IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 288 OF 2017

AWADHI GAITANI @ MBOMA .... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu)

(Kalli, PRM, Extd. J.)

Dated the 31st day of May, 2017
in
Criminal Case No. 42 of 2015

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JUDGMENT OF THE COURT

24th February & 5th May, 2020

KOROSSO, J.A.:

Awadhi Gaitani @ Mboma the appellant, was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 Revised Edition 2002 (the Penal Code). The allegations being that on the 29th March, 2012 around 11.30hours at Mihuga village, within Bagamoyo District in Coast Region, the appellant murdered one Ester Petro, the deceased. After a full trial the appellant was convicted and sentenced to be

detained during the President's Pleasure on such condition(s) to be directed by the Minister responsible for legal affairs under section 26(2) of the Penal Code.

The factual setting underlying the arrest, arraignment and conviction of the appellant as expounded by the prosecution side who presented a total of nine (9) witnesses and three (3) exhibits, in essence was that, on the 29th March, 2012 the deceased a ten (10) year old, was left alone at home while her parents, Petro Omari Mgaya (PW1) and Martina Elias Kijojo (PW2) went to their "shamba". The other children had also left to attend to other matters including school and herding cattle. While the deceased was alone at home, it is alleged that the appellant arrived at the house and killed the deceased by stabbing her on the neck about five times. According to Fatuma Hussein (PW3), a neighbour of PW1 and PW2, while outside her house during the morning hours, she saw the appellant going to and enter PW1 and PW2's house and a while later saw him leaving the house taking the same route he took when going to the house where the deceased was. PW3 stated that a while later around 12.00hours, she heard people crying and then saw some people rushing to PW1 and PW2's house and she also followed suit to fathom what had happened.

The deceased parents who were working in their farm at the time, testified that at around 12.00hours they were informed by the deceased younger sister that Ester Petro was injured and laying down with blood oozing from her mouth and nose. PW1 and PW2 rushed back to their house and enroute they managed to inform the village chairman of the incident. The Kitongoji chairman, Abdallah Rajabu Mlongwa (PW4) at around 12.30hours, proceeded to inform the village executive officer and thereafter the incidence was reported to the Police who then came with a doctor to the scene of crime. The body of the deceased was found inside the house laying down with blood on the mouth and nose and injuries on the neck showing signs of having been stabbed with a sharp object about five times. Upon hearing PW3 claims of having seen the appellant enter the house prior to the incident, the appellant was traced but was not found in the village and later he was arrested in a nearby village and then arraigned facing the charges for which he was convicted and sentenced.

In his defence, the appellant denied involvement in the alleged offence raising an *alibi* stating that on the day of the alleged incident, he was at Mihuga village and then in the morning he travelled to Mandera village to visit his stepfather and that he never went to the crime scene.

The appellant acknowledged knowing the deceased before her death as his friend's younger sister since he was a friend of the Petro's family and also because the prayed in the same church. He conceded to have been arrested on the night of 29th March, 2012 while at his stepfather's place. As stated earlier, the trial court was convinced that the charge was proved and therefore convicted the appellant.

Unperturbed, the appellant dissatisfied with the trial court's decision appealed to this Court fronting a total of eleven (11) grounds of appeal. The memorandum of appeal filed on the 3rd January, 2018 with seven (7) grounds and four (4) grounds as found in the supplementary memorandum of appeal filed on the 14th February, 2020. The grounds in the memorandum of appeal, paraphrased, reads as follows:

1. *That the extrajudicial statement (Exhibit P3) was improperly admitted in view of the fact that it was recorded beyond the four hour prescribed period and also non-compliance of the Chief Justice guidelines for justice of the peace in taking extra judicial statements.*
2. *That PW7 violated the appellant's rights for non-disclosure to the justice of peace on whether the appellant's guardian or parents had been informed in recording the extrajudicial statement, since the appellant was a child in compliance with CPA.*

3. *Trial judge erred in convicting the appellant relying on the extrajudicial statement despite the fact that the police taking the appellant to justice of peace had disclosed the charge the appellant was facing.*

4. *Trial judge erred in admitting the Post Mortem Report (Exh. P2) which was tendered by the prosecutor instead of author.*

5. *Prosecution failed to lead forensic evidence related to telephone communication between appellant and his mother on his intention to leave the village thus failed to prove such allegations.*

6. *Trial judge erred in convicting the appellant relying on circumstantial evidence which did not lead irresistibly to the guilty of the appellant due to failure to properly evaluate the evidence at the crime scene.*

7. *That the offence against appellant was not proved as required.*

The Supplementary grounds of appeal paraphrased are that:

1. *That, the appellant was erroneously convicted on circumstantial evidence, despite important threshold not being met.*

2. *That, the trial Court erred in convicting appellant despite the fact that the case was poorly investigated. Neither the alleged weapon, photographs of scene of crime nor telephone communication with the appellant's mom was tendered. Also a poorly drawn sketch plan.*

3. *Trial court erred in finding PW3 evidence credible while she failed to provide details on essential facts pertinent to the case.*

4. *That, the appellant was convicted despite irregularities that rendered the trial unfair. Such as, admissibility of extra judicial statement; Part of PW8's testimony was taken while he was not under oath; Exh.P3 read allowed by unsworn witness; Exh. P1 and P2 tendered un-procedurally and were not read aloud in court; failure to number assessors; and failure of trial SRM to sign after testimonies of each witness.*

At the hearing of this appeal, the appellant was represented by Mr. Ali Jamal, learned Advocate whereas the respondent Republic had the services of Ms. Gloria Mwenda and Mr. Deus Makakala, both learned State Attorneys.

The learned counsel for the appellant proceeded by grouping the grounds of appeal filed and contended that the first ground of appeal in the memorandum of appeal is also found in the fourth ground of the supplementary grounds of appeal and challenges un-procedural recording and improper admission of the extrajudicial statement of the appellant. He argued that sections 50 and 51 of the CPA require that such statement

should not be taken beyond four hours or within reasonable time. He argued that the appellant was arrested on the 29th March, 2012 at 21.00hours and his cautioned statement was recorded on the 30th March, 2012 and the extrajudicial statement was taken on the 4th of April, 2012 which was six days after his arrest. To cement his stance, he made reference to the holding in **Japhet Thadei Msigwa vs Republic**, Criminal Appeal No. 367 of 2008 (unreported), where six factors to consider when taking an extrajudicial statement were discussed. The learned counsel contended that despite the fact that the appellant objected to admissibility of the extrajudicial statement, his objection was overruled without regard to availed infringement of various procedures in recording the statement. He thus prayed that the extrajudicial statement be expunged from the record.

On the second ground of appeal, found in the fourth ground in the memorandum of appeal, the learned advocate submitted that the trial court's error in admitting the PF3 for non-compliance of section 291(3) of the CPA, where no doctor testified on the report and the appellant was not informed of his right to call for cross-examination such a maker of the medical report, then the appellant's rights were infringed. He contended

that, notwithstanding the fact that the cause of death as stated in the postmortem report was not disputed and it's admissibility was not objected to by the appellant, it remains a clear fact that the appellant was not informed of his right, a right which is not derogated by their failure to object to admissibility of the postmortem report. He cited the decision of this Court in **Frank Massawe vs Republic**, Criminal Appeal No. 302 of 2012 (unreported) to cement his assertions. He thus prayed that the postmortem report (Exhibit P2) be expunged.

The third ground which the learned advocate proceeded to address was the sixth ground in the memorandum of appeal that contends that the trial court erred in convicting the appellant relying on circumstantial evidence which did not conclusively prove that it was the appellant who committed the offence. He submitted that, the only testimony which provided a semblance of link to the offence charged was that of PW3 who testified to have seen the appellant going and entering PW1 and PW2's house, where the deceased was at the time. That PW3 testified that her house is about 100 meters from where the deceased was killed, which he contended is a long distance for one to properly identify or recognize a person.

The learned counsel also challenged the fact that PW3 did not describe clothes the appellant was wearing or describe any other special matter to cement her contention that she recognized the appellant on the fateful day. He argued that when PW3's evidence is carefully assessed, it lacks certainty that it is the appellant of whom PW3 saw going to the deceased's house on that day. That another issue which the trial court considered was what PW1 and PW2 had narrated as a rift between them and the appellant which had occurred a few years before the incident and which was irrelevant.

The learned advocate thus urged us to find that the statement that the appellant did not take long and came back passing the same route, and a few minutes later heard people crying from the scene of crime is not watertight identification and that the circumstances surrounding the scenario of what PW3 testified to have witnessed is very weak. He argued further that there are a lot of doubts in this testimony and especially when the fact that the house was unfenced is taken into consideration, a fact which allows a possibility of mistaken identity or misconception on what actually transpired. He argued that it is unbelievable that a person who has

committed such a heinous crime will come back the same route as alleged by PW3.

The other evidence relied upon by the trial court the learned counsel argued, was the testimony of PW2, which he contended was grounded on mere suspicions that the appellant committed the offence because he had been previously suspected of stealing from them and he had threatened PW2 through a phone communication, and that the prosecution failed to accord the trial court an opportunity to see such alleged communication. That it should also be borne in mind that in his testimony, the appellant stated he had no bone to pick with PW1 and PW2 but he knew they disliked him despite attending the same church.

The learned counsel for the appellant reasoned that taking the evidence against the appellant in totality, as discerned from the testimonies of PW1 and PW2, it is grounded on strong suspicions against the appellant and not on tangible evidence. He maintained that such suspicions are not sufficient and the prosecution failed to show that the alleged circumstantial evidence was so strong and led to an irresistible inference that it is only the appellant who committed the said offence, in track with various decisions

including **Ahmad Issa and Ramadhani Amani Kasanga vs Republic**, Criminal Appeals No. 171 of 2016 and No. 362 of 2017 (unreported).

On the part of the respondent Republic, Ms. Gloria Mwenda objected to the appeal and supported the conviction and sentence meted against the appellant. Her response to the first ground challenging recording and admissibility of the extrajudicial statement, was that section 50 and 51 of the CPA was inapplicable since the provisions deal with cautioned statements and not extrajudicial statements. She argued that there is no specific provision that prescribes the time for recording extrajudicial statements, but that practice has inferred that they should be taken within reasonable time, relying on the holding of this Court in **Vicent Ilomo vs Republic**, Criminal Appeal No. 337 of 2017 (unreported). The learned State Attorney contended that in the present case, the appellant was arrested on the 29th March, 2012 and that the vital factor in assessing admissibility of such a statement is voluntariness, and thus delay of six days to record the appellant's extrajudicial statement did not interfere with the voluntariness in recording the said statement. She further argued that during his defence, the appellant conceded to have given a statement to the justice of peace. She cemented her arguments by citing the case of

Vicent Ilomo vs Republic (supra) where the Court adopted the holding in **Mashimba Dotto @ Lukubanija vs Republic**, Criminal Appeal No. 317 of 2013 (unreported), that it is enough if recording of extra judicial statements substantially conforms to the Chief's Justice's instructions.

With regard to the second ground of appeal, that the doctor who authored the postmortem report was not called as a witness neither was the appellant informed on his right to pray for the doctor to be summoned for cross examination, the learned State Attorney conceded that section 291(3) of the CPA was not complied with by the trial court and submitted that the postmortem report be expunged. She also contended that despite this fact, there is enough evidence on record that reveals that Esther Petro died an unnatural death, therefore her death is not in issue.

With regard to the ground of appeal challenging credibility of PW3, the learned State Attorney contended that the witness was truthful and credible. That PW3 testimony that around 11.00am she saw the appellant who had also greeted her and he went to PW1 and PW2's house and that he came back using the same route was firm and reliable. That PW1 had also testified that upon hearing people crying from PW1 and PW2's house

PW3 went there and told them that she had seen the appellant going to the house. The learned State Attorney contended further that PW3 evidence is supported by the sketch map which shows there is only one way to PW1 and PW2's house. The learned State Attorney also argued that the appellant was arrested at night in the third village, which infers that he ran away after committing the offence. That there was evidence from PW1 and PW2 that the appellant had previously stolen from them and threatened them thus she argued that when all the evidence is considered together with the circumstantial evidence it should lead to no other inference but that it is the appellant who killed the deceased on the fateful day.

The appellant's counsel rejoinder reiterated his earlier prayers that the extrajudicial statement should be expunged from the record in view of the alleged irregularities in recording the extrajudicial statement and non-compliance with prescribed time to record it after arrest of suspect. He added that there is also the fact it was not voluntary as discerned from the appellant's defence that he was threatened by the police before the statement was taken. He conceded that sections 50 and 51 of the CPA applies to extrajudicial statements, but argued that the case of **Vicent**

Ilomo vs Republic (supra) addresses recording extrajudicial statements and refers to section 32(2) of CPA as the applicable section, and states that an extrajudicial statement should be recorded within reasonable time and argued that the six days taken to write the appellant's statement after the arrest of the appellant cannot be said to be reasonable time.

He also reiterated prayers for the postmortem report to be expunged and urged for re-evaluation of the evidence especially PW3's evidence and allegations that the appellant escaped to another village after the incident, which he stated is contrary to the evidence on record showing the appellant went to his stepfather's house. With respect to the respondent Republic contention that circumstantial evidence was sufficient to prove the case, the learned counsel argued that there was no such evidence to lead to a verdict of guilty against the appellant. The counsel implored us to find that the prosecution failed to prove their case and to allow the appeal.

Having considered the foregoing submissions from both sides, we shall address the grounds of appeal as paraphrased and as submitted by the parties. The main issues under contention are **first**, irregularity in recording the extrajudicial statement and its admissibility (1st, 2nd, 3rd

grounds in the memorandum of appeal and the 4th ground in the supplementary grounds of appeal). **Second**, irregularity in admissibility of the Postmortem report (4th ground in the memorandum of appeal). **Third**, trial court reliance on circumstantial evidence in convicting the appellant (6th ground in the memorandum of appeal and 3rd ground in the supplementary grounds of appeal). **Fourth**, offence against appellant not proved (5th and 7th grounds in the memorandum of appeal and 2nd ground in the supplementary grounds of appeal).

Starting with the first area of contention that is, assertions on irregularity in recording the extrajudicial statement and its admissibility by the trial court. The first arm of the objection was that PW8 who recorded the extrajudicial statement did not make a statement to the police, an objection which was overruled by the trial court, on ground that the name of this witness was listed in the preliminary hearing as one of the witnesses for the prosecution, we find need to further scrutinize this matter there being nothing amplified by the appellant in the memorandum of appeal apart from what has been stated in limited form in oral submissions in this Court. The second arm of the objection related to the fact that the

extrajudicial statement was recorded six days after the appellant's arrest, a fact also conceded by the respondent Republic side.

The prosecution challenged these arguments and contended that the extrajudicial statement was properly admitted and that the allegations have no substance and should not be considered.

We have considered the defence arguments, that there was a delay of six days from the time of arrest to when the extrajudicial statement was recorded, and also that the delay to record the extra judicial statement of the appellant meant that sections 50 and 51 of the CPA were not complied with. Suffice to say as also conceded by the learned appellant's counsel, after a brief discussion with the Court. Sections 50 and 51 of the CPA addresses statements taken by investigators where a suspect is arrested (cautioned statements) and not extrajudicial statements. Section 50 of the CPA deals with periods available for interviewing persons under restraint and modality for calculating that period, while section 51 of the CPA addresses modality to seek extension of time where custodial investigations cannot be completed with four hours expounded in section 50 as the time to interview a person after arrest.

We are aware of the position of this Court where there is no time specified by the law on when an extrajudicial statement can be recorded after the arrest of a suspect. In **Mashimba Doto @ Lukubanija vs Republic** (supra), the Court, relying on the provision of section 32(2) of the CPA, held that upon restraint a suspect is to be taken to the justice of peace "*as soon as possible*". It is important to also remember that in the above case, the Court found the delay of six days in taking an extrajudicial statement was not proper because apart from the said delay there was lack of an explanation by the prosecution regarding the said delay and the appellant had also contended that he was tortured by the police during this period of delay.

In the present case, the arrest of the appellant is not disputed, according to MG 447590 Gaspa Thobias (PW6), he was arrested on the 29th March, 2010 at night around 20.00hours at Mandera village. On the 4th April 2012, the appellant was taken to the Justice of the Peace to give his statement as expounded by F.248 Dte Cpl. Nassoro (PW7) and Abdul Said Mnolya (PW8).

We agree with the learned State Attorney that there is no law that prescribes the time of recording the extrajudicial statement and expectations being that the said statement must be made "as soon as possible" as advanced in **Mashimba Doto @Lukubanja vs Republic** (supra). It is upon the prosecution side to provide explanations for any delay if it occurs. Suffice to say there was no such explanation expounded by the prosecution side, which we find rendered the exposed delay unwarranted. This being the case we are satisfied that under the circumstances where the prosecution side failed to provide reasons for the delay and other circumstances surrounding the recording of the appellant's statement, leads this Court to find wanting the circumstances leading to the admissibility of the extrajudicial statement. We agree with the learned counsel for the appellant that the highlighted flaws in recording and admissibility of the extrajudicial statement cannot be discounted and we find that this ground has merit. Therefore we shall henceforth expunge the extrajudicial statement (Exhibit P3) from the record and disregard the statement in our deliberations.

The next ground was disgruntle on alleged irregularities in admissibility of the Postmortem report. The argument being that there was

non-compliance with the law in that the appellant was not informed of his right to call its author for cross examination and also that the Post Mortem report was not read over in court. The prayer by the learned counsel for the appellant was that the postmortem report be expunged. On the part of the learned State Attorney he conceded to the stated defects and the prayers sought. Our scrutiny of the record of appeal has discerned that the Postmortem Report was admitted as Exhibit P2 during the Preliminary hearing without any objection from the defence. Despite this fact, we are aware of the provision of section 291(3) of CPA which enjoins the court to inform the accused of his right to call the medical expert who prepared the report for cross examination. The record of appeal divulge that immediately after the PF3 was admitted the appellant was not informed of this right. Failure to inform the appellant of this right was no doubt, an infringement of section 291 (3) of the CPA and on numerous occasions, this Court has reiterated the importance of complying to this provision. [See **Dowido Qumunga vs Republic** (1993), TRL. 120; and **Jackson Monga vs The Republic**, Criminal Appeal No. 145 of 2009; **Selemani Kisava @ Emilo vs The Republic** and **Jerald Ndarusanze vs Republic,** Criminal Appeal No. 181 of 2014 (all unreported)].

There is also the fact that the post-mortem report upon being admitted was not read over in court to enable the appellant (the accused then) to be informed the contents therein. On this issue, this Court has had an opportunity to address it in numerous decisions. In **Lack Kilingani vs Republic**, Criminal Appeal No. 402 of 2015 (unreported), when discussing a similar issue regarding cautioned statement and PF3, we reiterated the importance of the established practice of the courts that admitted evidence should be read over so as to appraise the appellant of facts therein. The Court also adopted the principle outlined in the Case of **Robinson Mwanjisi and Three others vs Republic** [2003] T.L.R. 218 which stated that:

> *"Whenever it is intended to introduced any document in evidence, It should first be cleared for admission, and be actually admitted, before it can be read out..."*

Thus expounding that there are three stages in admitting evidence that is; that is, **first**, clearing for admission; **second,** admitting it; and **third**, reading out the admitted document. (See also **Erneo Kidilo and Matatizo Mkenza vs Republic**, Criminal Appeal No. 206 of 2017 (unreported). Therefore, without doubt in the present case, non-compliance of 291(3) of

CPA and failure to read the admitted postmortem report were irregularities that are fatal and as rightly advanced by the learned counsel for the appellant and the learned State Attorney that should lead for the Postmortem Report (Exhibit P2) to be expunged. The ground is therefore meritorious, and the post mortem report is henceforth expunged.

The third area of contention was that the trial court erred in relying on circumstantial evidence which did not lead to an inference that it was only the appellant who could have committed the offence. The trial court (at page 121 of the record of appeal) stated:

> *"The connection of event before and after incidence made by the accused, lead to an inference that the accused is the one who killed the deceased"*

and further on, stated:

> *"Although the evidence produced by the prosecution witnesses is circumstantial, but the same is best in this case..."*

We have considered submissions by both counsel on this issue, aware that we have expunged the extrajudicial statement (Exhibit P3) and the Postmortem report (Exhibit P2), and thus what remains pending is to examine whether the available evidence proved the case against the

appellant. On our part we agree with the appellant that the case against him expounded by the prosecution is grounded on circumstantial evidence. This Court has a number of times restated basic principles that courts should consider when relying on circumstantial evidence. These principles were restated and adopted in **Mark Kasimiri vs Republic**, Criminal Appeal No. 39 of 2017 (unreported), and they are:-

" *i. That the circumstances from which an inference of guilty is sought to be drawn must to be cogently firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See* ***Justine Julius and Others vs Republic****, Criminal Appeal No. 155 of 2005 (unreported)).*

ii. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no existing circumstances which would weaken or destroy the inference [See, ***Simon Msoke vs Republic*** *(1958) EA 715A and* ***John Magula Ndongo vs Republic****, Criminal Appeal No. 18 of 2004 (unreported)].*

*iii. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. (See M**athayo Mwalimu and Masai Rengwa vs Republic** (supra).*

*iv. That each link in the chain must be carefully tested and, if in the end it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. (See **Samson Daniel vs Republic** (1934) E.A.C.A 154).*

*v. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person (See **Shaban Mpunzu @Elisha Mpunzu vs Republic**, Criminal Appeal No. 12 of 2002 (unreported).*

*vi. That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **Ally Bakari vs Republic** (1992) TLR 10 and **Aneth Kapazya vs Republic**, Criminal Appeal No. 69 of 2012 (unreported)."*

When addressing this ground, the above principles are relevant to the present case and shall be considered in our endeavour to establish whether or not the evidence on record compellingly point to the guilt of the appellant. The chain of events in the present case we find are **first**, the fact that the appellant was at Mihuga village and not Mahera village at the time

the deceased was attacked. This can be discerned from the evidence of PW3 who testified that she saw the appellant going to the house of PW1 on the fateful day. She stated:

> *"I was outside my house when Awadhi passed and went to the house of Petro. I saw him going to the house of Petro. I saw him entered in the house of Petro. Awadhi passed my house and went to the house of Petro. I was at my house when Awadhi passed. It did not take long time when I heard people crying, I can see people going to house of Petro I also went to the house of Petro."*

When questioned by the 1st assessor, PW3 stated that this transpired in the morning hours. PW3 was also adamant that she was outside her house when she saw the appellant who greeted her and proceeded to go to PW1's house and then entered the house of PW1. That when he left the house he came back with hands in his pocket using the same route he had taken earlier to go to PW1's house. She also testified that the distance between their two houses is about 100 meters and that not much later after the appellant had passed by from PW1's house, at about 12.00hours she heard people crying from PW1's house and she went there to see what had transpired and that she was the one who then informed the people there

including PW1, PW2 and PW4, what she had witnessed with respect to the appellant.

There is also the evidence of PW1 and PW2 who stated that while at the farm which is about thirty (30) minutes' walk from their house, at about 12.00noon, the deceased younger sister schooling who was still in uniform came there and informed them that on arrival at home from school she found her elder sister, the deceased laying on the ground while blood oozed from the mouth and nose. PW1 and PW2 rushed back home soon after. On reaching home, they found the deceased in a room, laying on the ground while blood was oozing from mouth and nose. That they discerned that the blood was caused by injuries on her neck which showed she has been stabbed by a sharp object about five times.

PW1 testified that their neighbour PW3, informed them that about 11.00hours she had seen the appellant who passed her house and went to PW1's house and that thereafter he returned back using the same path. It was the evidence of PW1 and PW2 that when they left for the farm, they had left the deceased at home. There was also the testimony of PW2, who said she left the deceased alone in the house around 11.00hours to go to the farm carrying porridge. That it was around 11.45 hours, when the

deceased's younger sister came to the farm and informed them of the injured deceased. PW1, PW2 and PW4 evidence support the PW3's evidence, on the information she gave them of seeing the appellant enter PW1's house.

The trial court relied on the evidence of PW1, PW2, PW3 and PW4 on the ground that the court is satisfied with their evidence. From this evidence, especially that of PW3, we also find that it is sufficient to establish that the appellant did go to PW1's house after 11.00hours and before 11.45 hours. There is also no doubt that the deceased was alone in the house as of 11.00hours. It is also important to note that this evidence is not challenged by the appellant's defence neither in the cross examination of PW3 nor in his defence. The appellant's defence was that he had left for his stepfather's house in the morning of 29th March, 2012 although he was unable to reveal the time he left Mihuga village to Mandera village. The only time revealed in his testimony is that he was arrested on the same day at 21.00hours while at his step father's place at Mandera. Leading us to find that the appellant did go to PW1's house and was seen by PW3.

Second, conditions leading to the death of Esther Petro. There is evidence, from PW3, that soon after the appellant left PW1's house, around

12.00hours sounds of people crying were heard from PW1's house. That Ester Petro was found to be dead with stab wounds on the neck. The fact that Ester Petro died, is not disputed, the appellant also conceded this during the preliminary hearing. **Third,** is the question who killed Esther Petro? From the circumstances narrated above and the chain of events, as discerned from testimonies of PW3, PW1, PW2 with respect to the time of seeing that Ester Petro was dead creates a close link, that leads to the most probable explanation being that it is only the appellant who killed her and no one else.

Fourth, this is further amplified by the conduct of the appellant thereafter. The appellant was arrested at Mandera village having left Mihuga village, where the offence was committed. There is no question that, he was arrested at his stepfather's house. The appellant claimed that he was there to assist his stepfather. We are aware that the appellant had no duty to establish his innocence, but having raised the defence of *alibi*, although no notice was given within the confines of section 194 (4) of CPA but as the first appellate Court, we exercise our discretion in re-evaluation of evidence to consider such evidence within the confines of section 194(6) of the CPA. Our consideration of the evidence in totality shows the *alibi* was nothing but

an afterthought as rightly found by the trial and first appellate courts. The appellant *alibi* did not raise any doubt to the firm evidence of PW3, the evidence of the appellant's presence at the scene of crime between 11.00hours to 11.45 hours on the fateful day, and soon after being seen, the deceased being found dead, is very cogent leaving no doubts. Also being arrested at Mandera village on the same night after the incident of killing Esther Petro at Mihuga village, shows that the appellant had tried to escape by hiding at Mandera village. Efforts to trace the appellant at Mihuga village ran futile according to PW1.

Fifth, the evidence on their being misunderstandings and threats from the appellant to PW1's family. The fact that the appellant was known to the family of PW1 and met at the church is not disputed, by the appellant and PW1 and PW2 alluded to this fact. The appellant stated that he considered himself a friend of the family although he contended that PW1 family did not like him. PW1 and PW2 testified that the appellant had stolen about Tshs. 200,000/- from him and had been told to leave the village by the village chairman and that led him threatening that he will do something which they will not forget. PW2 stated further that the threats from the appellant were

aired via a phone call on Tuesday and their daughter was killed on Thursday.

It is interesting to note that neither PW1 nor PW2 were not questioned by the appellant on the allegations of threats during their cross examination and established principles were a witness is not questioned on a material point, leaves the unquestioned evidence to stand as it is [see **Nyerere Nyegue vs Republic**, Criminal Appeal No. 67 of 2010 and **Mustapha Hamis vs Republic**, Criminal Appeal No. 70 of 2016 (both unreported)]. PW4 Abdallah Rajabu Mlongwa, the Kitongoji Chairman, acknowledged having received complaints of theft against the appellant and reaffirmed this when cross-examined by the appellant's counsel stating that the appellant had the habit of stealing and threatening. All these facts without doubt leads to the motive for the killing.

Therefore, taking into consideration all the above pieces of evidence, in our view what is illustrated is a chain of events which we find are so connected to lead to nothing else but inference that it the appellant who killed Esther Petro. Therefore this ground of appeal fails.

With regard to the fourth ground which is general and contends that the prosecution failed to prove their case, we are of the view that in light of

what has been demonstrated above, this ground has also been dealt with when determining the other three grounds. In this ground we also find it pertinent to consider whether the killing of Esther Petro was with malice aforethought. We are well aware that malice aforethought is inferred from actions leading to the unlawful act of killing since it is rare that the attacker will declare his intention to cause the death or grievous harm of another person. It has been held that the type of weapon used, the amount of force applied, part or parts of body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attackers utterances made before or after killing, and the conduct of the attackers before and after killing are factors that ascertain malice aforethought [See **Enock Kipera vs Republic**, Criminal Appeal No. 150 of 1994 and **Mark Kasimiri vs Republic**, Criminal Appeal No. 39 of 2017 (both unreported)].

In light of the above, applying it to the present case where the deceased was killed by stabbing at her neck, a volatile and sensitive area for any injury is a clear indication of malice aforethought. The conduct of escaping from the scene of crime discerned from his arrest in another village shows the killing was planned with intention to accomplish it without being

noticed or found. In the end, we thus are in tandem with the trial court's findings, and find that the appellant was justly convicted with murder of the deceased as charged. Therefore this ground also fails.

In the end, as expounded above, serve for the two grounds of appeal which we have allowed, we find that the appeal lacks merit and we proceed to dismiss it.

DATED at **DAR ES SALAAM** this 27th day of April, 2020.

S.A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

Judgment delivered this 5th day of May 2020 in the presence of the appellant in person-linked via video conference and Ms. Chesensi Govyole, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL