**IN THE COURT OF APPEAL OF TANZANIA**
**AT SHINYANGA**

**(CORAM: MUGASHA, J.A., KITUSI, J.A And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 254 OF 2017**

**NGASA SITA @ MABUNDU..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Shinyanga)**

**(Makani, J.)**

**Dated the 2nd day of June, 2015**
**in**
**Criminal Session No. 50 of 2015**

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# JUDGMENT OF THE COURT

9th & 13th August, 2021

## MUGASHA, J.A.:

The appellant **NGASA SITA @ MABUNDU** was charged with the offence of murder contrary to section 196 of the Penal Code (Cap 16 R.E. 2002). It was alleged by the prosecution that on 08/08/2013, at Mnyuzi Mwanindwa village, Meatu District within Shinyanga Region, the appellant did murder one Nwigulu s/o Shinya Nkalango, the deceased. The appellant denied the charge. In order to prove its case, the prosecution lined up three witnesses and tendered three documentary exhibits namely: the

Report on Post Mortem Examination (Exhibit P1); the sketch map of the scene of crime (Exhibit P2) and the cautioned statement of the appellant (Exhibit P3).

The facts underlying the conviction of the appellant are briefly as follows: In the afternoon of 08/08/2013, the appellant surrendered himself at the office of the chairman of Mwanindwa village one Sospiter Sangi (PW1) revealing to have killed his grandfather because of family misunderstandings. Upon being further probed by PW1, the appellant revealed to have struck the deceased with a machete and that his body was lying at the sugarcane farm. This prompted PW1 to seek the assistance of one Odeka Deus Shagembe (PW2) who was the Village Executive Officer of Makabula village and acting Ward Executive Officer of Mwakisandu Ward to whom the appellant made a similar narration adding that, the deceased would not be seen again because he had killed him reiterating the cause to be family misunderstandings. Subsequently, an alarm was raised, the villagers assembled and the matter was reported to the Police who rushed at the village office at around 21.00 hours. However, because of darkness nothing could be pursued until on the following day when the Police went at the scene of crime accompanied by

a doctor who conducted an autopsy which established the cause of death to be severe haemorrhage and severe head injury. Similarly, the investigator F.4238 D/CPL Mujenjwa (PW3), as well recounted that in the cautioned statement, the appellant confessed to have killed the deceased. It was also the prosecution account that it is the appellant who led PW1, PW2 and PW3, to the scene of crime where the lifeless body of the deceased was found and that he identified the body of his grandfather. After the investigations, the appellant was arraigned in court.

It is glaring that before the appellant made his defence, upon being moved by the defence counsel, the trial court committed the appellant to Isanga Mental Institution and upon examination it was established that he was sane at the time of occurrence of the offence in question. In his defence, the appellant denied the assertions by the prosecution. Apart from testifying that on the fateful day after taking breakfast with the deceased, the deceased went to the sugarcane farm to meet customers whereas he went to the cotton farm up to 11.00 hrs. and was accompanied by his sister one Kamba Sitta. He further recounted that, upon returning home, he was sent by his grandmother one Nkamba Limbu to take food to his grandfather who was still at the sugarcane farm.

However, upon arrival at the farm as the deceased was nowhere to be seen he traced him and found him dead. Although, the appellant testified to have reported the incident to the village chairman, he denied to have confessed to have killed the deceased be it to PW1 and PW2 or in the cautioned statement which he alleged to have been irregularly obtained in contravention with the law.

At the end of the trial, the learned High Court Judge summed up the case to the assessors who all returned a verdict of guilt. Ultimately, the appellant was convicted and sentenced to suffer death by hanging. It is against the said backdrop; being aggrieved, the appellant has preferred this appeal against the decision of the trial court fronting the following grounds of complaint:

1. *That, the trial court erred in law and fact to admit the [cautioned] statement by the ruling that the statement was recorded within time while the reasons of the delay are not supported by the evidence.*
2. *That, the trial court was wrong in law and fact to admit the [cautioned] statement without giving opportunity to the appellant to say [anything] for repudiation of his statement*

*than his [counsel] who did not [present] the repudiation for admission.*

3. *That, the trial Judge erred to accept the corroboration of the alleged confession before PW1 and PW2 while it was denied by the appellant[in] his defence with strong evidence which was not considered totally in the judgment.*
4. *That, the trial Judge failed to observe that the assessors cross-examined and re-examined the witnesses contrary to the law.*
5. *That, the trial Judge erred in excluding denied evidence of the alleged confession, the remaining circumstantial evidence is derogatory, it has contradictions and inconsistencies and destroyed coexisting circumstances in the inference which were not found by the trial court that exculpatory facts are incompatible with the innocence of the appellant.*

At the hearing, the appellant was represented by Mr. Frank Samwel, learned counsel, whereas the respondent Republic had the services of Ms. Mercy Ngowi and Ms. Immaculate Mapunda, learned State Attorneys.

In the 1st and 2nd grounds of appeal the appellant is faulting the learned trial Judge for relying on the irregular cautioned statement which

was contrary to provisions of section 50 of the Criminal Procedure Act [CAP 20 RE.2002]. Clarifying on this point, it was the appellant's counsel submission that since the appellant was arrested on 8/2/2013 at 21.00 hours, the statement recorded on the following day, that is 9/2/2013 at 10.00 am was beyond the prescribed four hours from the time of arrest and extension was not sought and obtained. In this regard, it was argued that, the reason availed by the prosecution that the recording of the statement was delayed because the autopsy was not yet conducted is wanting because the latter is not dependent on the former. Another point raised to fault the cautioned statement was the competence of the person who recorded it considering that the recorder was the same person who had investigated the matter was aware of what had transpired in relation to the fateful incident therefore biased. To support his propositions, he referred us to the case of **OMARY MOHAMED MARUKULA VS REPUBLIC,** Criminal Appeal No. 195 of 2018 (unreported) whereby the High Court cited the decision of the Court in the case of **IDDI MUDIN @ KIBATAMO VS REPUBLIC**, Criminal Appeal No. 101 of 2008 (unreported). In that case, the Court observed that, it is inadvisable for the police officer involved in conducting the investigation of the case to

charge and record the cautioned statement. Ultimately, on account of the aforesaid reasons, the appellant's counsel urged the Court to expunge the appellant's cautioned statement. At this juncture, the appellant's counsel, in addressing the 5th ground of appeal, contended that if the cautioned statement is expunged, then, the circumstantial evidence on the death of the deceased remains uncorroborated and, in this regard, faulted the learned trial Judge for relying on hearsay evidence of PW1 and PW2 to convict the appellant. As for the complaint that he was not given opportunity to address on the repudiation of the cautioned statement, this was not entirely addressed by the appellant's counsel in his submission and as such, we treated the second ground of appeal as abandoned.

In relation to the 3rd ground of appeal, the appellant faulted the trial Judge to have acted on the evidence of PW1 and PW2 which was not corroborated by other prosecution account. On this, it was appellant's counsel submission that, the testimonial account of PW1 and PW2 is hearsay as it is based on what they were told by the appellant who yet denied to have confessed to have killed the deceased. It was further submitted that, since the appellant maintained that the deceased went alone to the sugarcane farm to meet customers, these were material

witnesses on the prosecution side, failure to parade them rendered the prosecution case unproven because it was not thereby established as to who was last person to be seen with the deceased before he was killed. On being probed by the Court as to why the appellant did not parade the alleged customers to testify on his side, the appellant's counsel was of the view that being in custody, the appellant had no opportunity to call any witness.

The appellant's counsel as well challenged the failure to exhibit in evidence the machete together with a finger prints report and thus the prosecution fell short of proving that it is the appellant who used the respective weapon to strike the deceased. Furthermore, it was the appellant's counsel argument that, failure by the trial court to inquire on the alleged family misunderstandings rendered the prosecution account marred with contradictions considering that, none of the family members of the appellant testified in that regard.

Pertaining to the 4th ground of appeal, it was the appellant's complaint that, the assessors cross-examined and re-examined the witnesses which is contrary to the law. Clarifying on this point, it was the appellant's counsel argument that, the assessors cross-examined the

witnesses instead of seeking clarification. In this regard, he urged the Court to nullify the trial court's proceedings, quash and set aside the conviction and the sentence and order the immediate release of the appellant in the wake of weak prosecution account on the record.

On the other hand, Ms. Ngowi opposed the appeal. She challenged the complaint on the propriety of the cautioned statement and submitted that it was recorded in accordance with the dictates of the law. She contended that although the statement was recorded beyond the prescribed period of four hours, the delay was explained to have been occasioned by **one**, the police having rushed at the scene at night hours in the dark and that nothing could be pursued, **two**, in the wake of the fateful incident, the appellant had to be taken away by the police from the villagers who had assembled as his safety was at stake, **three,** the investigation was still on going because the autopsy was conducted on 9/2/2013 and soon thereafter, the cautioned statement was recorded. To back up her propositions, the learned State Attorney cited to us the cases of **YUSUFU MASALU @ JIDUVI AND OTHERS VS REPUBLIC,** Criminal Appeal No. 163 of 2017, **CHACHA JEREMIAH MURIMI AND OTHERS VS REPUBLIC,** Criminal Appeal No. 551 of 2015 (both unreported). As to

the competency of the investigator who recorded the cautioned statement, the learned State Attorney challenged the same arguing that PW3 was qualified to record the statement in terms of the provisions of section 58 (4) of the CPA. She thus urged the Court not to expunge the cautioned statement of the appellant as it was obtained in accordance with the dictates of the law.

In response to the 3rd ground of appeal, it was the learned State Attorney's submission that, the account given by PW1 and PW2 is not hearsay as suggested by the appellant's counsel. On this, it was contended that, in the wake of the credible account of PW1 and PW2 it is the appellant who volunteered and disclosed to have killed the deceased and further led the witnesses to the scene of crime where the body was lying. She argued this to have been corroborated by the appellant's cautioned statement who confessed to have killed the deceased and as such, the learned trial Judge was justified to ground the conviction. To cement her arguments, the learned State Attorney cited to us the cases of **DIRECTOR OF PUBLIC PROSECUTIONS VS NURU MOHAMED GULAMRASUL** [1988] TLR 82; **POSOLO WILSON @ MWALYEGO VS REPUBLIC,** Criminal Appeal No. 613 (unreported). Thus, it was the

learned State Attorney's argument that on account of the credible account of PW1 and PW2, the customers whom the deceased met as alleged by the appellant, were not material witnesses. As to the weapon used to strike the deceased, it was Ms. Ngowi's contention that although the prosecution was not successful in tendering it at the trial, there is no dispute that the deceased was killed and besides, the machete was washed in the water by the appellant and as such, neither could the blood stains be detected nor finger prints traced. Moreover, Ms Ngowi contended that, PW1 and PW2 became aware of the family misunderstandings after being so told by the appellant when confessing that he had killed the deceased and as such, it was unnecessary to parade family members to testify in this regard.

In relation to the irregular conduct of the assessors which is the gist of the 4th ground of appeal, Ms. Ngowi opposed the same arguing that the assessors did not cross-examine and instead sought clarifications on what the witnesses had earlier testified. To support this proposition, she cited the case of **BAHATI NDUNGURU @ MOSES VS REPUBLIC,** Criminal Appeal No. 361 of 2018 (unreported). Finally, it was Ms. Ngowi's submission that the defence of the appellant was considered by the

learned trial Judge as reflected at page 84 of the record of appeal. Ultimately, Ms. Ngowi urged the Court to dismiss the appeal in its entirety.

In rejoinder, the appellant's counsel reiterated what he submitted earlier.

Having carefully considered the grounds of complaint, the submissions of learned counsel and the record before us, we have to determine the propriety or otherwise of the trial and if the charge was proved against the appellants at the required standard. Before doing so, it is crucial to state that, this being a first appeal is in the form of a re-hearing. Therefore, as the first appellate court, we are obliged to re-evaluate the entire evidence on record and subject it to a critical scrutiny and if warranted arrive at our own conclusions of facts. (See **D. R. PANDYA VS R.** (1957) EA 336 and **IDDI SHABAN @ AMASI VS R.**, Criminal Appeal No. 111 of 2006 (unreported).

In a nutshell, the appellant's complaint in this appeal hinges on procedural irregularities on account of the irregular admission of the cautioned statement; irregular conduct of the assessors at the trial and finally, that the charge was not proved beyond reasonable doubt. In this

regard, we shall dispose of the appeal in line with the said order while addressing the grounds of appeal.

With regard to the competence of the investigation officer recording the cautioned statement of the appellant, this need not detain us as we shall soon demonstrate. While the decision relied upon by the appellant's counsel dates back in 2008, the offence which is a subject of the present appeal occurred on 8/8/2013. This was after the amendment of the Criminal Procedure vide Written Laws (Miscellaneous Amendments) Act, 2011 whereby subsection (4) was added in section 58 and it stipulates as follows:

> *"Subject to the provision of paragraph (c) of section 53, a police officer investigating an offence for the purposes of ascertaining whether the person under restraint has committed an offence may record a statement of that person....."*

In the light of the said provision we are satisfied that PW3 was qualified to record the cautioned statement of the appellant.

Pertaining to delay to record the cautioned statement of the appellant, it is on record that he was arrested on 8/8/2013 at night and taken into the police custody and his statement was taken on the following

day. Section 50 of the CPA regulates the periods available for interviewing persons as follows:

> *"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*
>
> *(2)* ***In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence–***
>
> *(a) while the person is, after being taken under restraint, being conveyed to a police station*

*or other place for any purpose connected with the investigation;*

*(b) for the purpose of–*

*(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;*

*(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;*

*(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or*

*(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;*

*(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or*

*(d) while the person under restraint is consulting with a lawyer."*

[Emphasis supplied].

The bolded expression allows exclusion of the period utilised in the investigation connected with the offence in calculating the period available for interviewing a person who is under restraint in respect of an offence. The Court was faced with a similar scenario in the case of **YUSUFU MASALU @ JUDUVI AND 3 OTHERS VS REPUBLIC,** (*supra*) and it had the occasion to make the following observation:

> *"In this case, the appellants were arrested on 8.7.2014, but the cautioned statements were recorded on the following day. The reasons for failure to record the statement within time was stated to be the nature of crime and complications in the investigations. The fact that the appellants sometimes were moved from one place to another as explained by PW1 and PW6 cannot be ignored. This shows investigation was in progress.... the delay was with plausible explanation and in the circumstances, we find justification in recording the same outside the four hours prescribed under the provision of section 50 (2) (a) of the CPA which*

*provides exception to the four hours' period prescribed by the law."*

[See also and **CHACHA JEREMIAH MURIMI AND 3 OTHERS VS REPUBLIC,** (*supra*).

In this regard, the question before us is whether the prosecution addressed reasons for the delay. On our part, as correctly found by the learned trial Judge in her Ruling at page 25 of the record, we are satisfied that, although the appellant was under restraint, his statement could not be recorded within four hours because the investigation connected with the offence was still on going. We are fortified in that regard having considered the evidence of PW3 who upon being informed about the fateful incident by the OC-CID, at 20.00 and that the safety of the appellant was at stake as he was apprehended by the villagers he had to rush to the scene on the same day at 21.00hrs. In addition, what transpired thereafter is reflected at page 21 of the record of appeal as follows:

*"We returned to the Office and took the accused and the panga with us. We arrived at Mwanuhuzi Police at about 24.00 hours that was now 09/08/2013. The first thing to do was to open*

*an investigation file, the file went to the OCS and then back to the OC – CID for assignment. The file was assigned to me for investigation of the case at about 10.00 hours on 09/08/2013 when we came back from the Village in the morning. At the village in the morning we were with the doctor for examination of the body, and I drew a sketch map of the scene of crime. I went to the Village with the OC – CID, doctor, the accused and other Police Officers. The main things done at the second time was to examine the body, and we went with the accused for confirmation whether the deceased was the one killed by him. I drew the sketch map and the doctor examined the body of the deceased. The Chairman was showing me what had happened while I was drawing the sketch map. The accused was in the Police car. The accused showed the body and confirmed that it was the body of his grandfather and he was the one who killed him. After the examination by the doctor and the drawing of the sketch map and some questioning to the Villagers, the OC – CID permitted the relatives to bury the deceased and we returned to the Police with the accused. We arrived at Meatu Police at about 10.00 hours. After being instructed to continue with the investigation, I recorded the*

*statement of the accused. I recorded the statement at about 10.00 hours on 09/08/2013 we took the accused from the Village at 24.00 hours and the statement was recorded at 10.00 hours at least 10 hours after we took him in. I am supposed to record the statement within 4 hours, but I did not do so because, firstly we were still continuing with the investigation secondly the CPA section 50 allows us to do so and thirdly we had arrived at 24.00 hours at night we could not record a statement before examination of the body of the deceased and proper identification of the body by the accused and that he is the one responsible with the death of the deceased. We could not do the examination and the identification at the night because of the darkness."*

In view of the foregoing, the fact that the appellant had to be moved from the scene of crime to the police for his own safety as stated by PW3 cannot be ignored as correctly found by the learned trial Judge. Similarly, since the police went at the scene at night in the dark, they had to pursue the matter on the following day which entailed seeing and ascertaining if the deceased was actually dead so as to proceed with the interrogation of the appellant on the killing incident. In a nutshell, the delay to record the

cautioned statement within four hours was with plausible explanation and justified in terms of section 50 (2) (a) of the CPA which provides an exception to record the statement within four hours. Thus, since the appellant's cautioned statement was properly obtained, we decline the appellant's counsel suggestion to expunge it from the record and this renders the 1st ground of appeal not merited.

We have now to deal with the propriety or otherwise of the role of assessors who are alleged to have cross-examined and re-examined the witnesses. It is settled that the law frowns on assessors cross-examining or re-examining the witnesses as that erodes their partiality which is crucial for the fair conduct of the trial. The learned counsel had rival submissions on the matter. The questions asked by the assessors, can be discerned from the responses of the respective witnesses which we shall scrutinize. At pages 15 to 16 of the record, after the prosecuting attorney re-examined PW1 is on record to have responded to the question by the assessors in the following manner:-

***"1st Assessor:***

*The accused came to me when I was resting at a shop, it was near the Village Office. He come to me because I am the Village Chairman. I went to the Office when he came and an Elders Maige was also present and he heard what the accused said. He was saying that there were family problems but I was not aware of them. The deceased legs were in the water and the body was at the edge of the water hole ("dimbwi") and it was face down and the panga was close to the body. I know it was the same panga because the accused previous told me he had used the panga to kill and has left it beside the deceased.*

***2nd Assessor:***

*I left the accused in the office under the watch of Sungusungu so that he won't run away. The first time we went to the scene of crime with other villagers and the father of the accused. We were afraid that if we release him they villagers might attack and kill him. We knew the area he had directed us and were with his father also.*

***3rd Assessor:***

*The accused surrendered to me at 13.00 hours and he was not drunk. We left him in the office with the Sungusungu and other appointed people to keep*

*watch so that he won't run away. I have not heard that the family had problems and no member of the family came to me with a problem. The deceased and the accused were in the sugarcane farm there is a water hole which the grandfather was taking a bath. The accused told me that he was alone with his grandfather. At the first instance, I listened to the accused and later he made a statement and signed."*

Similarly, after re-examination of PW2 by the prosecuting attorney, assessors asked questions and reflected responded in terms of what is at pages 19-20 of the record of appeal as follows:-

"***1st Assessor:***

*I cannot remember the clothes of the deceased but the clothes were piled beside the deceased body. But I remember there was a black coat. The accused used to live with his grandfather but I do not know for how long.*

***2nd Assessor:***

*The Chairman called me by phone, I was in my Office. As a justice of peace I have to be at my work station on a Public holiday. The deceased was hacked when we found him, he was lying face down.*

*The father of the accused said his son was sick. He said this while at the Village Chairman's Office. I think he said this after he heard that his son has killed his grandfather."*

Having scrutinised the content of the responses given by PW1 and PW2 we are satisfied that the questions asked by the assessors were not geared at testing the veracity of the testimony of the witnesses but rather sought clarification of what was earlier testified which was indeed, neither cross-examination nor re-examination of the witnesses as suggested by the appellant's counsel.

Next for determination is whether the charge was proved to the hilt against the appellant. It is not in dispute that, the cause of death is unnatural as indicated in the autopsy and the preliminary hearing. It is also not in dispute that none of the prosecution witnesses testified to have seen the appellant killing the deceased. The trial court relied on the written and oral confession to convict the appellant. Since it is settled that the cautioned statement of the appellant was properly obtained in accordance with the law, the remaining contentious issue is the validity or otherwise of the appellant's oral confession to PW1 and PW2. While the

appellant's counsel argued that the evidence of PW1 and PW2 is hearsay as it is based on what they were told by the appellant who denied to have confessed to have killed the deceased, the respondent Republic stressed that the confession of the appellant before PW1, PW2 is corroborated by the appellant's cautioned statement.

The trial court convicted the appellant relying on his oral confession to PW1 and PW2 and the cautioned statement of the appellant which according to the learned trial Judge corroborated the circumstantial evidence on the killing incident because none of the prosecution witness testified to have seen the appellant killing the deceased. At this juncture, it is crucial to construe the meaning of an oral confession which is defined under section 3 of the Evidence Act as follows:

> *"(1) In this Act, unless context requires otherwise–*
>
> *"confession" means–*
>
> *(a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence;"*

It is settled law that, an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect. See: **THE DIRECTOR OF PUBLIC PROSECUTIONS VS NURU MOHAMED GULAMRASUL** (*supra*) and **POSOLO WILSON @ MWALYEGO VS REPUBLIC,** Criminal Appeal No. 613 of 2015 (unreported).

The Court has also stressed that oral confessions are admissible in certain circumstances if extreme care is taken before accepting them on face value. It is equally important to ensure that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. See - **MOHAMED MANGUKU VS REPUBLIC,** Criminal Appeal No. 194 of 2004 and **NDALAHWA SHILANGA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 247 of 2008 (both unreported).

We shall be guided by the stated principles to determine as to whether or not the appellant made any confession and its bearing in the matter under scrutiny.

The cautioned statement of the appellant at pages 63 and 64 of the record indicates as follows:

*"... tarehe 08/08/2013 tuliondoka mimi na babu yangu MWIGULU s/o SHINYA NKALANGO kuelekea kwenye shamba lake la miwa tulikuwa tumepata wateja wa kununua miwa wapatao wawili lakini siwafahamu kwa majina ila ni Watoto wa Jirani yetu aitwaye MANGE tulienda shambani na Panga moja ambalo lilikuwa la babu yangu na mimi ndiye niliyekuwa nimelinoa kwa kuambiwa na babu yangu nililinoa kwa kutumia jiwe la kawaida nyumbani baada ya kumaliza kuwauzia miwa waliondoka tukabaki mimi na babu yangu baada ya hapo tulianzisha mazungumzo kuhusu kutothaminiwa kwangu nyumbani na baba yangu babu akanieleza kuwa mjukuu wangu mambo ya baba yako sio mazuri kwani hakujali kwa lolote licha ya kuwa mashine ya kuchanga mimi na wewe kununua mashine ya kusaga nafaka lakini bado baba yako hakujali kwa chochote na mimi siwezi kukutetea sana kwani hata yeye hajaliwi na huyo mtoto wake mwisho akaniambia labda uniue tu mjukuu wangu usiogope chochote baadae nilitangulia kuoga kwani ndani ya shamba hilo kulikuwa na dimbwi la maji naye akavua nguo kuoga baada ya mimi kumaliza kuoga wakati babu anaoga nilichukua panga kwani alikuwa amenipa mgongo nikamkata panga la kwanza shingoni kwa nyuma kisha nikamkata*

*panga jingine kichwani akaangukia kwenye maji akawa amekufa palepale muda huo ilikuwa 12.00 hrs nilisafisha Panga nililotumia kumuua nalo na kutoa damu yote kisha nikaliweka kwenye nguo zake kisha nilikaa kidogo nikawa najifikiria baadae niliondoka hadi ofisi kwa Mwenyekiti wa Kijiji SOSPETER s/o SANGI nikamueleza kuwa nimemuua babu yangu akanieleza nikae hapo kisha kukawa na watu hapo baadae aiifika Afisa Mtendaji toka Katani Mwakisandu baadae ndipo nilifungiwa lock-up ya pale ofisi ya Kijiji wakati namuua babu yangu tulikuwa wawili tu mimi na yeye hakuna mtu mwingine aliyeniona"*

Moreover, it is on record that after committing the brutal act, the appellant surrendered himself at the offices and confessed to PW1 and PW2 to have killed the deceased at the sugarcane farm using a machete having narrated that, "***you will not see Mzee Nkalango anymore because I have killed him"***. The credible evidence of PW1 and PW2 as gleaned from their coherent and consistent account when compared with that of the appellant, was not materially contradicted by the appellant. That apart, there is entirely no scintilla of evidence that the appellant was coerced to make the confession. He was a free agent when confessing to

PW1 and PW2. Moreover, it is the appellant who led to the discovery of the deceased's body in a sugarcane farm having led PW1, PW2 to the scene of crime and identified the lifeless body of his deceased grandfather lying along the river bank.

Moreover, as correctly found by the learned trial Judge at page 78 of the record when considering the appellant's defence that he was together with the deceased when he met his death, the conduct of the appellant leaves a lot to be desired. Naturally, the appellant ought to have initially relayed news on the demise of the deceased to his grandmother who had sent him to take food to the deceased. This was not the case. Thus, the appellant's account was all out to circumvent the fact that he was together with the deceased at the sugarcane farm and struck him to death and as such, he cannot get off the hook. Also, we found wanting the appellant's counsel proposition that the customers alleged to have been with the deceased were material witnesses. We say so because, this being a criminal case, the burden lies on the prosecution to establish the guilt of the appellant beyond all reasonable doubt. This, in our view, is not dependent upon the number of witnesses called upon to testify because it is trite law that every witness is entitled to credence and must be believed

and his testimony accepted unless there are good and cogent reasons for not believing a witness. (See: **WOOLMINGTON VS DIRECTOR OF PUBLIC PROSECUTIONS** [1935] AC 462 and **GOODLUCK KYANDO VS REPUBLIC** [2006] TLR 363) and **MATHIAS BUNDALA VS REPUBLIC**, Criminal Appeal No. 62 of 2004 (unreported).

As earlier stated, as the prosecution account from PW1, PW2 and PW3 was not materially contradicted, what is important is their credibility and reliability which was established and not the number of witnesses as suggested by the appellant's counsel. That apart, since such evidence on the customers came from the appellant, considering that he who alleges must prove, the appellant was not barred to parade those customers to adduce evidence on his part. However, it is glaring at page 10 of the record that during the preliminary hearing, given the opportunity, the appellant intimated to be the only witness for the defence. Thus, with respect the appellant was not barred from calling witnesses as suggested by his counsel.

In a nutshell, the credible account of PW1 and PW2 is entitled to be believed having been corroborated by the confession in the cautioned statement which clearly points to the guilt of the appellant and no other.

In the premises, we are satisfied that the prosecution successfully managed to prove beyond doubt that it is the appellant who terminated the life of the deceased which renders the 5th ground of appeal not merited.

In view of what we have endeavoured to discuss, we do not find any cogent reason to fault the verdict of the learned trial Judge and thus the appeal is without merit and it is hereby dismissed.

**DATED** at **SHINYANGA** this 12th day of August, 2021.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

This Judgment delivered this 13th day of August, 2021 in the presence of Appellant in person, Mr. Frank Samwel, his learned counsel and Ms. Wampumbulya Shani, 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**