IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 123 0F 2020

ESTER JOFREY LYIMO ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mazengo, PRM. Ext. Jur.)

dated 8th day of November, 2019
in
Extended Jurisdiction Criminal Sessions Case No. 19 of 2018

JUDGMENT OF THE COURT

23rd February & 14th April, 2022

KWARIKO, J.A.:

Ester Jofrey Lyimo, the appellant, was aggrieved by the decision of the Court of Resident Magistrate of Dar es Salaam at Kisutu exercising extended jurisdiction. In that decision, the appellant was convicted and sentenced to suffer death by hanging for the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002, now R.E. 2019] (the Penal Code). It was alleged by the prosecution that on 25th day of March, 2017 at Tuangoma area within Temeke District in Dar es Salaam Region, the appellant did murder one Naomi John. The appellant pleaded not guilty and after the trial, she was found guilty, convicted

and sentenced as indicated above. On being aggrieved by the decision, the appellant has come to this Court on appeal.

Before we proceed any further, we find it apposite to narrate the material facts which led to this appeal. The evidence on record reveals that, the appellant is related to the deceased and one Andrew John (PW1). The appellant had taken the two children from their parents at Moshi for the purpose of providing them livelihood including education. According to PW1, the two were enrolled to school but had to stop following the appellant's failure to pay school fees. It was PW1's further narration that the appellant used to ill-treat them by frequently beating them with sticks and flat sides of machete and by pinching them with nails. He himself had sustained injuries as a result of the beatings.

As regards to what happened on 25th March, 2017, PW1 narrated that the deceased poured water in the house whereas the appellant had directed her to mop the entire house. However, the deceased cleaned only part of the house, leaving some parts unattended and when the appellant asked her to finish, the deceased refused and that is when the appellant started beating her with guava sticks and thereafter lifted her with teeth and dropped her down. By the direction of the appellant, the deceased was then put in the drum of water. Upon removal therefrom, the appellant poured some hot water on the deceased. As the deceased

was tired, she fell down. She was taken to the bathroom and then put on bed with a fan on. PW1 was sent to buy flour so that they could prepare porridge for the deceased. When he returned, he found the deceased emitting foams from nostrils. The appellant went to buy medicine for her and when she came back, she found the deceased in bad condition. She thereafter took the deceased to hospital with the assistance of her daughters. They did not return until afternoon. Later, PW1 was taken to hospital but the doctors lied to him that the deceased was alive.

The ill-treatment of the deceased and PW1 was supported by the appellant's neighbour one Mwanahamisi Karibo (PW5) who said she used to see the appellant beating the children. She also used to see the deceased moping the house with a bandaged hand.

At the hospital, the deceased was attended by Dr. Abdulkarim Hassan (PW2). He told the trial court that when the appellant brought in the child, she was unsettled and looked suspicious. Upon examining the child, he found no heartbeat, pupils dilated and was discharging abdominal fluid through the mouth. He diagnosed that the child was dead about four hours earlier. The appellant informed PW2 that the child had malaria but when he inspected her body, he found trauma in

the head, old and fresh wounds in the body and skin peels on the chest, signifying that the death might not be natural.

Upon that discovery, PW2 inquired from the appellant about the real source of the problem but she was reluctant to tell anything and only said that when she left for work, the child was fine. PW2 could not either get any information from the people who had accompanied the appellant as they were afraid of her. As the death was suspicious, PW2 handed over the appellant to the Social Welfare Officer, one Dr. Ruth John Mkwemba (PW4). When PW4 failed to get any useful information from the appellant and her daughters, she reported to the police where No. WP 3925 D/Cpl Joyce (PW7) of Chang'ombe Police Station heeded to the call. When PW7 got to the hospital, PW2 explained the situation and she viewed the deceased body which had wounds. The appellant's daughters revealed that the appellant was cruel and they feared her. PW7 escorted the three women to Police Station Chang'ombe and then to Temeke Police Station where SP Thobias Simbawaleo (PW3) took over and opened a case file.

Thereafter, No. WP. 2265 D/Sgt Mgeni (PW6) who was assigned to investigate the case, interviewed PW1 who revealed that the appellant used to beat him and the deceased. She saw bruises on PW1's chest, forehead and arms. PW6 also photographed the deceased body which

was malnourished with wounds. She tendered the photographs and sketch map of the scene of crime which were admitted in evidence as exhibits P1 and P2, respectively.

The appellant was interrogated by Inspector Salima Sechange (PW8) where she confessed to the allegations. However, during the trial, the appellant objected her cautioned statement on account that she was tortured to confess. It turned out that, upon a trial within a trial, the objection was overruled and the cautioned statement admitted in evidence as exhibit P3.

The autopsy on the deceased body was conducted by Dr. Modesta Nicholaus Lasara (PW9). The post mortem report was admitted in evidence as exhibit P4 which indicated that the cause of death of the deceased was traumatic head injury. The report also showed that the deceased body was found with fractured upper part of humerus and fractured right distal part of humerus with dislocation in the right shoulder.

In defence, the appellant testified as DW1 and called one witness on her behalf. DW1 narrated that she took the deceased and PW1 from her sister at Moshi. She enrolled them to school but they stopped going there as she had relocated to another area. She explained that the two kids were naughty. On the material day when she returned from

community prayers, the deceased was still in bed and when she awakened her up, she was just staring at her and did not even want to brush her teeth. When she threatened to beat her, she ran around the house and when she caught her, she picked an avocado stick and caned her. In the process, the deceased sat down complaining that she was tired. The appellant picked her to the veranda and went to buy medicine and when she returned, she gave the deceased some glucose but she was just looking at her. When her daughters returned from prayers, they took the deceased to hospital.

It was the appellant's further narration that, at the hospital, the doctor said the deceased was suffering from malaria and was anaemic. In the course of examination by the doctor, she saw the deceased taking a deep breath and was told that the child had died. The appellant further testified that when the doctors inquired about the scars in the deceased body, she explained that, they were old wounds she had sustained in Moshi as she was rearing goats in the bush. She said, thereafter, the police were summoned and took her together with her daughters to police station, where she was interrogated on 27th March, 2017 at 10:00 hours. The appellant denied having murdered the deceased. However, she admitted that, she used to punish the deceased and PW1 as a way of reforming them to be of good behaviour.

The appellant's evidence was supported by her daughter, Jackline Kessy (DW2). This witness said she saw her mother beating the deceased with avocado stick on the material day. However, in the course of cross examination, it transpired that DW2's evidence in court differed with what she narrated in her statement at the police station (exhibit P5).

At the close of the evidence from both sides, the counsel for the parties were granted leave to present final closing submissions for and against the charge of murder.

In convicting the appellant, the trial court concurred with the ladies and gentleman assessors that the appellant intended to kill the deceased when she inflicted severe beatings on her already scarred body. She was found guilty, accordingly convicted of murder and sentenced to suffer death by hanging.

The appellant was aggrieved by the trial court's decision hence she came to this Court on appeal. On 2nd February, 2021, Mr. Danstan Nyakamo, learned advocate for the appellant filed a five-ground memorandum of appeal, whereas on 17th February, 2021, the appellant lodged her own memorandum of appeal containing eleven grounds. However, on 22nd February, 2022, Mr. Nyakamo filed a consolidated memorandum of appeal raising a total of nine grounds. For convenience

purpose, we have consolidated the two sets and paraphrased those grounds into the following eleven grounds of appeal, that the trial court erred in law and fact: **one,** to convict the appellant basing on a retracted confession (exhibit P3) which was taken outside the prescribed period of time; **two,** to act on the evidence of PW3 and PW8 whose statements were not read out during committal proceedings; **three,** to rely on the evidence of PW1, a boy aged nine years which was taken contrary to the law; **four,** for failure to properly address the appellant upon a *prima facie* case; **five,** for failure to consider the defence evidence; **six,** to rely on the contradictory evidence of PW2 and PW9 in relation to the cause of death of the deceased; **seven,** to rely on deceased photos (exhibits P1) and sketch plan map (exhibit P2) which were admitted in evidence contrary to the law; **eight,** for failure to inquire into the mental status of the appellant; **nine,** for failure to warn itself before it convicted and sentenced the appellant; **ten,** to convict the appellant of murder without proof of malice afore thought; and, **eleven,** to convict the appellant while the prosecution case was not proved beyond doubt.

At the hearing of the appeal, Mr. Nyakamo, represented the appellant. On the other hand, the respondent Republic was represented

by Ms. Anna Chimpaye, learned Senior State Attorney assisted by Ms. Salome Assey, learned State Attorney.

Before we deliberate on the grounds of appeal, we would like to restate a principle of law that, this being a first appeal, it is in a form of rehearing. We shall, therefore, re-evaluate the evidence of both sides and if appropriate we will come out with our own conclusion. This principle has invariably been applied by the Court in its decisions, including the cases of **Nicholaus Mgonja @ Makaa v. R,** Criminal Appeal No. 85 of 2020 and **Trazias Evarista @ Deusdedit Aron v. R,** Criminal Appeal No. 188 of 2020 (both unreported).

Submitting in respect of the first ground of appeal, Mr. Nyakamo argued that the appellant was arrested on 25th March, 2017 at 13:00 hours and was interrogated at 20:00 hours which was beyond four hours period hence contravened sections 50 and 51 of the Criminal Procedure Act [CAP 20 R.E. 2019] (henceforth "the CPA"). That, the omission rendered the cautioned statement (exhibit P3), illegal evidence. The learned counsel fortified his contention by the Court's decision in the case of **Florence Athanas @ Baba Ally & Another v. R,** Criminal Appeal No. 438 of 2016 (unreported).

Responding to the above submission, Ms. Chimpaye contended that the appellant spent time at the hospital for the examination of the

deceased and there is no evidence to prove at what time she was arrested but the interrogating officer said the appellant was brought to her at around 19:00 hours and started interrogation at 20:00 hours.

We have gone through the evidence and noted PW7 to have stated that she received a call from the hospital at 13:00 hours and heeded thereto. Upon inquiry in respect of the incident, she took the appellant and her daughters to the police station and handed them to PW4. PW8 said she was asked to take the appellant for interrogation at around 19:00 hours and started interview at 20:00 hours to 21:00hours. On the other hand, the appellant did not mention the exact time of her arrest but only said from the hospital she was taken to Mbagala Turubani Police Post and later to Charambe Police Post at 21:00 hours and spent the night there before she was interrogated on 27th March, 2017 at 10:00 hours.

The law under section 50 (1) of the CPA has set up limitation periods for which interviews of persons under restraint can be taken. It provides thus:

> *"50 (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."

Therefore, according to this provision of the law, a suspect is supposed to be interviewed within four hours after being taken under restraint. That time can be extended as provided under section 51 of the CPA. In the case at hand, there is no evidence to show when was the appellant arrested. This is because PW7 only said that while at police station, she received information from hospital about the incident but did not mention the time she put the appellant under restraint so that the time could start running. In this respect, the prosecution was duty bound to explain when the appellant was arrested. It is thus our considered view that where there is no exact time of arrest of the appellant, it is doubtful to conclude as to whether she was interviewed within the time prescribed by law. This doubt, in our view, ought to be resolved in favour of the appellant. This Court has stated in a number of its decisions that a statement recorded in contravention of section 50 of the CPA is inadmissible. For example, in the case of **Janta Joseph**

Komba & Three Others v. R, Criminal Appeal No. 95 of 2006 (unreported), the Court observed thus:

> *"The obtaining of the statements of the appellants while still in custody outside the time provided under the law for investigative custody, contravened the provision of the law".*

See also-**Roland Thomas @ Mwangamba v. R,** Criminal Appeal No. 308 of 2007 and **Joseph Mkumbwa & Another v. R,** Criminal Appeal No. 94 of 2007 (both unreported).

It follows, therefore, that exhibit P3 was improperly admitted in evidence and it is consequently expunged from the record. The first ground thus passes.

In relation to the second ground, Ms. Chimpaye conceded that PW3 was not in the list of witnesses whose statements were read out in court during committal proceedings. She urged us to expunge his evidence. Section 246 (2) which is relevant here provides thus:

> *"Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the*

Director of Public Prosecutions intends to call at the trial."

According to the cited provision of the law, statements of the witnesses whom the Director of Public Prosecutions intends to call at the trial ought to be read out to the accused at the committal proceedings. If that is the case, and since the statement of PW3 was not read out at the committal proceedings, his evidence was illegal as it was taken contrary to the law. It is thus expunged from the record.

Likewise, PW8 was not among the witnesses who were mentioned during the committal proceedings. However, as correctly argued by Ms. Chimpaye, the substance of her evidence was contained in the appellant's cautioned statement (exhibit P3) which was read out at the committal proceedings. She did not add anything and thus her evidence was legally taken. This ground partly succeeds as indicated herein.

Submitting in respect of the third ground, Mr. Nyakamo argued that, since PW1 did not live with a male figure at home, his evidence needed corroboration when he told the trial court that he could not tell lies to the court for fear of being caned by his father. Ms. Chimpaye argued in response that PW1 was asked questions for the trial court to satisfy itself whether or not he understood the meaning and nature of an oath. That, following those questions, the trial court was satisfied

that PW1 understood the meaning and nature of an oath and thus allowed him to give his evidence on oath. For that reason, he argued, the question of corroboration could not arise. To give credence to her proposition, Ms. Chimpaye referred us to the Court's decision of **Ally Ngozi v. R,** Criminal Appeal No. 216 of 2018 (unreported).

On our part, we find this complaint purely out of context. This is because the issue that was before the trial court regarding PW1, a child of tender age, was not to prove if he was living with male figures or not. As correctly put by the learned Senior State Attorney, the trial court was concerned with PW1's understanding of the nature and meaning of an oath before he gave evidence either on oath or after promising to tell the truth to the court and not to tell lies. This is in line with section 127 (2) of the Evidence Act which provides thus:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell lies."*

Now, following those questions, the trial court's finding was that, PW1 knew the meaning and the nature of an oath therefore he gave his evidence on oath hence requiring no corroboration to be relied upon. This ground of appeal fails.

In the fourth ground, the appellant is attacking the trial court for its failure to properly address her in respect of the *prima facie* case. It was Mr. Nyakamo's contention that the trial court did not discuss other pieces of evidence when it ruled out that the prosecution had established a *prima facie* case against the appellant in terms of section 293 of the CPA, citing an example of the retracted confession. In rebuttal, Ms. Chimpaye argued that the trial court properly addressed the appellant in terms of that provision of the law who accordingly responded and that also no injustice was committed more so because the appellant had legal representation.

Having considered the foregoing submissions, our starting point would be the relevant provision of the law. Section 293 (2) of the CPA provides thus:

> *"293. (2) When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, shall inform the accused person of his right–*

(a) to give evidence on his own behalf; and

(b) to call witnesses in his defence,
and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights."

Thus, in compliance with the law, when the prosecution case was closed on 23rd July, 2019, the trial court ruled out that a *prima facie* case had been established against the appellant for her to enter defence. The record of appeal speaks at page 84 thus:

"Ruling:

The prosecution has closed its case and having heard and gone through the prosecution's evidence along with the exhibits produced in court in support of the prosecution's case it is my finding that a prima facie case has been made out against the accused person sufficiently enough to make her defence, she will therefore defend herself and I do hereby invite her to do so in terms of section 293 of CPA.

Sgd P. Mazengo, PRM

With Extended Jurisdiction

23/07/2019

Court: *The accused is addressed in terms of section 293 (2) (a) and (b) of the CPA, Cap 20 R.E. 2002."*

Following that ruling and address of the trial court in respect of the cited provision of the law, the appellant's counsel was recorded to have replied thus:

> ***"Mr. Mafie:*** *She will give sworn testimony, 3 witnesses on her behalf."*

We do not see anything that was left out by the trial court subsequent to the close of the prosecution case. If anything, the appellant's counsel would have raised it. This ground fails.

The appellant is complaining in the fifth ground of appeal that her defence was not properly considered. The respondent did not specifically address this issue. We have gone through the record and found that the appellant's defence was sufficiently considered by the trial court from page 174 of the record of appeal and observed at page 175 among other things thus:

> *"Aside to that, the accused said the deceased had scars and wounds when she arrived from the village which were caused by scratches she sustained when she was keeping goats in the bushes. Assuming this fact is true, there is no*

explanation regarding the fresh wounds seen on the deceased body given the fact that she was taken from Moshi since May 2016 and died in March 2017, almost 10 months had passed. Nevertheless, wounds and scars did not cause the death of the deceased."

We are therefore settled in our mind, that the appellant's defence was considered. This ground too lacks merit.

In the sixth ground of appeal, the appellant's complaint is that the doctors, PW2 and PW9 contradicted in their evidence in respect of the cause of death of the deceased. Mr. Nyakamo argued that, while PW2 said the cause of death was a combination of several injuries, PW9 said it was head injury and broken arm. Responding, Ms. Chimpaye argued that according to the post mortem report which was authored and tendered by PW9, the cause of death was head injury, whereas, PW2 and PW4 explained the injuries they saw on the deceased body.

On our part, we find this ground unmerited since we find no material contradictions in the evidence of PW2 and PW9. This is because PW2's evidence related to what he saw on the deceased body as he received her from the appellant and her daughters. He testified that upon examination, he found the child with old and new injuries in her body. Although PW2 said he participated in the post mortem

examination of the deceased body, it was PW9 who was officially assigned to do it. The post mortem was filled by PW9 and showed the cause of death to be traumatic head injury.

The seventh ground relates to the deceased's photos and sketch map of the scene of crime. It was Mr. Nyakamo's argument that these exhibits were received contrary to section 78 and 79 (2) of the Evidence Act [CAP 6 R.E. 2019] (the Evidence Act). He contended that the photos ought to have been accompanied by print out and affidavit because according to section 18 of the Electronic Transactions Act, 2015 ("the Act"), the photos might have been tampered with. He fortified his argument with the Court's decision in the case of **Onesmo Nangole v. Dr. Steven Lemomo Kiluswa & Two Others,** Civil Appeal No. 117 of 2017 (unreported).

In her response, Ms. Chimpaye argued that sections 78 and 79 of the Evidence Act relate to banker's book hence inapplicable in the instant case. She however argued that the photos were properly tendered in evidence and that even if they are expunged from the record, the remaining evidence proves the case against the appellant.

Having considered this complaint, we agree with Ms. Chimpaye that sections 78 and 79 of the Evidence Act is inapplicable in the instant

case because they relate to banker's book. For ease of reference these provisions are reproduced hereunder:

> *"78. - (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.*
>
> *(2) Such proof under subsection (1) may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits.*
>
> *79. - (1) A copy of any entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.*
>
> *(2) The proof under subsection (1) shall be given by person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits."*

In the same vein, section 18 of the Act, relates to admissibility of data message which is not the issue in the instant case. This ground is thus unmerited.

The appellant is complaining in the eighth ground that the trial court should have invoked the provisions of section 216 (1) to (7) of the CPA to inquire into the mental status of the appellant owing to her behaviour of cruel treatment of the children. Ms. Chimpaye argued that this issue ought to have been raised before the trial court more so as the appellant was represented by an advocate. She contended that the appellant was of sound mind because she pleaded to the charge and gave her defence quite coherently.

We are alive to the trial court's power under section 216 or 220 of the CPA to order examination of the mental status of the accused where it has reason to believe that, such accused may have been insane at the time he is alleged to have committed the offence. In this case, the trial court did not exercise that power probably because it had no reason to believe that the appellant was of unsound mind. However, if the defence had reason to suspect the appellant's mental status, it could have invoked the provision of section 219 (1) of the CPA and raise the defence of insanity when the accused was called upon to plead so that

the trial court could order inquiry into the mental status of the appellant. Section 219 (1) of the CPA provides thus:

> *"Where any act or omission is charged against any person as an offence and it is intended at the trial of that person to raise the defence of insanity, that defence shall be raised at the time when the person is called upon to plead."*

Now, since the appellant had legal representation, had there been any suspicion that she was not of sound mind, the defence could have informed the trial court that they intended at the trial to rely on the defence of insanity. On being satisfied that the appellant might have not been of sound mind at the time she is alleged to have committed the offence, the trial court would have stayed the proceedings and invoke the provisions of section 220 (1) of the CPA to order the appellant to be sent to a mental hospital for examination of her mental status. This provision provides as follows:

> *"Where any act or omission is charged against any person as an offence and it appears to the court during the trial of such person for that offence that such person may have been insane so as not to be responsible for his action at the time when the act was done or omission made, a court may, notwithstanding that no evidence has been adduced or given of such insanity, adjourn*

the proceedings and order the accused person to be detained in a mental hospital for medical examination."

Therefore, since the law is clear on how to deal with the suspected unsoundness of the mind of the accused person, we have wondered as to why this complaint has been brought at this late stage of the case. Even if we were to look into the circumstances of this case, we have found that cruelty, beating and ill-treatment of the deceased and PW1 by the appellant could not be a reason to suspect that the appellant was not of sound mind. This complaint is therefore devoid of merit and it is rejected.

In the ninth ground, Mr. Nyakamo argued that the trial court did not warn itself before it convicted the appellant on the basis of the evidence of a child (PW1). He supported his argument by the Court's decision in the case of **Mtendawema Said v. R,** Criminal Appeal No. 199 of 2011 (unreported).

Responding to this ground, Ms. Chimpaye argued that the trial court warned itself before it convicted the appellant. Having gone through the record of appeal, we are in agreement with Ms. Chimpaye that the trial court warned itself before it convicted the appellant. As regards the evidence of the child (PW1), the court was satisfied that this

witness was credible and told nothing but the truth. The court observed at page 176 of the record of appeal thus:

> *"I also had time to see the PW1 when testifying in court, a boy of 9 years, was so calm and composed; by his look, he was telling nothing but the truth and I have no reason to fault on what he testified in court. He is the witness of truth."*

Therefore, since the trial court found PW1 to be credible and that he told the truth, his evidence did not need any corroboration. This ground of appeal too, fails.

The tenth ground is whether the prosecution proved malice aforethought on the part of the appellant. It was Mr. Nyakamo's argument that the appellant took the deceased for the purpose of providing her with education and when she beat her it was in the process of teaching her good behaviour. He contended that the appellant did not intend to kill the deceased. In support of this argument, the learned counsel cited our earlier decision in the case of **Bernadeta Paul v. R** [1992] T.L.R 97.

In response, Ms. Chimpaye argued that the appellant intended to kill the deceased because she excessively punished her as she went to the extent of biting and dipping her in the barrel of water. She thus contended that malice aforethought was proved and the trial court had

sufficiently considered it. The learned counsel fortified her contention with the Court's decision in the case of **Bujigwa John @ Juma Kijiko v. R,** Criminal Appeal No. 427 of 2018 (unreported).

From the foregoing, it appears that the appellant is not contesting that she caused the death of the deceased. However, even if the appellant disputes that she caused the death of the deceased, we have found ample evidence that she is the one who caused that death. This is because, not only PW1 but also the appellant and DW2 narrated what happened on the material date. In her own words, in the examination-in-chief by her advocate, the appellant stated at page 88 of the record of appeal thus:

> *".....she kept on playing, when she heard me going outside she started running, she had that habit of running around the house, I toid Andrew to catch her she was crying raising voice used to cry and raise the voice they sometimes asked why, I picked avocado (stick/batch) I started beating her, I was beating as warning her, she told me she was tired, I think because she was running, I just saw her sitting down complaining that she was tired, I thought she was joking.....I picked her and kept her on veranda, I went to fetch for medicine at pharmacy, I explained what*

happened he gave me glucose, Andrew was there when all these happened...."

Likewise, DW2 stated at page 94 of the record thus:

"Mama left to where Naomi was at the room, Naomi left to the veranda, we were taking tea on the table, mama went out to pick a stick, she started beating her, Naomi "akalegea", (means; "she became weak") mama said why "analegea"? (means; "mama said, why is she becoming weak") She left to the pharmacy to explain that Naomi became weak, she was advised to take her to the hospital..."

The evidence by these witnesses is that, before she died, the deceased was beaten by the appellant. There is no evidence to show that the deceased was ill before the material day and time or had any life-threatening condition before the appellant descended on her. Soon after the beating, her condition changed and was rushed to hospital and thereafter she was pronounced dead. The post mortem report shows that the deceased died of traumatic head injury. The report also shows that the deceased had fresh and old wounds all over her body. This is consistent with the beatings on the material day and before as clearly explained by the witnesses.

The question which follows is whether, in beating the deceased, the appellant intended to kill her. In other words, did the appellant have malice aforethought when she caused the death of the deceased. Malice aforethought is defined under section 200 (a) of the Penal Code as follows:

> *"Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances–*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not."*

Malice aforethought can also be inferred from various factors. In the case of **Enock Kipela v. R,** Criminal Appeal No. 150 of 1994, the Court said thus:

> *"Usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of weapon, if any, used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow or blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case,*

be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

See also- **Bujigwa John @ Juma Kijiko v. R,** Criminal Appeal No. 427 of 2018 and **Elias Paul v. R**, Criminal Appeal No. 7 of 2004 (both unreported).

Guided by the above factors, we have dispassionately evaluated the evidence on record and found it hard to conclude that the appellant premeditated the death of the deceased. We are of a settled mind that, under the circumstances of this case, it cannot be safely concluded that the appellant caused the death of the deceased with malice aforethought. This is because, although there is evidence on record to the effect that, apart from the material day, the appellant had been persistently and cruelly mistreating the deceased, there is no sufficient evidence that on the material day, she had formed an intention to kill the deceased or cause grievous harm to her. The evidence from PW1 is to the effect that on the material day the deceased who had poured water all over the house was asked by the appellant to mop the floor and clean the place but after cleaning part of it, she refused to finish the remaining portion. That is when the appellant decided to punish the

deceased by caning her using a guava stick. PW1 did also testify that at one point when the deceased looked so weak, the appellant asked one of her daughters to put the deceased in the drum of water. However, there is no evidence of the size of the drum and whether there was water in it or not. The purpose of putting her in it, was also not disclosed. Thereafter, the appellant took the deceased in the bathroom and then on bed, she turned on the fan but the deceased's condition was still not better. PW1 was then sent by the appellant to go to the nearby shop and buy flour so that she could make porridge for the deceased. The appellant did not end there but she also rushed to the nearby pharmacy where she bought some medicine for the deceased. She then took her to the hospital. The evidence from PW1 on what was done by the appellant was substantially corroborated by the evidence given by DW2.

It is from the above explained conduct of the appellant that, we find it hard to believe that she had intended to kill the deceased. We think that if the appellant had intended to kill the deceased, she could not have acted the way she did.

Going forward, the instant case is distinguishable from the case of **Bujigwa John @ Juma Kijiko** (supra), cited to us by the learned Senior State Attorney. In that case, the appellant had dismembered the

deceased's body, in that, her left hand, ears and private parts were completely cut off and some flesh cut from the back bone muscles. The body was buried and completely sealed. The appellant also tried to hide when he saw the search party. With that evidence, it was found that the appellant had malice aforethought in killing the deceased thus he was convicted of murder. Whereas, the case cited by Mr. Nyakamo of **Bernadeta Paul** (supra) concerned the offence of infanticide thus distinguishable from the instant case.

Thus, it is our considered view that had the trial court viewed the scenario from the perspective as we have explained, it could not have convicted the appellant of the offence of murder. This ground of appeal succeeds.

The last ground is whether the prosecution case was proved beyond reasonable doubt. From what we have found in the preceding ground, it is clear that the prosecution did not prove the offence of murder contrary to section 196 of the Penal Code against the appellant but instead it proved the offence of manslaughter contrary to section 195 of the Penal Code. In the event, we therefore quash the conviction for murder and set aside the sentence of death imposed on the appellant by the trial court. We find the appellant guilty of the lesser offence of manslaughter and convict her accordingly.

Finally, we think, in the circumstances of the case, a sentence of ten (10) years imprisonment against the appellant will meet the justice of the case which shall start to run from 8th November, 2019, when she was convicted by the trial court.

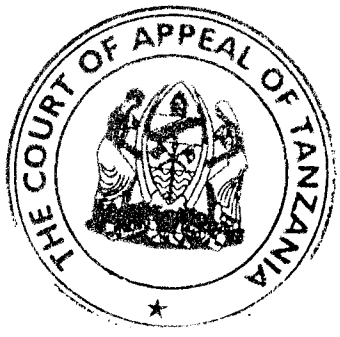
DATED at **DAR ES SALAAM** this 13th day of April, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 14th day of April, 2022 in the presence of Mr. Danstan Nyakamo, learned counsel for the appellant, the appellant present through Video Conference at Segerea Prison and Ms. Salome Assey, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL