra judicial statement without properly directing the gentlemen assessors on the danger of it.*

3. *That, the trial court erred in law and fact for taking into consideration the evidence of PW1 which was received in contravention of section 130 (3) of the Evidence Act, Cap. 6 R.E 2019.*
4. *That, the trial court erred in law and fact for basing its conviction of the appellant on the questioned visual identification made by PW1 against the appellant herein named.*
5. *That, the trial court erred in law and fact in convicting the appellant basing on the weak evidence of the appellant.*
6. *That, the trial court erred in law and fact for convicted the appellant while the prosecution failed to prove their case beyond reasonable doubt.*

On the part of the 2nd appellant, she lodged a memorandum of appeal that contained five (5) grounds which are:-

1. *That, the trial judge erred in law and fact when it convicted and sentenced the appellant without considering that the circumstantial evidence relied upon must have a chain of events which is lacking in the present appeal.*
2. *That, the trial judge erred in law and fact when he failed to take into consideration that the appellant was not involved in killing the deceased and this fact was corroborated by the 1st appellant when he was adducing his evidence and said he killed the deceased alone.*
3. *That, the trial judge erred in law and fact when he convicted and sentenced the appellant without considering the statement made by*

the 1st appellant (Extra Judicial Statement) which clearly shows that the 1st appellant said he killed the deceased alone.

4. *That, the trial judge erred in law and fact when he convicted and sentenced the appellant basing on contradictory evidence of the prosecution witnesses.*
5. *That, the trial judge erred in law and fact in his finding that the prosecution proved the case against the appellant beyond reasonable doubt:*
    i) *It is clear that the whole pattern of evidence fashioned by the prosecution failed to walk the case within the corridors of the charged offence, that is to say, the evidence did not prove the ingredients of the offence against the appellant.*

At the hearing of the appeal, Mr. Singano, learned advocate appeared for the 1st appellant. The 2nd appellant had the services of Mr. Ramadhani Rutengwe, learned advocate whereas Mr. Waziri Magumbo and Ms. Maisara Mkumba, both learned State Attorneys, appeared for the respondent Republic.

The 1st appellant followed the proceedings through a video link facility at Maweni Central Prison and the 2nd appellant followed it from Dodoma High Court as she was serving her sentence at Isanga Prison, Dodoma.

In support of the appeal, Mr. Singano began by abandoning the memorandum of appeal lodged by the 1st appellant and argued the grounds contained in the supplementary memorandum of appeal.

He tried to argue the grounds of appeal in seriatim but in the middle of his submission, after noting that the 1st appellant admitted in his defence evidence to have killed the deceased, he abandoned all the grounds of appeal and instead focused on one critical issue, whether there was malice aforethought in killing the deceased.

He implored us to go along with the narration given by the 1st appellant in his sworn defence evidence that the death of the deceased was accidental and there was no motive of killing the deceased. He pointed out that the 1st appellant testified that he was drunk on that day, they had a dispute over a farm, the death of the deceased occurred when he was trying to defend himself by a machete which he carried with him for farming activities whereas the deceased was armed with an axe.

He, therefore, urged us to discredit the extra judicial statement because he said it was recorded after the passage of four days from the date the 1st appellant was arrested. According to his argument, given the delay of four days without explanation from the prosecution the appellant was under stressful condition and not a free agent at the time when he was giving his statement before the justice of peace. It was his submission that the appellant, after his arrest, was to be taken as soon as practicable to the justice of peace.

To augment his stance, he referred us to the case of **Mashimba Dotto @ Lukubanija v. The Republic**, Criminal Appeal No. 317 of 2013 (unreported).

He added that the extra judicial statement was not voluntarily made by the 1st appellant. To cement his argument, Mr. Singano referred us to page 38 of the record of appeal where the appellant in his sworn defence evidence said that he was tortured by the police to make the statement before the justice of peace. He further contended that the record bears out that the 1st appellant was not cross-examined by the adversary party to shaken the evidence of torture. With the pointed out shortfalls, the learned counsel argued that the only reliable evidence is that of the 1st appellant that the death of the deceased was not intentional. He, therefore, urged us to substitute the guilty verdict of murder to a lesser offence of manslaughter and in sentencing the 1st appellant we should have in mind the time he spent in prison custody.

On the part of the 2nd appellant's appeal, Mr. Rutengwe fully adopted the memorandum of appeal filed by the 2nd appellant. He structured his submission into two parts. The first part was in relation to the 1st and 4th grounds of appeal which he combined by arguing that there was no direct evidence to implicate the 2nd appellant. The chain of events on the circumstantial evidence relied on by the trial court to convict the 2nd appellant

leaves a lot to be desired. He contended that the evidence of PW1, PW2 and PW5 are a pure hearsay where nobody witnessed the killing of the deceased. He further argued that PW1 and PW2 were not reliable witnesses because they made contradictory statements in their evidence. PW1 in her examination in chief suggested that the appellants entered inside the house whereas in her reply to the question posed by the 1st assessor refuted the statement. Further, PW2 initially told the trial court that the 1st appellant confessed to the three elders who then conveyed the confession to the people who gathered there including PW2 but later this same witness, said that he heard the 1st appellant confessing to the killing. According to Mr. Rutengwe, the contradictory testimonies of PW1 and PW2 are not minor but they go to the root of the case to the extent of shaking their credibility. To back his submission, he referred us to the decision in the case of **Chukwudi Denis Okechukwu and 3 Others v. The Republic**, Criminal Appeal No. 507 of 2015 (unreported).

The second part of his submission was in respect of the 2nd, 3rd and 5th grounds of appeal which he also combined into one that the prosecution failed to discharge its duty of proving the case beyond reasonable doubt against the 2nd appellant. He submitted that in totality there is no evidence linking directly the 2nd appellant with the murder of the deceased apart from the

circumstantial evidence of PW1 whose credibility is questionable. He added that there is no mention of the 2nd appellant in the extra judicial statement of the 1st appellant. On the whole, it was submitted, the trial court based its conviction against the 2nd appellant on the alleged lies which were not explained and no reason was given for that opinion.

At the end, he prayed for the appeal to be allowed, conviction be quashed, sentence be set aside and the 2nd appellant be set free from prison custody.

Ms. Mkumba prefaced her submission by making it clear that the respondent opposed the 1st appellant's appeal but supported the 2nd appellant's appeal. It was her submission that the 1st appellant killed the deceased with malice aforethought. She asked us to closely look at the 1st appellant's extra judicial statement where he explained in details the way he planned the killing and the accomplishment of that plan. She argued that the details in the extra judicial statement fall squarely within the definition of malice aforethought provided under section 200 of the Penal Code, Cap. 16 R.E 2019 ("the Penal Code"). She elaborated that the 1st appellant used a machete to fulfill his evil plan and after the killing he hid the body in the unused pit latrine. It was her view that the oral confession made to PW1 and

PW2 led to the discovery of the body of the deceased thus the confession made to PW4 was nothing but the truth. She fortified her submission by referring us to the case of **Mabala Masasi Mongwe v. The Republic,** Criminal Appeal No. 161 of 2010 (unreported).

After making that submission, she asked for leave of the Court which was granted for Mr. Magumbo to continue with the reply submission. Mr. Magumbo confined his submission on the issue of malice aforethought. He stressed that the 1st appellant used a machete and that he slashed the deceased's neck while he was asleep. He added that his conduct was inconsistent with the behavior of the innocent person as he wondered why the 1st appellant remained silent for almost three clear months until when he was arrested. He said, this evidence is gathered from PW1 who said the incident occurred sometime in March, 2014 and 1st appellant himself admitted so after he was arrested on 6th June, 2014.

On whether the 1st appellant was a free agent before the Justice of Peace, he argued that he was free because the words "as soon as practicable" do not mean that he should be taken to the justice of peace immediately after his arrest. In reliance to the decision of this Court in the case of **Andius George Songoloka and 2 Others v. The Republic**, Criminal Appeal No.

373 of 2017 (unreported), Mr. Magambo forcefully submitted that the key factor is the time which the accused expressed his willingness to make his statement before the justice of peace.

He then concluded his reply by supporting the 2nd appellant's appeal in that there was neither circumstantial evidence nor direct evidence to her involvement and that she was not even mentioned by the 1st appellant in his extra judicial statement. He, thus, implored us to allow the 2nd appellant's appeal by quashing and setting aside the sentence but the appeal by the 1st appellant be dismissed for lacking merit.

Rejoining to what was submitted, Mr. Singano reiterated his submission in chief that the 1st appellant did not intent to kill the deceased as the two were not in good terms because they had a dispute over land. He emphasized that the weapon carried by the 1st appellant was weaker compared to the one the deceased had on that day.

Mr. Rutengwe had nothing to rejoin.

What stands for our deliberation and determination in the light of the submission made by the counsel for the parties, is whether or not the 1st appellant caused the deceased's death with malice aforethought because there

was no dispute that he was the one who killed the deceased. We say so because the 1st appellant admitted to have killed the deceased in his defence evidence. At page 36 of the record of appeal, he said:

> *"Sometime in March, 2014 (I don't remember the exact date) I was drunk and went to my shamba while I was there working with a panga (machete) there came Leandry Geay possessing an axe. Leandry then started abusing me and said "wewe nitakuua sasa. Nitakunyanganya hilo shamba lako lote sasa. Siyo hatua kumi tu" ("I am going to kill you. I will dispossess from you the whole farm. Not just ten paces"). When uttering the words, the deceased came approaching me and there was a pit latrine at the place whose building materials had rotten. The deceased wanted to cut me with an axe and I successfully evaded it. I started running away and as I was drunk I was not in high speed. When I turned back I found the deceased chasing me with an axe. I then turned so that I defend myself. By bad luck as I was turning back, with my machete,* ***I cut his neck and he swerved into the pit latrine and he completely sunk into the waste water****. That was about 5:00 pm. I then left to my home and notified no body of the event...."* [Emphasis is added]

From the bolded part, it is gathered that the 1st appellant admitted to have killed the deceased with his machete. Therefore, we completely agree with the counsels that there is no dispute that it was the 1st appellant who killed the deceased with a machete.

Now coming to the crux of the matter, that is, whether the killing was with malice aforethought? As hinted on earlier, there are two versions as to what exactly transpired. The first version comes from the prosecution side and it is contained in the extra judicial statement of the 1st appellant. The second version is as contained in the defence evidence of the 1st appellant. Mr. Singano urged us to disregard the extra judicial statement for two main reasons. One, he believed that at the time the 1st appellant was taken to the justice of peace he was not a free agent due to the delay in taking him to the Justice of Peace. Two, he argued the 1st appellant was tortured before being taken to the justice of peace.

Admittedly, there was a delay in taking the 1st appellant to the justice of peace. According to the available evidence on record the 1st appellant was arrested on 7th June, 2014 by PW4 and he was taken to the justice of peace on 11th June, 2014 that is after a lapse of four days. Here, we wish to state that we differ with the submission made by Mr. Singano when he said the law

requires the accused person to be taken to the justice of appeal as soon as practicable. There are plethora of decisions of this Court to the effect that there is no law prescribing time within which a suspect can be taken to the justice of peace. (See **Andius George Songoloka and 2 Others v. The Republic** (supra) and **Vicent Ilomo and Another v. The Republic,** Criminal Appeal No. 337 of 2017 (unreported)).

For instance, in the case of **Andius George Songoloka and 2 Others v. The Republic** (supra) we observed that:

> *"It is our firm view that what is required to be observed is the reasonableness of time within which the suspect elects to make his EJS (extra judicial statement) to the justice of peace the bottom line being when the suspect is willing to give his statement."*

Further, in **Vicent Ilomo and Another v. The Republic** (supra) we explained the reason of not stipulating time that:

> *"We take voluntariness to be the key factor even when it comes to the decision whether and when a suspect should be taken to a justice of peace. We say so because not in every case do suspects record extra judicial statements, and this, in our view, is a healthy situation tending to confirm that only when the suspects freely*

make up their minds to have confessions recorded, are they taken before Justices of the Peace to record such statement."

Likewise, in the present appeal although there is no explanation given by the prosecution as to why there was a delay of four days for the 1st appellant to be taken to the justice of peace but given the fact that a suspect will be taken to the justice of peace after he has expressed his willingness to record a statement then we do not see any merit to the 1st appellant's complaint. We take this course as there is no indication that the 1st appellant expressed his desire to confess much earlier before then.

With regard to the case of **Mashimba Dotto @ Lukubanija v. The Republic** relied upon by Mr. Singano, that case is distinguishable in facts to the present appeal. We shall demonstrate herein as to why we say so. In that appeal, the Court did not only link the delay of six days with the provisions of section 32 (2) of the CPA but went further and cited the case of **Martin Manguku v. The Republic,** Criminal Appeal No. 194 of 2004 (unreported) where it was reiterated that, the suspect after his arrest shall be taken to court as soon as possible.

In **Martin Manguku v. The Republic** (supra) the appellant was arrested on 7th October, 1991 but he was not taken to court until 12th October 1991 after he had made a confessional statement which was followed with record of his extra judicial statement. The Court noted that it took six clear days for the appellant to be taken to court. Thus, it said:-

> *"There is no explanation from the police why they kept him in police custody for all those six days without taking him to court. Section 32 (2) of the Criminal Procedure Act, 1985 requires that where a person has been taken into custody without a warrant for an offence punishable with death, he shall be brought to court as soon as practicable. It is noted that in the case of other offences, such a person must be taken to court within twenty four hours. It is appreciated that offences which are punishable with death are more serious and the police may need more time to make basic investigations before taking the suspect to court, hence the leeway that the police will take such a suspect to court within reasonable time. "Reasonable time" will depend on the circumstances of each individual case.*
>
> *In the case under discussion, even in those six days the appellant had not been taken to court. In the absence of acceptable reasons for keeping the appellant in custody for the six days up to the time he made the statement*

about the knife it must be taken that the police were holding the appellant unlawfully in custody. It does not need extra-ordinary thinking to know that the appellant have been under very stressful condition."

From the above, it is clear that there was a delay in the arraignment of the appellant in both cases of **Martin** and **Mashimba** and that is why the Court referred to section 32 (2) of the CPA which requires for a suspect who has been taken to custody without a warrant to be taken to court "*as soon as practicable*". It is imperative to state here that section 32 (2) of the CPA does not deal with an accused person to be taken before the Justice of Peace for recording of his extra judicial statement. In that regard, the complaint in this appeal that the appellant was delayed to be taken to record his extra judicial statement before a Justice of Peace is not supported by the authority cited by Mr. Singano.

Another reason advanced by Mr. Singano was that the 1st appellant was tortured. It is worthwhile to observe here that the 1st appellant in his defence admitted to have made the statement before the Justice of Peace but he alleged that he did not do it voluntarily. In that respect, we need to satisfy ourselves on its voluntariness by making a review of it to see whether the Justice of Peace complied with the Chief Justice's **Guide for Justice of Peace**

made pursuant to powers conferred to him under section 62 (2) of the Magistrates' Courts Act, Cap 11 RE 2019.

In the case of **Japhet Thadei Msigwa v. The Republic**, Criminal Appeal No. 367 of 2008 (unreported) we said:-

> *"We think the need to observe the Chief Justice's Instructions are twofold. **One**, if the suspect decided to give such statement he should be aware of the implications involved. **Two**, it will enable the trial Court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntary. Non compliance will normally render the statement not to have been taken voluntarily."*

The Guide is published under item 6 of Part I of the second Chapter of the **Revised and Updated Handbook for Magistrates in the Primary Courts**, 2019 at pages 123-127 and it was summarized in the case of **Japhet Thadei Msigwa v. The Republic** (supra) as follows:-

> *"Before the Justice of the Peace records the confession of such person, he must make sure that all eight (sic.) steps enumerated therein are observed. The Justice of the Peace ought to observe, inter alia, the following:-*
>
> *(i) The time and date of his arrest.*

(ii) The place he was arrested.

(iii) The place he slept before the date he was brought to him.

(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement.

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he makes a statement, the same may be used as evidence against him."

In the present appeal, we have thoroughly scrutinized Exhibit P2 which is found at pages 100 -103 of the record of appeal and noted that the Justice of Peace observed all steps enumerated in the Chief Justice's Guide. He inspected the appellant and found that he had no fresh wound. The 1st appellant explained to him that he was arrested on 6th June, 2014 at Kompapa village at around 15:00 hrs and before being brought to him, he was first taken to Mswaki village office then Mkuyu Police Post. He also told him that he voluntarily wanted to record his statement and that he was not forced, threatened, persuaded, or promised any favour to make it. The justice of peace then warned the 1st appellant that if he made a statement it may be used as evidence against him. Upon being satisfied that he was a free agent,

he recorded his statement. It is, thus, obvious that the Justice of Peace followed the Guide to the letter. From what the 1st appellant told the justice of peace, we failed to see any torture, threat or intimidation. The 1st appellant voluntarily made his statement before the justice of peace. With that we do not see any justifiable reason to disregard the 1st appellant's voluntarily made extra judicial statement and we share the same view with the learned trial judge that the 1st appellant's defence evidence was an afterthought.

We now turn to the contents of the 1st appellant's extra judicial statement of which we reproduce part of:

> *"Marehemu nilimuua tuligombana kwa ajili ya mipaka ya shamba. Nilimtafuta njiani ili kumuua lakini haikuwezekana. Nilimkuta amelala kitandani nilichukua panga na nilimpiga nalo, baada ya hapo nilimbeba nikampeleka kumtumbukiza kwenye shimo la choo. Baada ya hapo mchanga haukutosha nilienda nyumbani kwangu nilimweleza mke wangu twende kuchimba mchanga aliniuliza wa nini, nikamueieza nimemuua Leandry Geay Bura mke alisema anaogopa heandi. Mimi nilienda na ndoo yangu na jembe niiibeba mchanga nikafukia hilo shimo."*

The above simply translates as follows:

"I killed the deceased because we had a dispute over a farm demarcation. I planned to kill him on his way but I could not get a chance. One day, I found him sleeping on his bed, I took a machete and cut him. Then, I carried the body and dumped it in the pit latrine. I tried to fill up the pit latrine but there was insufficient soil to fill it up. I went back home and asked my wife to help me. She asked me what for and I told her that I have killed Leandry Geay Bura. My wife said she would not go because she is scared. I took a bucket and a hoe and went to carry more soil to fill up the pit latrine."

The question that follows is whether from that narration one can infer malice aforethought? Section 200 of the Penal Code provides that malice aforethought is deemed to be established by evidence proving any one or more of the following four circumstances:-

"(a) ***any intention to cause death of or to do grievous harm to any person whether that person is actually killed or not;***

(b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference

whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused it;

(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit and offence." [Emphasis supplied]

That position of the law was summarized in the case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported) that:

". . . usually an attacker will not declare his intention to cause death or grievous bodiiy harm. Whether or not he had that intention must be ascertained from various factors, including the following:

i) the type and size of the weapon, if any used in attack;

ii) the amount of force applied in assault;

iii) the part or parts of the body the blow were directed at or inflicted on;

iv) the number of blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose;

v) the kind of injuries inflicted;

vi) the attacker's utterances, if any, made before, during or after the killing; and

vii) the conduct of the attacker before, or after the killing."

In the present appeal, there are several factors to be inferred from the 1st appellant's act and conduct. First, he used a machete to kill the deceased. Second, he hid the body of the deceased in a pit latrine. Third, he remained silent until when he was arrested. All these acts if taken singularly or together point to the appellant's motive to kill with malice. Therefore, we are fully satisfied and concur with the learned trial judge's finding that the malice aforethought on part of the 1st appellant, in causing the death of the deceased, was sufficiently established by the prosecution and that the defence of the 1st appellant was an afterthought. To that end, the conviction of the 1st appellant to the offence of murder and the subsequent sentence of death by hanging are upheld.

With regard to the 2nd appellant we entirely agree with the learned counsel for 2nd appellant that there is no evidence that connects, directly or indirectly, the 2nd appellant with the deceased's death for this Court to draw the inference of guilt on her. It be remembered that the conviction of the 2nd

From the foregoing, we find the appeal by the 1st appellant is brefit of merit and we proceed to dismiss it. On the other hand, we find the appeal by the 2nd appellant's has merit. We, accordingly, quash the 2nd appellants' conviction for murder and set aside the sentence of death by hanging. We order for the immediate release of the 2nd appellant, **Bibiana d/o Joseph**, from custody unless otherwise held for other lawful reasons.

DATED at **DAR ES SALAAM** this 2nd day of December, 2020.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgement delivered this 4th day of December, 2020 in the presence of the appellants in person through Video link facility and Mr. Candid Nasua and Ms. Tussa Mwaihesia State Attorneys, for the respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL