IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 96 OF 2018

1. GEOFREY KITUNDU @ NALOGWA
2. MICHAEL JOSEPH ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Morogoro]

(Munisi, J.)

Dated the 5th day of March, 2018
in
Criminal Sessions No. 46 of 2015

JUDGMENT OF THE COURT

23rd November, 2020 & 2nd February, 2021

MKUYE, J.A.:

In the High Court of Tanzania at Dar es Salaam, Geofrey Kitundu @ Nalogwa and Michael Joseph (the 1st and 2nd appellants) stood arraigned for the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). It was alleged that on the 31st day of August, 2013 at Cocacola Depot, Mtawala area within the Township and District of Morogoro in Morogoro Region, did murder one Elisha Paul. Upon a full trial, they were convicted and sentenced to death by hanging.

The brief facts of the case leading to the arraignment of the appellants are that: on the 31st August 2013, the appellants together with other persons who were not apprehended invaded the Cocacola Company Warehouse located at Mtawala area within Morogoro in an attempt to commit a crime. Upon entering into the said premises, they attacked the security guards who were manning the place using crude weapons including machetes and iron bars upon which one of the security guards was severely injured and died at the scene of crime while the other fell unconscious and later survived. It was the case for the prosecution that during the attack one of the security guards who was armed with a short gun managed to shoot one of the thugs (the 1st appellant) injuring him on the upper thigh. Thereafter, the thugs fled with the gun. They also took the injured one and presented him at the home of one Jefta Jared who, upon seeing his (the 1st appellant's) wound requested him to go to hospital but he refused. This led Jefta to be suspicious and reported the matter to the police which precipitated to the arrest of both appellants. Upon the arrest, the 2nd appellant led the police officers to the place where the stolen short gun was hidden. Meanwhile, the 1st appellant recorded a cautioned statement in which he confessed to have together with others, the 2nd appellant inclusive,

taken part in the commission of the offence that caused the death of the deceased.

They were then taken to court, tried, convicted and sentenced as alluded to earlier on.

Aggrieved with the decision of the High Court, the appellants appeal to this Court whereby they initially, on 12/06/2018 lodged a joint substantive memorandum of appeal containing 5 grounds of appeal and thereafter on 21/08/2019 and 04/12/2019 each lodged a separate supplementary memorandum of appeal in which they raised 11 and 13 grounds of appeal respectively. However, the learned counsel who represented the 2nd appellant also lodged a supplementary memorandum of appeal consisting of 5 grounds of appeal in substitution of the earlier memoranda of appeal lodged by the appellant himself. Nevertheless, after going through the 1st appellant's grounds of appeal, we have found it appropriate to extract them as follows: -

1)The visual identification evidence by PW1 was not watertight.

2)The appellants were convicted on uncorroborated retracted caution statement of the 1st appellant.

3)The prosecution omitted to call Jefta Jared to testify in Court.

4)There was no chain of custody or paper trail of the recovered short gun (Exh P2).

5)The case was not proved beyond reasonable doubt.

With regard to the 2nd appellant, the grounds of appeal in his substituted memorandum of appeal are to the effect that:

1) *The 2nd appellant was convicted on the basis of PW2' evidence regarding the information received from Jefta Gerad without being corroborated.*
2) *The 2nd appellant was convicted on the basis of PW2' evidence regarding his admission statement without proof of an admission statement made by him.*
3) *The 2nd appellant was convicted on the basis of PW2' evidence regarding recovery of the short gun (Exh, P2) which was recovered without complying with the provisions of section 38(3) of the Criminal Procedure Act Cap 20 RE 2019.*
4) *The 2nd appellant was convicted on the basis of confession statement of the 1st appellant without corroborative evidence.*
5) *The prosecution failed to prove the case against both appellants to the standard required.*

When the appeal was called on for hearing, the 1st and 2nd appellants were represented by Messrs Henry Chaula and Braysoni Shayo, learned advocates respectively; whereas the respondent Republic had the

services of Ms. Cecilia Mkonongo and Ms. Salome Assey, the learned Senior State Attorney and State Attorney, respectively.

Submitting on the complaint that the 1st appellant was not properly identified by PW1, Mr. Chaula argued that **one**, PW1 could not have identified him in such a horrific situation where there was a gun shot and eight thugs attacking the deceased. **Two**, PW1 could not have identified the 1st appellant who was lying on the ground in agony at a distance of 19.5 meters as shown in the sketch map (Exh P1). In support, he referred us to the case of **Yassin Hamis Ally @ Big v. Republic**, Criminal Appeal No. 254 of 2013 page 9. **Three**, the fact that 1st appellant worked with the security company ought to have been proved by the employer and not PW1 and PW6 who purported to know him as their former co-worker.

With regard to the trial court's reliance on the 1st appellant's retracted cautioned statement (Exh. P3), Mr. Chaula argued that, it ought not to have relied on such statement as it was taken while the 1st appellant was not in good health and, as such, the said statement cannot be said to have been freely made. He said, such evidence ought to have been corroborated with other evidence from Jefta who could have cleared the dust on the health status of the 1st appellant at the time he was arrested but he was not called to testify in court. In support

of his argument, he referred us to the case of **Abubakari Hamis and Another v. Republic,** Criminal Appeal No 253 of 2012 (unreported).

On the complaint regarding recovery of the gun (Exh. P2) near the scene of crime, it was Mr. Chaula's contention that the said gun was recovered contrary to section 38 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) as there was no certificate/receipt issued evidencing its recovery. Apart from that, he challenged the chain of custody of the said gun from the place where it was retrieved, to the police where it was kept until the date it was tendered in court. He said, there was no paper trail.

Moreover, Mr. Chaula argued that, though the 2nd appellant is alleged to have shown where the gun was recovered, his cautioned statement was not tendered in court and that even the exhibit keeper (custodian of exhibits) did not testify in court. He also challenged PW1 and PW3's identification of the said gun without producing its certificate to show that it was from their employer. While relying on the cases of **Seleman Abdallah and Others v. Republic**, Criminal Appeal No. 384 of 2008 and **Julius Mtama @ Babu @ Babu @ Mzee Mzima v. Republic**, Criminal Appeal No. 137 of 2015 (both unreported), he urged us not to believe in Exh. P2 and disregard it.

As to the issue concerning the proof of the case, the learned counsel for the 1st appellant argued that it was not proved beyond reasonable doubt **one**, for failure to call Jefta who was the informer of the police to testify in court; **two**, failure to produce the cartridge of the bullet from the short gun Exh. P2; **three**, due to unreliable cautioned statement (Exh. P3).

With regard to the 2nd appellant, in the first place, Mr. Shayo challenged the identification evidence contending that the 2nd appellant was not identified by PW1 at the scene of crime. He also pointed out that Jefta who informed PW2 that it was the 2nd appellant who took the 1st appellant to his home did not testify in court. Neither did any eye witness who stayed in Jefta's house said that it was the 2nd appellant who took the 1st appellant there. Moreover, he said, the 2nd appellant's cautioned statement was not tendered in court much as PW2 said that both appellants confessed to have invaded the deceased. He added that even the trial judge's observation that the 2nd appellant admitted to PW2 dropping the 1st appellant at Jefta's home does not feature in evidence.

Regarding the recovery of the gun (Exh. P2), it was Mr. Shayo's argument that the same was recovered contrary to the provisions of section 38 (3) of the CPA. Moreover, though the 2nd appellant seems to have shown the police (PW2 inclusive) where the gun and machete were

hidden, no certificate of seizure was produced to show that such things were so recovered. Apart from that, he said, the other weapons which were recovered together with the gun were not tendered in court. In his view, since the deceased was alleged to have been cut with pangas, failure to produce them in court raised doubt. He concluded that, in totality, the prosecution failed to prove the case against the appellants and in particular, its evidence does not connect the 2nd appellant with the offence of murder. He, lastly, urged the Court to find that the appeal is meritorious and allow it.

In response, Ms Mkonongo in the first place declared her stance of supporting both the conviction and sentence in respect of both appellants. With regard to the issue of identification of the 1st appellant, Ms Mkonongo submitted that PW1's identification evidence was watertight since he knew the 1st appellant even before the incident and he identified him by name. To support her argument, she referred us to the cases of **Nchangwa Matokole @ Lante v. Republic**, Criminal Appeal No. 315 of 2013 pg 5 – 6 and **Fadhili Gumbo @ Malota and 3 Others v. Republic,** [2006] TLR 50 in which it was held that where the witness knew the appellants before the date of incident, their identification by name cannot be faulted. She went on to clarify that the 19.5 meters shown in the sketch map (Exh. P1) does not relate to the

place where PW1 stood while watching the bandits but it shows the distance from where the deceased's body was found to the room/place where PW1 was found. Otherwise, she said, PW1 was 3 meters from where he was watching the deceased while being attacked.

As regards the 1st appellant's retracted cautioned statement, she contended that the same (Exh. P3) was a credible evidence as all the conditions for its admission were complied with. She pointed out that, trial within trial was conducted before its admission and the trial judge believed it to be voluntarily made. While relying on the cases of **Festo Mwanyagila v. Republc,** Criminal Appeal No. 255 of 2012 (unreported) and **Tuwamwoi v. Uganda** (1967) EA 84 pg 88, Ms Mkonongo stressed that even without corroboration, the trial court could still use such retracted or repudiated cautioned statement to convict the appellants but, in this case, there was corroboration. In addition, the learned Senior State Attorney contended that the trial judge saw the witness's demeanour and took into account the conduct of the 1st appellant lying in court.

As to the contention by Mr. Chaula that had Jefta been called to testify in court he would have corroborated PW1's evidence, she said, he was not a material witness as his evidence could not have added anything to what was said by other witnesses.

With regard to the discovery of Exh. P2 and that its chain of custody was broken for lack of certificate, she readily conceded to it. She also agreed that the exhibit keeper did not testify in court. However, she was quick to state that the Exh. P2 was recovered under emergency circumstances as per section 42 of the CPA. She was of the view that the case of **Seleman Abdallah and Others** (supra) was distinguishable as in this case the 2nd appellant was the one who showed the gun in the shrubs in which case even section 38 (1) of the CPA was inapplicable. She referred us to the cases of **Julius Mtama @ Babu @ Mzee Mzima** (supra) and **Deus Josias Kilala @ Deo v. Republic**, Criminal Appeal No. 191 of 2018 (unreported) where the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) was quoted with approval in that: -

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence* ***is not in the danger of being destroyed or polluted and/or in any way tempered with****. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this*

will depend on the prevailing circumstances in every particular case." [Emphasis added]

She, then, urged us to find that the circumstances in that case are similar to this case and follow suit. In the instant case, Ms. Mkonongo argued, it was the 2nd appellant who showed the police the said gun and the same was identified by PW1 and PW3 through its number MV 65552. In addition, she argued that PW1 and PW3's testimony was not on ownership but was only intended to show that it was the gun which was used at the Godown.

In relation to the 2nd appellant, Ms. Mkonongo contended that though he was not identified at the scene of crime, he was convicted on among others, the evidence that he led to the recovery of the gun and his conduct of telling lies in court. Responding to the issue why Jefta was not called to testify in court, she reiterated that he was not a material witness. As to the 2nd appellant's admission to PW2 that he dropped the 1st appellant at Jefta's home; and showed the police where he was found, it was her contention that the admission does not necessarily need to be in writing as it can also be made orally.

Regarding failure to bring the machete and iron bar in court she equally conceded that they were not produced though they were crucial. However, she said, there was other evidence which was relied on in

convicting the appellants including leading the police to the place where the weapon was hidden as well as at Jefta's home where the 1st appellant was arrested.

As to the complaint against the proof of the case generally, the learned Senior State Attorney argued that it was proved beyond reasonable doubt based on the 1st appellants caution statement, discovery of Exh. P2 after being led by 2nd appellant and both appellants' conduct of telling lies in court. In the end, Ms. Mkonongo urged the Court to find that the appeal lacks merit and dismiss it in its entirety.

In rejoinder, Mr. Chaula reiterated his submission in chief and added that the evidence of Jefta was crucial to corroborate Exh. P3. He said, the case of **Festo Mwanyagila** (supra) was distinguishable as in that case, the offence was committed at 18:00 hrs and the cautioned statement was not objected to unlike in this case.

On his part, Mr. Shayo, apart from reiterating his submission in chief, he also insisted that Jefta was a crucial witness to show if the 1st appellant was brought to his house by the 2nd appellant, otherwise, PW2's evidence remains a hearsay. He contended further that there ought to be a paper trail in handling Exh P2 from its recovery to its production in court.

As to the 1st appellant's cautioned statement, Mr. Shayo said it does not show any link with the 2nd appellant. In the end, both learned advocates reiterated for the Court to allow the appeal.

Having summarized the submissions from both sides, we think we should now be in a position to determine the issues involved in the appeal.

As regards the issue of visual identification evidence it is now trite law that in a determination depending on such evidence, conditions favouring correct identification is of utmost importance. In the case of **Nchangwa Matokole @ Lante** (supra) which was cited by Ms. Mkonongo, the Court revisited the case of **Waziri Amani v. Republic** [1980] TLR 250 where pertinent features of visual identification were underscored and went on to lay down other factors to be taken into account by trial courts in satisfying themselves if such evidence is watertight. The Court laid such factors as follows: -

> *"(a) the time the witness had the accused under observation;*
> *(b) the distance at which he observed him;*
> *(c) the conditions in which such observation occurred;*
> *(d) if it was a day or night time;*
> *(e) whether there was good or poor lighting at the scene;*

(f) whether the witness knew or had seen the accused before or not."

Also, in **Yassin Hamis Ally @ Big** (supra), the Court emphasised that the visual identification evidence is of the weakest character and that where determination of the case depends essentially on visual identification be it of a single or more witnesses, such evidence must be watertight even if it is evidence of recognition.

In this case, we have considered the lone visual identification evidence by PW1 and the submissions from either side and we are inclined to agree with the learned Senior State Attorney that the visual identification evidence was watertight. We say so for three reasons, **one,** according to PW1's testimony, he observed the 1st appellant lying down in agony while other thugs were attacking the deceased. At that time, he hid himself in a room which was at distance of about 3 paces from the place the 1st appellant was lying in agony and the deceased being attacked. In this regard, we take, Mr. Chaula's contention that PW1 could not have identified the 1st appellant at a distance of 19.5 to be misconceived. This is so, as was rightly stated by Ms Mkonongo, the distance between "A" and "E1" shown in Exh P1 at page 135 of the record of appeal related to the distance between the place where the body of the deceased was found and the room where PW1 was found

after the incident. The distance did not relate to the place PW1 was hiding while watching the incident. **Two,** there was sufficient light which PW1 described as a day light illuminating from two bulbs of about 150 watts each lighting the gate area. **Three,** PW1 knew him before as he once worked with him in the same security company. We think, naming by PW1 of the 1st appellant was sufficient as was stated in the case **Fadhili Gumbo @ Malota and 3 Others** (supra). Thus, the contention by the learned counsel that the 1st appellant's employment ought to have been proved by his employer is baseless in the circumstances of the case as the issue is not on employment but the identification of who was involved in the commission of the offence. Afterall, PW1's evidence was corroborated by PW6, a stock controller at Coca Cola Depot, who had also worked with him for about 3 to 4 months. Hence, the ground on visual identification is devoid of merit and we dismiss it.

On the issue relating to the 1st appellant's cautioned statement, the complaint is that it was not obtained voluntarily as it was recorded while the 1st appellant was not in good health and that Jefta who could have corroborated it did not testify in court. The learned Senior State Attorney is of the view that the same (Exh. P3) was credible as was made voluntarily.

We are aware that during the trial, the counsel for the 1st appellant had objected to the said statement to be tendered in court for reason that it was taken while he was not in good condition which could have impaired his voluntariness. Thereafter, the trial within trial was conducted and the trial judge was satisfied that the same was taken voluntarily as the 1st appellant was in good health when it was recorded. On our part, we do not have any reason to fault the trial judge's finding on this.

We are alive that in the case of **Abubakari Hamis and Another** (supra), the Court underscored the need of looking for corroboration in support of the confession which has been retracted or repudiated. Yet, in the case of **Festo Mwanyangila's** case (supra) in which the case of **Tuwamwoi** (supra) was adopted with approval, it was emphasised that the court could enter conviction based on repudiated or retracted statement even if it is not corroborated, if the court is satisfied that such confession must be true.

In this case, we agree with Ms. Mkonongo that the trial court could have convicted the 1st appellant based on his confession (Exh. P3) on how he was involved in the commission of the offence without corroboration more so when taking into account that it was admitted

after trial within trial was conducted and found to have been obtained freely while the 1st appellant was in good health.

At any rate, in his statement he gave such a detailed narration incriminating both appellants in the offence as opposed to Mr Shayo's proposition that the 1st appellant's cautioned statement did not link the 2nd appellant. We think such details could only come from a person who was involved in the commission of the offence. In particular, the 1st appellant explained to have been shot by a gun at his upper left leg (nyonga) while at the scene of crime; that he was arrested at Jefta's house; and that when he was taken in the police vehicle, he found Jefta and 2nd appellant therein together with the shotgun they had stolen from the scene of crime.

Nevertheless, in this case the narration of the 1st appellant in the cautioned statement (confession) was corroborated in material particular by PW2 who found the 1st appellant at Jefta's home where they arrested him with a wound on his thigh/ leg which was also observed by PW4 who recorded his cautioned statement. Moreover, the other corroboration was as was rightly found by the trial court at pages 171 - 172 of the record of appeal when it stated as follows: -

> *"...in the instant case there are sufficient corroborative circumstances, including the 1st appellants conduct in court whereby he appeared so unsettled and told apparent lies*

demonstrated by his contradictory versions he gave under oath when he testified before the trial within trial and during his defence. The versions were different with regard to what befell him at the Police Station and what made him bleed. While in the trial within trial he said, he was bleeding from a wound at his upper left thigh (Nyonga) in his main defence during trial he claimed that the bleeding was from injuries he sustained at the Police after being subjected to hitting in his feet by the police .... the 1st accused's lies in court constituted sufficient corroboration to the cautioned statement. In this regard, when the cautioned statement is taken together with the fact that PW1 identified the 1st accused at the scene, evidence which was not challenged much and which I have already found credible, I am satisfied that the 1st accused person was sufficiently incriminated. I find sufficient corroboration."

On our part, we subscribe to it, and thus, we do not find any reason to fault it. Even Jefta's testimony was uncalled for in the circumstances of this case. Hence, the appellant's complaint on the retracted cautioned statement is baseless and we hereby dismiss it.

We now move to the issue of the recovery of the gun (exhibit P2) and lack of paper trail. We agree with the learned Senior State Attorney's concession that there was none and that the exhibit's keeper did not testify in court. While the counsel for the 1st appellant thinks that

lack of paper trail, contravened section 38(3) of the CPA, the respondent is of the view that the Exh. P2 was recovered under emergency situation in terms of section 42 of the CPA.

Section 38 (3) provides as follows: -

> *"Where anything is seized in pursuance of the powers conferred by subsection (1), the officer seizing the thing shall issue a receipt acknowledging the seizure of the thing, being the signature of the owner or occupier of the premises or his near relative or other persons for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".*

Our reading of this provision is that it provides for the requirement to issue receipt of the things seized out of the search. The purpose of issuing the receipt was stated in the case of **Selemani Abdallah & 2 others** (supra) which is, to ensure that the property seized came from no place other than the one shown in the receipt.

Also, in **Julius Mtama @ Babu @ Mzee Mzima** (supra) and **Deus Josias Kilala's** cases (supra), the Court emphasized the need of the prosecution to produce evidence or chronological documentation and paper trail showing the seizure, custody, control, transfer analysis and disposition of an exhibit alleged to have been seized from the accused.

We do not hesitate to state that in an ideal situation this requirement ought to have been complied with.

Yet, as we have alluded to earlier on, it is not in every time when the chain of custody is broken that the relevant item cannot be admitted as evidence in court (See **Joseph Leonard Manyota's** case (supra).

In this case, we agree with Ms. Mkorongo that **Selemani Abdallah & 2 others's** case (supra) is distinguishable to this case, since unlike in that case where the items were seized in the accused's premises, in this case the item (the gun) was shown by the 2nd appellant in the bush in which case even section 38(1) of the CPA could not have applied. Instead, section 42 of the CPA could cater for the situation as the seizure was under emergency. And, looking at the item involved, in our view, it is not among items which could easily change hands or be tempered with. In this regard, we subscribe to what was stated in **Deus Josias Kalala's** case (supra) that the requirement may be relaxed in situations where items involved may not charge hands easily or cannot be tempered with.

On top of that, in this case, despite the fact that the short gun (Exh P2) was recovered by PW2 after being led by the 2nd appellant to the bush where it was hidden, it was identified by PW1 and PW3 by its

number MV 65552 which was used at their place of work and went missing after the incident. Much as there was no documentation to show how it was kept from its seizure to the time it was tendered in court, we are of the considered view that failure to produce such evidence in court could be inconsequential. We believe that, the fact that the gun whose numbers were stated by PW1 and PW3 got lost and came to be retrieved by PW2 after being shown by the 2nd appellant; and the fact that the same was identified by PW1 and PW3 even in court it was the same weapon that was retrieved by PW2. Apart from that, we think, the gun is not among such item which could charge hands easily or be tampered with. As such, we are satisfied that the evidence on recovery of Exh. P2 and its custody until its production in court was credible.

As regards the 2nd appellant's complaint challenging failure to identify him at the scene of crime; failure by Jefta or any other person from Jefta's home to testify in court; or failure by the prosecution to produce the 2nd appellant's cautioned statement, we agree with the learned Senior State Attorney that all complaints are correct. The 2nd appellant was not identified at the scene of crime. Neither was Jefta called to testify in court nor his cautioned statement or machete or iron bar, were tendered in Court. As we had acknowledged earlier on, Jefta could have been a crucial witness. However, calling or not calling a

witness to testify in court is within the mandate of the prosecutor. And, in terms of section 143 of the Evidence Act, Cap 6 R E 2002, there is no specific number of witnesses required to prove a fact in issue (See also **Yohanis Msigwa v Republic**, (1990) TLR 148). In this case, Jefta was not considered by the prosecution to be a material witness.

In any case, our scrutiny of the evidence generally, we find that there was sufficient evidence to mount a conviction against the 2nd appellant without even calling Jefta to testify in court. There was evidence that he (2nd appellant) facilitated the recovery of the gun (Exh P2) which was stolen at the scene of crime; that, he led the police to the place/house he had dropped the 1st appellant in the previous night; and that he told lies in the trial court when he contradicted with his witness (DW3) on when and why he was arrested. Apart from that, there was evidence of the 1st appellant's cautioned statement in which the 1st appellant not only incriminated himself but also mentioned the other people, the 2nd appellant inclusive, for having plotted to steal at Cocacola Depot. Also, the trial judge relied on the 2nd appellant's oral admission to PW2 on having dropped the 1st appellant at Jefta's house. The argument that the admission does not feature in the record of appeal, we think, is not tenable since the record of appeal at page 60 clearly bears out that he admitted to PW2 to ferry Geofrey also known

as Ngosha who was bleeding to a certain place by a bodaboda in the last night in a Mshikaki (meaning more than one passenger).

In this regard, even if the 2nd appellant's cautioned statement was not tendered as was indicated before; or that the machete or iron bar were not tendered in court, failure to tender them did not vitiate the strong evidence which was adduced against him.

The next complaint relates to the issue of the chain of custody of Exh P2 that it was broken. We, however, think that we have dealt with this issue exhaustively when discussing it in relation to the 1st appellant. We need not repeat what we have said there.

The last issue that covers both appellants is whether the prosecution proved the case beyond reasonable doubt. It is Mr. Chaula's argument that failure to call Jefta and to produce the cartridge of the bullet from the gun and the unreliability of Exh. P3 raises doubt. On his part, Mr. Shayo argues that the prosecution evidence did not connect/link the 2nd appellant with the offence. On the other hand, Ms. Mkonongo had a different view that it was proved to the required standard on the basis of the 1st appellant's cautioned statement; discovery of the gun (Exh P2) with the facilitation of the 2nd appellant; and both appellants' conduct of telling lies in court.

On our part, we agree with the learned Senior State Attorney's proposition. We need not say much on that. In view of what we have discussed in other grounds of appeal, we are satisfied that the prosecution proved its case beyond reasonable doubt against both appellants.

In the event, we find the appeal to be devoid of merit and we hereby dismiss them in their entirety.

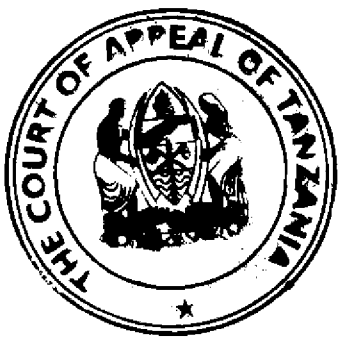
DATED at **DAR ES SALAAM** this 29th day of January, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 2nd day of February, 2021 in the presence of both Appellants – linked via video conference at Ukonga Prison and Ms. Belinda Batinamani holding brief of Mr. Bryson Shoyo Advocate, for the 2nd Appellant and Ms. Salome Assey learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL