IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 549 OF 2020

MSAFIRI BENJAMIN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 23rd day of October, 2020
in
Criminal Sessions Case No. 59 of 2017

.....

JUDGMENT OF THE COURT

20th & 27th August, 2021

KOROSSO, J.A.:

The High Court of Tanzania sitting at Dodoma convicted Msafiri Benjamin, the appellant of the offence of Murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E 2002 – now R.E 2019 (the Penal Code) and imposed the mandatory sentence of death by hanging. The particulars of offence alleged that on 15/8/2016 at Nzali Village within Mpwapwa District, Dodoma Region, the appellant did intentionally kill Mariam Madeje @Mariam Malima. The appellant in an affirmed testimony, denied the charges against him.

To prove the charge against the appellant the prosecution side produced seven witnesses, that is, Elizabeth Chilendu (PW1), Jobu Lubasho (PW2), Mary Chilama (PW3), Benjamin Segu (PW4), Timoth Joseph (PW5), Hamisi Haji (PW6) and F.6836 D/Cpl Pilimo (PW7). They also tendered four exhibits.

PW1 who is also the appellant's sister, testified that on the 15/08/2016 (although later in her testimony she alluded that it was on 16/08/2016) around 19.00 hours while at home with her husband, the appellant came and told her that he had done something wrong at their mother's house and urged her to go there and see and also sought forgiveness for what he had done. PW1 rushed to the deceased's house and upon arrival there, she found PW2 outside the house. PW2 informed her he had to wait outside for the deceased and despite their agreement to meet there at the time, there was no sign of her. PW1 went inside the house and as she entered, she saw the body of her dead mother lying down, bleeding with wounds on the head, shoulder and ear. PW1 shouted for help and people gathered there, the incident was reported to village leaders and the police. Later, the police arrived and took the deceased's body to the hospital.

PW2's evidence was that on 15/8/2016 he had agreed to meet the deceased around 19.00 hours. On arrival at the deceased house there was no sign of anyone so he decided to wait outside. While waiting, PW1 arrived there, greeted him and rushed into the house. Soon-after, he heard her shouting; "*baba kaka amemuua mama*", after also seeing the deceased body lying down inside the house, he called and reported the incident to the Village Chairman. PW3, a medical doctor testified on conduct of the post mortem examination of the deceased. She stated that the deceased's body had wounds on the head, blood on the ear and bruises on the neck. Her findings were that the death of the deceased was caused by internal bleeding prompted by having been subject of a beating by a heavy object. PW3 tendered the Post Mortem Report which was admitted as exhibit P1. Other evidence came from PW6, a Primary Court Magistrate who testified that on 17/08/2016 he recorded the extrajudicial statement of the appellant, tendered and admitted as exhibit P2. PW7 tendered the cautioned statement of the appellant which was admitted as exhibit P4.

The appellant when called to testify, categorically denied the charges and contended that on the 16/8/2016, he left for Nzali Village in Makaavali area having visited the deceased. He contended that he left

her still alive. That he came back later in the evening on the same day and the next morning of the 17/8/2016, he was apprehended by some people in the village and taken to the police station suspected of murder of his mother, kept in custody and subsequently arraigned in court as stated hereinbefore. He also denied having spoken to PW1 on the fateful day stating that, PW1 was not his sister and his sister did not testify in court.

After a full trial, and upon the trial Judge being satisfied with the evidence presented by the prosecution especially that of PW1, PW3 and exhibit P2 and P4, she convicted the appellant and sentenced him to death by hanging. Aggrieved, the appellant on 6/4/2021 filed a memorandum of appeal with four grounds. The said memorandum of appeal was however abandoned by the learned counsel for the appellant when the instant appeal came for hearing and in lieu thereof, the learned counsel filed the supplementary memorandum of appeal filed on 16/8/2021 predicated on two grounds, which state as follows:

1. That, the trial Judge erred in law and fact by convicting the appellant basing on the cautioned statement and extrajudicial statement which are doubtful, unreliable and prejudicial.

2. That, the trial judge erred in law and fact by convicting the appellant on the case that was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant who appeared in person was represented by Mr. Leonard Mwanamonga Haule, learned advocate whilst, the respondent Republic was represented by Mr. Harry Mbogoro, learned Senior State Attorney. At the outset, we invited the parties to address us on the propriety and adequacy of the trial Judge's summing up to assessors prior to hearing their rival submissions on the grounds of appeal before the Court.

Mr. Haule contended that the summing up notes found in the record of appeal do no show that the assessors were properly directed on salient points of law related to the case particularly, the essence and import of the defence of *alibi* which was raised by the appellant. He urged the Court to find this a fatal irregularity and contended that its effect is nullification of the trial proceedings and judgment. Moreover, he contended that although ordinarily the way forward is an order for retrial, in this case, taking into account the insufficiency of evidence presented by the prosecution to prove the charges against the appellant, and in the interest of justice, the appellant should be acquitted.

On the respondent's side, Mr. Mbogoro informed the Court that upon revisiting the summing up notes to assessors by the trial Judge, found in the record of appeal, certainly, the substance, conditions and consequences related to the defence of *alibi* were not alluded to them. He argued that this was a serious irregularity, since it is in essence, failure to properly address the assessors on a salient point of law. Having recognized the discrepancy on the dates of the incident as testified to by the appellant and the prosecution witnesses, the learned counsel argued that the particulars of the charge and the testimonies of a number of prosecution witnesses resolve the anomaly having stated that the incident causing the death of the deceased occurred on 15/8/2016 while the appellant stated that he left the village on 16/8/2016. According to him, the fact still remained that the appellant stated that when he left the village, his mother was alive, therefore narrating different dates for the same issue could just be normal confusion or forgetfulness on their part on the exact date. He argued that from the record of appeal, undoubtedly, the appellant raised the defence of *alibi* and the trial court should have addressed the assessors on this defence in the summing up notes.

The learned Senior State Attorney did not discuss the consequence expected for the non-direction of the assessors, only stating that the Court should apply the overriding principle to step into the shoes of the trial court and do the needful to cure the anomaly.

On our part, having carefully considered the submissions of the learned counsel for both sides, who conceded that there was a non-direction on a salient point of law, that is, defence of *alibi* to the assessors by the trial Judge in the summing up, the tasks confronting us are; **first**, to determine whether the defence of *alibi* was raised by the appellant; **second**, if yes, whether the trial Judge properly addressed the assessors on the same in the summing up; and **third**, the consequences thereto.

In determining the first concern, we are of the view that at this juncture it is pertinent to understand what the defence of *alibi* is? We find ourselves persuaded by the definition provided by the Court of Appeal of Kenya in the case of **Karanja vs Republic** [1983] eKLR 501 stating that:

> *"The word "alibi" is a latin adverb, meaning "elsewhere' or "at another place". Thus, if an accused person alleged that he was not present at a place at the time an offence was committed,*

and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi."

Essentially, the above excerpt reveals that the defence of *alibi* is raised when an accused says he was at a place other than where the offence was committed at the time when the offence was committed. Therefore, applying the above to the instant appeal; by the appellant saying he had left to another village and left his mother (the deceased) alive, in essence he was stating he was not at the scene of crime and raising the defence of *alibi*. Whether the defence was plausible or not was a matter to be determined by the Court upon consideration of all the evidence before it.

Taking into account the above, once the defence of *alibi* was raised in the trial, it became a vital point of law and it was incumbent upon the trial Judge to ensure the assessors are duly informed on its substance, essence and import in the summing up as expounded in various decisions of this Court such as; **Tulubuzya Bituro vs Republic** [1982] T.L.R. 39, **Charles Samson vs Republic** [1990] T.L.R. 39, **Musolwa Samwel vs Republic**, Criminal Appeal No. 206 of 2014 and

Mashaka Juma Ntalula vs Republic, Criminal Appeal No. 38 of 2018 (both unreported).

In the present appeal, our perusal of the record of appeal (the record) specifically, the summing up notes found at pages 89-104 of the record as revealed that the substance and import of the defence of *alibi* was not imparted to the assessors in the summing up as also conceded by counsel for the rival sides. This Court has previously held that a proper summing up must direct the assessors on vital points of law as stated in **John Mlay vs Republic**, Criminal Appeal No. 216 of 2007 and **Omari Khalifan vs Republic**, Criminal Appeal No. 107 of 2015 (both unreported). *Alibi* has been held to be a vital point of law which needs to be addressed to assessors. In the case of **Chacha Ghati Mwita and Another vs Republic**, Criminal Appeal No. 354 of 2015 (unreported) the Court observed:

> "*The glaring omission of the learned trial judge to direct assessors on the issue of alibi, need not unnecessarily detain us. The law is trite that failure to address the assessors on a vital point of law, such as alibi, as correctly argued by all counsel in the appeal, vitiates the trial.*"

Undoubtedly, the insufficiency of the summing up deprived the assessors of the opportunity to give informed and free verdicts. (See,

Ally Juma Mawepa vs Republic (1993) TLR 231). In the case of **Said Mshangama @ Senga vs Republic**, Criminal Appeal No. 8 of 2014 (unreported) we held:

> *"Where there is inadequate summing up, non-direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."*

The fact that one of the assessors discussed and rejected the appellant's defence of *alibi* cannot with certainty lead to a conclusion that the assessors would have given the same opinion if they had been properly directed on the vital points of law. Thus, it cannot be argued that the appellant was not prejudiced by the non-direction.

Therefore, on account of the above, we agree with the learned counsel for both sides that non direction of the assessors on vital points of law was fatal. We accordingly, invoke our revisional powers under Section 4(2) of the AJA and quash the proceedings from the summing up stage and the judgment and set aside the sentence imposed against the appellant.

Having nullified the proceedings from the summing up stage, ordinarily, the preferable way forward would have been to order for the

trial record to be remitted back to the High Court for the same Judge with the same set of assessors to conduct the summing up and compose a new judgment. The counsel for the two sides have differed on what should be the way forward. Whilst, the learned Senior State Attorney is open to remitting the trial record to High Court so that the trial may proceed from the stage of summing up, arguing that they have ample evidence against the appellant to lead to his conviction, the counsel for the appellant argues that since the trial was tainted with irregularities, proceeding as proposed by the learned Senior State Attorney would not serve the end of justice.

In determining whether or not to remit back the file to the High Court for a conduct of summing up and composing a new judgment is the best option under the circumstances we are guided by the case of **Fatehali Manji vs Republic** [1996] EA 343, which was also faced with a similar situation and held that:

> "*.. each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires.*"

In determining how facts of a case should guide on whether a retrial will be in the interest of justice or not, **Fatehali Manji case** (supra) guides that, a fresh trial will only be ordered when the original

trial was illegal or defective and not when conviction is set aside for insufficiency of evidence or were doing so will enable the prosecution to fill gaps in its evidence at the first trial. Taking into account of the holding in the said decision also utilized in **Aliasgar Mohamed Bhimji vs Republic**, Criminal Appeal No. 64 of 2019; **Halfan Ismail @Mtepela vs Republic**, Criminal Appeal No. 38 of 2019 and **Rashidi Kazimoto and Another vs Republic**, Criminal Appeal No. 458 of 2016 (all unreported), we are of the view that deliberation of the grievances presented by the appellant will facilitate determination of whether justice will require a retrial or not.

In the 1st ground of appeal found in the supplementary memorandum of appeal, the complaint submitted by the learned counsel for the appellant relate to the procedure in recording and admitting the cautioned and extrajudicial statements (exhibit P4 and P2). Mr. Haule argued that from the judgment of the trial court it is clear that exhibit P2 and P4 were relied upon in convicting the appellant despite various anomalies in how they were procured and admitted. He contended that had the trial Judge considered those, she would not have put any weight to the said exhibits.

Some of the anomalies which he revealed include; **one,** incompatibility in the time of recording the two statements. The learned counsel argued that if it was true that the appellant was on 17/8/2016 as of 8.30 hours in police custody and on the same day recorded exhibit P4 from 10.20 hours to 10.57 hours before PW7, how possible could he on the same day record exhibit P2 from 9.11-9.43 hours before PW6 at the Primary court? His query was on whether it was possible for the appellant to be in two places at the same time?

The learned counsel argued further that if on 17/8/2016 as of 8.30 hours when the appellant was kept in custody at the police station Chamwino, and thus in the vicinity of PW7, up to the time he recorded exhibit P4 from 10.20hrs, how was it possible for PW6 and exhibit P2 to state that on the same day from 9.11-9.43 PW6 recorded exhibit P2 at the Primary Court Chamwino? He argued that this discrepancy was not resolved by the prosecution and renders the evidence not credible. According to him the holes in the prosecution evidence left doubts on the voluntariness of the statements, since it is highly possible that either exhibit P2 or P4 are not statements recorded from the appellant but fabricated as asserted by the appellant.

Two, failure to endorse exhibit P4 upon being admitted into evidence. The complaint was that despite the fact that exhibit P4 was admitted after a trial within trial had been conducted upon retraction by the appellant as found at page 78 of the record, there was no endorsement by the Court as an exhibit, rendering the exhibit not to have been properly admitted and therefore subject to be expunged. **Three**, relates to voluntariness of exhibit P4. The learned counsel also questioned the ruling by the learned trial Judge that found that the cautioned statement was voluntary made. His doubts emanated from the fact that, in exhibit P2 it is recorded that before the statement was recorded, the physical inspection done to the appellant by PW6 showed that the appellant had a fresh wound. For the learned counsel for the appellant his concern was, assuming the appellant came from the police station where did he get the fresh wound from? That this finding by PW6 controverts the evidence of PW7 which did not allude on the said wound on the back of the appellant's head.

According to the learned counsel, having regard to the alleged time the statement was taken, it meant that after recording the extrajudicial statement at 9.43 hours, the appellant was taken to PW7 to record the cautioned statement. Thus, if this was the case, how come

PW7 kept quiet about having seen the said wound? Or was the said wound occasioned at the police station in the presence of PW7 prior to the appellant being sent to PW6? He argued that in the absence of any information from the prosecution with regard to where the fresh wound on the appellant came from, the evidence of the appellant that he was beaten at the police station remains unchallenged.

The learned counsel argued that the reasons for the beating were obviously linked to the recording of either the cautioned statement or the extrajudicial statement or both, which should lead to a conclusion that neither of the statements were done voluntarily and they should be expunged. He argued that had the trial Judge considered all the irregularities surrounding the recording of the statements, she would not have found that there was voluntariness when exhibit P4 was recorded. He relied on the holding in the case of **Shani Kapinga vs Republic**, Criminal Appeal No. 337 of 2007 (unreported) to buttress his prayer.

Addressing the Court on the 2nd ground of appeal, the learned counsel for the appellant alluded to existence of contradictions in the evidence of PW1 which challenges her credibility as a witness. He argued that her testimony gave two different dates, that is, 15/8/2016 and 16/8/2016 found at pages 37 and 38, with respect to the incident

that caused the death of the deceased and when she spoke to the appellant which led her to rush to her mother's house where she found her dead. The learned counsel for the appellant urged the Court to find that the contradictions in PW1's evidence have left doubts on the actual date the incident took place and when appellant went to PW1.

He contended further that the said doubts are further enhanced by the fact that the prosecution failed to summon PW1's husband to testify so as to corroborate and add credence to PW1's evidence. He invited the Court to draw adverse inference on the failure to call the said witness, citing the case of **Peter Mabara vs Republic**, Criminal Appeal No. 242 of 2016 (unreported) to bolster his argument. The learned counsel also doubted the impartiality of PW7, who was the investigator and also recorded exhibit P4. He argued that this was not proper and in contravention of the law and in essence prejudicial to the rights of the appellant.

Amplifying further, the learned counsel argued that despite the contradictions in her evidence, the trial Judge chose to believe her testimony and relied on it to convict the appellant. He also faulted the learned trial Judge for failing to properly analyse the evidence in total and deciding not to consider the defence raised by the appellant. He

invited the Court being the first appellate court to re-analyze the evidence and arrive at own conclusion.

Mr. Mbogoro commenced his submission by opposing the appeal and alluded that his response to the grounds of appeal will be in sequence. With regard to propriety in the recording and admitting of exhibits P2 and P4, he argued at the trial the defence did not object to admissibility of exhibit P2 thus they cannot challenge it at this stage. He contended further that after exhibit P2 was admitted, it was duly read over in court and thus enabling the appellant to understand the substance of the evidence therein. Mr. Mbogoro argued that any objection they had on its admissibility should have been done there to allow the prosecution to respond adequately and not at the appeal stage and the complaints now are an afterthought. He cited the case of **Abdallah Rashid Namkoka vs Republic**, Criminal Appeal No. 206 of 2016 (unreported) to reinforce his position. He contended that in the cited case the Court was confronted with a similar issue and it made reference to another decision in **Abdallah Rajab Waziri vs Republic**, Criminal Appeal No. 116 of 2004 (unreported) where the Court cemented the importance of objecting to admissibility of an exhibit at the earliest when it is tendered.

Confronting complaints raised with regard to exhibit P4, the learned Senior State Attorney argued that, when tendered, it was objected and the trial court conducted a Trial within Trial to inquire into the voluntariness of the cautioned statement of the appellant and in the end was convinced that it was made, and voluntarily. He argued further that, again there was no testimony in his defence that the appellant was tortured to enable the trial judge further analyse the evidence, when weighing the value to accord it. Regarding the time overlay between the time the cautioned statement of the appellant was recorded by PW7 and being put under custody at the police station and then the time went to PW6 for writing of extrajudicial statement, he argued there was no need for a concern because each statement was recorded within the time specified in exhibits P2 and P4 and there was no unexplained time overlap. The learned Senior State Attorney urged us to find the two exhibits were voluntarily made as found by the trial Judge.

On grumbles that exhibit P2 was improperly recorded in contravention of section 57 of the CPA, he argued that, case law has established that in recording the statement under section 57(2)(a) of the CPA, both questions and answers are accepted. Nevertheless, he argued there was no assertion by the appellant that he was prejudiced by this

so-called anomaly and cited the case of **Ramadhani Salum vs Republic**, Criminal Appeal No. 5 of 2004 (unreported).

On contradictions in the evidence of prosecution evidence expounded in the 2nd ground of appeal, the learned Senior State Attorney argued that there was no contradiction in the evidence of PW1 regarding the dates of the incident. when it was recorded 16/08/2016 instead of 15/08/2016. According to him the discrepancy on the date of the incident in the testimony of PW1 as recorded was a mere slip of the pen, as her evidence as supported by the charge sheet and the evidence of other prosecution witnesses indicate that it was on 15/8/2016. For the learned Senior State Attorney, since the 15/08/2016 is the date in the charge sheet and narrated by most of the prosecution witnesses including PW1 as the fateful date the deceased was killed and postmortem examination was conducted on the deceased as testified by PW3 on 15/8/2016 he thus argued the contradiction if any is resolved and there was no injustice occasioned as stated by the learned trial Judge. On complaints on credibility of PW1 and PW7, Mr. Mbogoro argued that the trial court found these witnesses to be credible and nothing has been displayed to fault the trial Judge in the said finding.

With regard to the alleged double role played by PW7 as the investigator and the one to record exhibit P4, he stated that the said double role has not affected the case and argued that even if the Court upon warning itself whether PW7 playing the said double role was prejudicial and finds it so, expunging the evidence of PW7 which shall include expunging exhibit P4 will not dent the prosecution evidence since the remaining evidence is sufficient to prove the case against the appellant.

Having heard the submissions and proposals from counsel for both sides on sufficiency of prosecution evidence to prove the charge against appellant and the way forward, our role now is to determine what justice requires in this case considering the available evidence against the appellant. In the instant case, the trial Judge to a large extent relied on the evidence of PW1, exhibits P2 and P4 in the conviction of the appellant as discerned from the judgment found at page 121 of the record.

Our perusal of PW1's evidence has led us to find some gaps which had the trial Judge considered she might not have arrived at the conclusion that PW1 evidence was reliable on its own. **One**, contradictions in her evidence. At page 37 of the record, while at the

start of her testimony she narrates that on 15/8/2016 she was at home with her husband one Imani Chilendu, later on she refers to another date and states: -

> *"On 16/8/2016 at 19.00 hours, Msafiri came to my house, he told me to go to my mother's house, he said he has done something wrong at the house and that I should go and see, but he said I should forgive him. I went to my mother's house I saw Jobu Lubasho sitting outside. I entered inside the house and found my mother already dead. She was bleeding, I shouted for help, Jobu came and asked me why I was shouting, I told him my mother is dead. Then so many people came."*

When PW1 was cross-examined she stated:

> *"On 15/8/2016, I was at the house with my husband and my child. On that day Benjamin came to my house, he told me to go home to see what he had done..."*

Her evidence raises unanswered questions. **first**, why did PW1 narrate two different dates for the same incident? **second**, did the appellant really come from the deceased's house when he went to PW1's house on the day of the incident? This is because, according to

PW1, it is a walking distance of two minutes from her house to the deceased's house. PW1 stated that soon after the appellant told her that he had done something at their mother's house, she rushed to the deceased house and found PW2 already there waiting for the deceased, taking into account the distance from the two houses, how come the appellant was not seen by anyone enroute since no one came to testify on this. Where was the appellant coming from when he went to PW1? Considering the obtaining circumstances, wasn't there a possibility of someone else to have killed the deceased? It is plausible to wonder whether the incidences occurred the same day.

All these queries arise having considered the evidence of the appellant that he had left the village on 16/8/2016 after having spoken to his mother and left her arrive, and PW1 mentioning both dates in her testimony, the doubts are uncleared. Under the circumstances, as argued by the appellant's counsel, it was important for the prosecution to summon PW1's husband, who according to PW1 was with her when the appellant came to their house on the fateful day to assist in clearing this doubt. We are alive to the contents of 143 of Tanzania Evidence Act, Cap 20 RE 2002 (TEA). Notwithstanding this, under the circumstances, had the trial court properly evaluated the evidence, the

prosecution side failure to summon PW1's husband, who was a material witness would have prompted the trial court to draw adverse inference and they cannot take cover under section 143 of the TEA. In **Boniface Kundakira Tarimo vs Republic**, Criminal Appeal No. 350 of 2008 (unreported) the Court held that before section 143 of the TEA is invoked, the facts of a particular case must be considered. Where a case leaves reasonable gaps, it can only do so at its own risk in relying on the section and stated that: -

> *"It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one*".

(See also, **Aziz Abdallah vs Republic** (1991) TLR 71 and Samwel **Japhet Kahaya vs Republic**, Criminal Appeal No. 40 of 2017 (unreported).

Grievance **two**, related to propriety in the recording and admitting exhibit P2 and P4. It was argued that exhibit P4 was not recorded in accordance to the provisions of section 57(2)(a) of the CPA and was recorded by PW7 who was also the investigator. This issue was not

deliberated in the judgment apart from what was stated in her Ruling after the trial within trial were she held that the irregularity was minor and curable.

Nevertheless, it is a concern which the Court has had an opportunity to consider previously. In **Ramadhani Salum vs Republic** (supra) the Court highlighted the circumstances were statements made under section 57 of CPA and those under section 58 of the CPA and that, the difference is the circumstances in which the two kinds of cautioned statements are taken. While under section 58 it is a result of a volunteered and unsolicited statement, under section 57 of CPA it may result either of answers to questions asked or partly answers to questions asked and partly volunteered statements. In the present case, exhibit P4 was recorded pursuant to section 58 of the CPA and not section 57 of the CPA as recorded, but in effect one cannot say the appellant was prejudiced in any way.

Three, similarly, the complaint that PW7 was the investigator and the one who recorded exhibit P4. We first need to point out that section 58 of the CPA was amended by section 15 of the Written Laws (Miscellaneous Amendments) Act, Act No. 3 of 2011, where subsections (4) was inserted introduced immediately after subsection (3). Under

section 58(4) of the CPA, it states that a police officer investigating an offence for the purpose of ascertaining whether the person under restraint has committed and offence may record a statement of that person. Also, restated in the decisions of this Court in **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017 and **Flano Alphonse Masalu @Singu and 4 Others vs Republic**, Criminal Appeal No. 366 of 2018 (both unreported).

We have also considered the complaint which relates to doubts in the recording of exhibit P2 and P4 in view of the possible overlap in the time the two were supposed to be recorded. The complaint in effect relates to whether the finding of trial Judge with regard to exhibit P2 and P4 is supported by evidence. Exhibit P2 and the oral evidence of PW6 shows that the appellant's extrajudicial statement was recorded on the 17/6/2016 between 9.11 hours to 9.43 hours. A scrutiny of exhibit P4 and oral evidence of PW7 reveal that the appellant's cautioned statement, was recorded on 17/8/2016 from 10.21 hours up to 10.57 hours. The evidence of PW7 also shows that on 17/8/2016, after the appellant was arrested, he was taken and locked up at Chamwino Ikulu police at about 8.30 hours. When he arrived at the police station, PW7 saw the appellant and later he interviewed him from 10.20 hours.

Taking into account the above evidence, remaining unanswered questions are: **One**, how was it possible for the appellant to be in the cell room waiting to be interviewed by PW7 while at the same time on the same day that is 17/08/2016 at 9.11, there is evidence that he arrived at the offices of PW6 where the extrajudicial statement was recorded? According to PW7, the appellant was in the Police vicinity the whole time up to the time he started interviewing him at 10.20 hours. So how did he go to PW6? Undoubtedly, a register book showing the time and his departure from the police cell room would have filled the gaps. **Two**, exhibit P2 outlines shows that the appellant was physically inspected prior to recording the extrajudicial statement and it states: "*ANALO JERAHA JIPYA SEHEMU YA NYUMA YA KICHWA*" unofficial translation: "*He has a fresh wound on the back of his head*". While in exhibit P4, there is nothing alluding that the appellant had a fresh wound.

Assuming PW7 interview of the appellant started at 10.20 hours meaning after the recording of the extrajudicial statement by PW6, why was this not recorded in exhibit P4? Where did the fresh wound on the back of the appellant's head come from? There was no evidence meted in the trial court regarding the same. In the absence of any other

evidence addressing the issue, we are thus left with the evidence of the appellant in his defence that he never wrote the statements.

Indeed, as the first appellate Court in this appeal, we are entitled to re-evaluate the evidence and come to our conclusion as stated in the case of **Juma Kilimo vs Republic**, Criminal Appeal No. 70 of 2012 (unreported). Taking into account concerns we have raised above with regard to exhibits P2 and P4, we are of the view that the prosecution failed to remove doubts with respect to the improper recording and admissibility of the same. For the foregoing reasons henceforth, we will not accord any value to exhibits P2 and P4 in our determination of this appeal.

In light of the above, in the absence of any other independent evidence to corroborate PW1's evidence regarding the incident that caused the death of the deceased and our holding that no value should be accorded to exhibits P2 and P4, the prosecution case is materially weakened.

In the end, we are of firm view that there is insufficient evidence for the prosecution to prove the charge against the appellant. For the foregoing, we hold that in the interest of justice this is not a proper case

to order for trial record to be remitted to the High Court for conduct of summing up and composition of a new judgment.

In the end, we order the appellant's immediate release from custody unless he is otherwise held for any other lawful purpose.

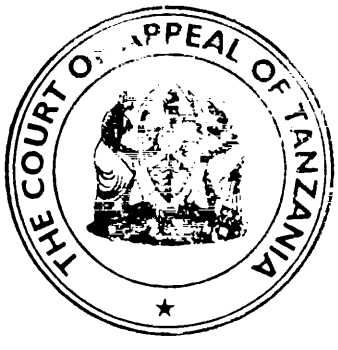
DATED at **DODOMA** this 27th day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered on 27th day of August, 2021 in the presence of the appellant in person and Ms. Salma Uledi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL