IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A and FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 548 OF 2020

NYANGE OMARY @ HALIFA S/O KILOLI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania,

(District Registry) at Dodoma

(Siyani, J.)

dated the 22nd day of October, 2020

in

Criminal Sessions Case No. 16 of 2017

JUDGMENT OF THE COURT

25th & 29th April, 2022

MUGASHA, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Dodoma Registry in which Nyange Omary @ Halifa s/o Kiloli, the appellant was charged and convicted of the offence of murder contrary to section 196 of the Penal Code [Cap 16 RE 2002]. It was alleged by the prosecution that, on the 28/12/2014 at or about 18.30hrs, at Hamai village within Chemba District in Dodoma Region, the appellant did murder one Mariamu d/o Mussa (the deceased). He denied the charge following which, in order to establish its case, the prosecution paraded a total of three (3) witnesses

and tendered documentary evidence namely; the postmortem examination report of the deceased, Exhibit P1. The appellant was sole witness for the defence.

Briefly, the facts underlying the present appeal are to the effect that: the appellant and the deceased were a married couple blessed with three issues. From what can be discerned from the record, the couple had a misunderstanding following loss of their cow which was under the care of the deceased. This forced the deceased to go to her mother's homestead where she encountered an attack which terminated her life. According to the prosecution, the appellant is alleged to have killed the deceased. The matter was initially reported to Ijumaa Salim Isaka (PW2) a Village Executive Officer at Kinkima village who directed two local militia to effect the arrest of the appellant at Njoro. The appellant was taken to the Ward Executive Officer and later to Chemba Police station.

As to the occurrence of the fateful incident, according to Juma Kalate (PW1), on the material date at about 18:00 hours while at his home, he heard an alarm coming from his sister's house one Mwajabu Hassan and heeded to it. When he was about 26 paces from his sister's house, he saw the appellant chasing the deceased she fell down and was stabbed with a knife on the stomach. Then the appellant ran away. PW1

and one Ijumaa Rajabu Ramadhani unsuccessfully chased the appellant while raising an alarm and then, reverted to where the injured deceased was lying down. She was taken to Hamai Health Centre and later referred to Kondoa hospital where at around 23:00 hrs succumbed to death. PW1 also recalled to have been aided by sunlight and managed to identify the appellant who he claimed to be familiar with because he was married to his niece.

However, when cross-examined, PW1 came with a following version, that the fateful incident occurred at his residence and it was witnessed by his sister one Mwatatu who also took part in chasing the appellant. He added that, prior to the killing incident the appellant who had a knife went to his house, told him that he was selling the knife, narrated about a conflict with the deceased and revealed his mission to collect his wife which was postponed to the following day by the deceased's mother. He as well, told the trial court that on the fateful day, aided by some moonlight identified the appellant who wore a black trousers and green shirt.

The incident was investigated by D. 6052, D/Sgt (PW3) who told the trial court to have witnessed the autopsy examination of the deceased's body and that it had a wound on the stomach. PW3 then,

went at the scene of crime, prepared a sketch map of the scene of crime, interrogated witnesses and recorded their statements including that of the appellant who is alleged to have confessed to kill the deceased. However, neither the cautioned statement nor the extrajudicial statement was tendered in the evidence at the trial. We shall revert to this matter at a later stage of our judgment.

The appellant denied to have killed the deceased. Besides, recounting that the deceased was his wife and that they were blessed with three children, he gave a narration as to how his cow was lost while under the care of the deceased being the cause of the quarrel with the deceased who opted to go to her mother's homestead. According to the appellant, he embarked on a prolonged search of the lost cow up to 28/12/2014 when he went at his in-law to pick his wife. However, upon reaching there, he found his wife having a sexual affair with another man and a fracas ensued. Consequently, as the man in question was about to stab the appellant, he stepped back behind the deceased and the fatal blow of the knife struck the deceased.

Having seen the deceased stabbed, both the appellant and the unknown man vanished. According to the appellant he ran away fearing to be attacked by the relatives of the deceased in vengeance.

After a full trial, the learned trial Judge summed up the evidence to the assessors who returned a unanimous verdict of guilty. Upon being satisfied that the prosecution account was true the trial Judge convicted the appellant with murder and sentenced him to death by hanging. Aggrieved, the appellant preferred the present appeal initially, fronting five grounds of complaint. On 19/4/2022, through his advocate, the appellant filed a supplementary memorandum of appeal with the following three grounds of complaint, namely:

1. That the learned trial Judge erred in fact and law in convicting the appellant on the offence of murder which was not proved beyond reasonable doubt.
2. That, the learned trial Judge erred in fact and law in grounding the conviction based on visual identification which was not absolutely watertight.
3. That, the learned trial Judge erred in law and fact in grounding the conviction based on singly uncorroborated evidence, which was also unreliable, incredible and contradictory.

Yet, on 22/4/2022, the appellant through his advocate filed another supplementary memorandum of appeal containing two grounds of complaint as follows:

1. That, the learned trial Judge erred in fact and law in convicting the appellant on the case which was not proved beyond reasonable doubt.
2. That, the learned trial Judge erred both in fact and law for being influential, biased and failure to properly lead assessors on all vital points of law during the summing up.

At the hearing, in appearance was Mr. Leonard Mwanamonga Haule, learned counsel for the appellant and Ms. Catherine Gwaltu, learned Senior State Attorney for the respondent, Republic.

On taking the floor, Mr. Haule abandoned all grounds in the Memorandum of Appeal and the first ground in the supplementary Memorandum of appeal dated 22/4/2022. Thus, the remaining four grounds of appeal are as hereunder:

1. That the learned trial Judge erred in fact and law in convicting the appellant on the offence of murder which was not proved beyond reasonable doubt.
2. That, the learned trial Judge erred in fact and law in grounding the conviction based on visual identification which was not absolutely watertight.

3. That, the learned trial Judge erred in law and fact in grounding the conviction based on singly uncorroborated evidence, which was also unreliable, incredible and contradictory.
4. That, the learned trial Judge erred both in fact and law for being influential, biased and failure to properly lead assessors on all vital points of law during the summing up.

Mr. Haule commenced his submission by addressing the 4th ground of appeal in which the learned trial Judge is faulted to have conducted the summing up of the evidence to the assessors contrary to the dictates of the law. He pointed out that, in the wake of the appellant's evidence at the trial that he was not at the scene of crime at 18.30 hrs as asserted in the charge, it was incumbent on the learned trial Judge to address the assessors on the respective point of law which was not the case. Thus, he argued the omission on non-direction to have rendered the assessors not capacitated to give informed and rational opinions on the matter. To bolster his argument, he cited to us the case of **MSAFIRI BENJAMIN VS REPUBLIC,** Criminal Appeal No. 549 of 2020 (unreported) at page 7,8 and 10.

It was Mr. Haule's further contention that, during the summing up the learned trial Judge influenced assessors having directed them to ignore

the discrepancies in the prosecution account which had the effect of placing the appellant at the scene of crime. He as well, faulted the learned trial Judge in having allowed assessors to consult with one another before giving their respective opinions which was against the dictates of the provisions of section 289 of the Criminal Procedure Act [CAP 20 R.E. 2019] which enjoins each assessor to give own opinion on the verdict of guilt or otherwise after the summing up of the evidence. Finally, it was Mr. Haule's submission that, the trial was vitiated on account of the omission to address the assessors on the material facts in the evidence of PW1 which was solely relied upon to convict the appellant.

On account of the pointed out shortcomings, Mr. Haule urged us to nullify the judgment and the trial proceedings and order the immediate release of the appellant arguing that, in the wake of the discrepant prosecution evidence a retrial is not worthy. On this he argued that: **One,** the appellant was not properly identified at the scene of crime considering the doubtful source of light thereat whose intensity was not stated. **Two,** failure by the prosecution to parade material witnesses mentioned by PW1 to have been at the scene of killing which apart from poking holes on the prosecution case, it entitles the Court to draw an inference adverse to the prosecution. **Three,** the contradictory and incredible account of PW1 who gave a conflicting account on the scene of crime and the persons who

witnessed the incident. In this regard, it was Mr. Haule's contention that ordering a retrial will enable the prosecution to fill in the evidence gaps which is not in the interests of justice. He thus urged us to nullify the trial proceedings, quash and set aside the conviction and sentence with an order to release the appellant.

On the other hand, the learned Senior State Attorney opposed the appeal. Challenging the appellant's stance on the summing up to the assessors, it was submitted that, neither were the assessors influenced nor directed to ignore discrepancies in the prosecution account. Instead, it was argued that the learned trial Judge addressed assessors on position of the law on how to deal with the discrepancies in the evidence and the content of the appellant's evidence which were not geared at influencing assessors' opinions in any way. In relation to the defence of *alibi,* Ms. Gwaltu's challenged the same as an afterthought considering the appellant's own admission to have been at the scene of crime.

Pertaining to the complaint on visual identification, the learned Senior State Attorney argued that, the appellant was properly identified at the scene of crime by PW1 who was aided by moonlight. She ruled out existence of any contradiction arguing that in case there was any, it is minor and does not go the root of the matter. To bolster her stance, she

cited to us the case of **JUMAPILI MSYETE VS REPUBLIC,** Criminal Appeal No. 110 of 2014 (unreported). It was also argued that, the prosecution's confession to have killed the deceased in effect carries the prosecution case which is in line with the what the Court propounded in the case of **PETER MABARA VS REPUBLIC,** Criminal Appeal No. 242 of 2016. She concluded her submission by urging the Court to dismiss the appeal and sustain the conviction of the appellant.

Having carefully considered the record before us, we shall initially determine the complaint on the propriety or otherwise of the summing up to the assessors as it has a bearing on the legality or otherwise of the trial proceedings. Contending arguments were raised by the parties in respect of the propriety of the summing up in: **One,** non-direction of the assessors on a vital point of law relating to the defence of *alibi*; **two,** influencing their opinions; **three,** allowing assessors to consult before each gave his/her opinion; and **four**, inadequate address of the assessors on the material facts of the evidence of PW1 who was a crucial prosecution witness.

We are aware that section 265 of the CPA requires the High Court to sit with the assessors in a criminal trial. After the conclusion of the trial,

the trial court is enjoined to comply with the dictates of the section 298 of the CPA which stipulates as follows:

> *"(1) When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion.*
>
> *(2) The judge shall then give judgment, but, in doing so, shall not be bound to conform to the opinions of the assessors.*
>
> *(3) If the accused person is convicted, the judge shall pass sentence on him according to law.*
>
> *(4) Nothing in this section shall be construed as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish or, during any such retirement or at any time during the trial, from consultation with one another."*

It is on record that the learned trial Judge in the summing up, among other things, reminded the assessors to consult with one another if they so wished in the course of considering their opinions. Apparently, this did not augur well with Mr. Haule who viewed it to offend the dictates of the law. At this juncture, we deem it pertinent to borrow a leaf from a Book titled: **Introduction to Interpretation of Statutes,** Avtar Singh and

Harpreet Kaur, 4th Edition at page 23 whereby the learned Authors observed as follows:

> *"When the language of a statute is plain, words are clear and unambiguous and give only one meaning, then effect should be given to that plain meaning only and one should not go in for construction of the statute.... Courts should not be overzealous in searching for ambiguities or obscurities in words which are plain."*

The above stance was emphasized in the case of **REPUBLIC VS MWESIGE GEOFREY AND TITO BUSHAHU** Criminal Appeal No 355 of 2014 (unreported) where the Court in discussing the familiar canons of statutory interpretation categorically stated:

> *"Indeed it is axiomatic that when the words of the statute are unambiguous, judicial inquiry is complete. There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation."*

In view of the stated position of the law and considering that the provisions of subsection (4) of section 298 are couched in plain and unambiguous language, it is glaring that when assessors retire to consider

their opinions, they are not barred from consulting one another and this is what was envisaged by the legislature in enacting the said provision. As such, it was not offensive for the learned trial Judge to draw their attention on the matter as suggested by Mr. Haule.

This takes us to what is entailed in the proper summing up of the evidence to the assessors. The essence of a proper summing up of the trial evidence to the assessors was emphasized in the case of **HATIBU GANDHI and OTHERS v REPUBLIC** [1996] TLR 12 where the Court apart from stating that, the trial Judge's summing of the case to his assessors is not mandatory, but is prudent as a matter of practice *inter alia* held among other things as follows:

> *"It is sufficient for the trial Judge to state the substance or gist of the case on both sides to enable the assessors' opinions to be formed on the case in general or on any particular point required".*

It is also a settled position of the law that, the assessors must be properly informed so as to make rational and independent opinion as to the guilt or otherwise of the accused person. Therefore, in the course of summing up, the trial Judge should address the assessors on vital points of law. Furthermore, a trial Judge should desist from disclosing his views

or making remarks or comments which might influence the assessors one way or the other in making up their minds about issues being left to them for consideration. See: **JUMA MAWERA VS REPUBLIC** [1993] T.L.R 231; **MASOLWA SAMWEL VS REPUBLIC**, Criminal Appeal No. 206 of 2014; **REPUBLIC VS BYAMTOZI JOHN @ BUYOYA AND ANOTHER,** Criminal Appeal No. 92 of 2016 and **ESTHER AMAN VS REPUBLIC,** Criminal Appeal No. 69 of 2019 (all unreported).

In the light of the stated position of the law, a follow up question is whether in the matter at hand the summing up was properly conducted. We begin with the appellant's complaint on the alleged non-direction of assessors on a vital point of law on the defence of *alibi.* This need not detain us. In our jurisdiction, the defence of *alibi* is a creature of section 194 of the CPA. Basically, in simple terms, it is a claim or piece of evidence that one was elsewhere when an act, typically involving a criminal one is alleged to have taken place. In the case at hand, what was fronted by the appellant in his defence on not being at the scene at 18.30 hrs, was not a demonstration of the typical defence of *alibi.* We are fortified in that regard because the same appellant never denied to have been at the scene of the fateful incident where the deceased was killed. Thus, Mr. Haule's suggestion that the appellant had exhibited a defence of *alibi* is

farfetched and as such, the question of the trial Judge addressing it to the assessors did not arise.

Next for our consideration is whether the learned trial Judge influenced assessors when summing up the evidence of the prosecution. In the earlier cited case of **REPUBLIC VS BYAMTOZI JOHN @ BUYOYA AND ANOTHER** (supra), the Court had the occasion to consider the propriety of the summing up of the evidence to the assessors in the following scenario:

> *"Gentlemen assessors and lady assessor, you will recall that when key witnesses (those who witnessed the commission of the offence) testified, PW6 swapped identity of the 1st accused with that of 2nd accused and vice versa, the action which has the effect of destroying a prosecution case....*
>
> *PW6 (Anod shows that he doesn't know the accused as he swapped their identities.) This, I have doubts having in mind he is the one who identified the accused at the identification parade."*

Yet, in the judgment of the trial court, the said evidence was the basis of concluding that the accused persons were not properly identified at the scene of crime. The Court thus held that:

"the direction was a clear expression of the trial Judge's finding of fact on the evidence. It had nothing to do with wanting to get then assessors' opinion but to influence them to agree with him. It was wrong for the trial Judge to have made his impressions known to the assessors.... By letting her impressions known to the assessors the trial Judge influenced them to agree with her on the deficient prosecution evidence on the identification of the respondents."

In the matter under scrutiny, a portion of the trial Judge's summing up to the assessors which is the gist of the appellant's complaint is at pages 68 and 69 of the record of appeal as follows:

"Ladies and Gentleman Assessors, *in matters of identification it is not enough to look at factors favouring accurate identification. Equally important is the credibility of witnesses because the conditions of identification might appear ideal but that is no guarantee against untruthful evidence. You should therefore also consider the credibility of identifying witnesses. From his conduct in court and what he testified, did you feel he was speaking the truth?* ***The law however, gives advantage to a witness who gives evidence after a long interval following the event. Allowance ought to be given for minor***

discrepancies. Such trifling contradictions if found, can be ignored.

Ladies and Gentleman Assessors, in order to find out whether the accused person was correctly identified by PW1, you may therefore consider the above issues with the fact that even the accused himself has admitted to have been at the scene of crime at the time of killing of his wife and the fact that he decided to disappear after seeing his wife has been stabbed."

The appellant's counsel faulted what appears in the bolded expression as the learned trial Judge's bid to influence the opinions of assessors having placed the appellant at the scene of crime while he had earlier on stated not to have been there. It is already settled that, having admitted to be present at the scene of crime, the appellant's account was not suggestive of anything close to the defence of *alibi*. That apart, in the above quoted excerpt, the learned trial Judge restated the position of the law on what constitutes minor lapses in the evidence which consequently ought to be ignored if they do not go to the root of the case. In the second limb of the quoted excerpt, the learned trial Judge made reference to what is the appellant's testimonial account at the trial.

In the premises, neither did the learned trial Judge give directions to the assessors nor make expressions of his own findings of facts when summing up the case to the assessors so that they could give their opinions. Thus, with respect, we found wanting the assertions by Mr. Haule on the learned trial Judge influencing the opinion of the assessors. In the same vein, Mr. Haule's assertion that the learned trial Judge was biased in the summing up to the assessors, is unwarranted accusation and misconceived.

We have now to determine the appellant's complaint on the inadequacy of the summing up of the evidence of PW1 who was the crucial witness for the prosecution. It is not disputed that, PW1 was the sole prosecution witness who claimed to have witnessed the appellant stabbing the deceased person. His evidence during the examination in chief is reflected at page 41 as hereunder reproduced:

> *PW1: Juma Kalate, Adult, Affirms and states as follows:*
>
> *I am a resident of Hamai in Chemba District Dodoma Region where I work as a peasant. On 28/12/2014 around 18.30 hrs. I was at home when a murder incident happened.*
>
> *I stated to hear (Rwangi) a call for help. I responded by going where the call came. The call was at my*

sister's house one Mwajabu Hassan. Upon reaching where which just approximately 26 paces, I saw Nyange Omary chasing his wife one Mariam Mussa. When he reached her, he dropped her (alimpiga ngwala) down and then he took a knife and stabbed her in the stomach, I was about 5 paces from them so I saw everything. Nyange Omary is also called Halifa Kiloli Nyanga then started to ran. I decided to chase him while raising an alarm for help. I couldn't arrest him as he had a knife and he ran to his bicycle took it and disappeared.

I returned to the scene. We took Mariam to the hospital. I was with Ijumaa Rajabu Ramadhani when chasing Nyange. We took Mariam Musa to Hamai Health Centre. Mariam was in a serious conditions following the attach. She was not able even to walk. From Hamai Health Centre, we were referred to Kiona Hospital. We travelled to Kondoa where we passed Police Station to report before going to the Hospital. Maria did not survive; she died around 23 hrs on the same day.

I managed to identify Nyange and Mariam because there were still some sun light and I knew both Nyange Omary and Mariam Mussa. The said Nyange Omary is there in the accused dock. I knew Nyange well because he married my sister's child (niece) for not less than

five years prior to the incident of this case. I witnessed the dead body of Mariam following her death.

Sgd

M. M. SIYANI

JUDGE

8/10/2020

However, what PW1 earlier recounted changed when he was subjected to cross-examination by the defence. This is reflected at page 42 to 43 of the record of appeal as hereunder:

PW1'S SXXD BY MR. MSELINGWA ADVOCATE:

I can't remember the year when Nyange married Mariam Nyange and Mariam lived in Churuku village and they hand four (4) children. I was never aware of any conflict between them.

There was still some moon light when the incident happened. ***The incident happened at my house. Mwatatu who is my sister witnessed the incident****. She was following Nyange and Mariam who were running as Nyange was chasing Mariam.*

Mariam returned from her husband. I met Nyange around 18:00 hrs on 28/12/2014 before the killing. He came to my house. He told me that he came to pick his wife as they had some conflict but her mother told him to go and returned the next day to pick her.

Nyange was in normal condition. He had no any sign that he was angry or that he was confused. Nyange had a knife at the back pocket of his trousers. He told me that he was selling the said knife. I was around 5 paces from where Mariam fell down and being stabbed by Nyange. Nyange was in black trouser and a green shirt. I saw Nyange stabbing Mariam and he escaped with a knife. Mariam was carried by a bed to Hamai Hospital. From there to Kondoa we used Ambulance. There was no any sign of serious conflict between Nyange and his wife.

Sgd
M. M. SIYANI
JUDGE
8/10/2020."

Apparently, the witness was not re-examined by the prosecuting attorney so as to remedy the varying account of PW1 during the examination in chief and cross-examination. Yet, when responding to a question by one of the assessors, he intimated that the appellant and the deceased had frequent conflicts which was entirely different from what he earlier recounted on not being aware if the two had any conflict. This had adverse impact on the credibility and reliability on PW1's evidence in our considered view. Thus, failure to address the assessors on such evidence, denied the assessors an opportunity of fully understanding the

entire material facts of the case before them on which they were required to give their opinions. The omission correspondingly reduced the value of the opinion of the assessors. **See: WASHINGTON S/O ODINDO VS REPUBLIC** [1954] 21 EACA CA 394.

On account of the said omission, it cannot be safely vouched that the trial was conducted with the aid of assessors as required by the mandatory dictates of the provisions of section 265 of the CPA. Thus, the 4th ground of appeal is allowed to the extent stated.

In view of the stated infraction, ordinarily this would have been remedied by ordering a retrial. However, having carefully analysed the evidence on record, we are hesitant to follow that course and we shall give our reasons after considering the state of the prosecution account.

The learned counsel had contending arguments on the matter. While the learned Senior State Attorney urged us to dismiss the appeal in its entirety, Mr. Haule implored on us not to order a retrial in the wake of what he considered to be weak prosecution evidence or else, the prosecution will utilize the opportunity to fill up the evidence gaps to earn a conviction.

As to whether there is on record strong prosecution account against the appellant, as earlier intimated, PW1, the key prosecution witness who

claimed to have witnessed the fateful incident, had a wavering and contradictory account on what actually transpired at the scene of crime. Initially, he told the trial court that, while he was rushing at the scene of crime heeding to an alarm raised at the house of his sister one Mwajabu Hassan, saw the appellant chasing and stabbing the deceased and those present thereat included Ijumaa Rajabu Ramadhan who took part in chasing the appellant. However, when cross-examined, he gave a different account having testified that, the incident occurred at his homestead and the deceased's mother one Mwatatu had witnessed the incident. This sheds the prosecution case with a cloud of heavy doubt. It really taxed our minds as to how could the same person who witnessed the occurrence of the fateful incident had a wavering account as to where the killing took place and who were present. Moreover, as earlier intimated, this highly dents the credibility of PW1 and as such, his evidence with regard to visual identification of the appellant is highly suspect. Apparently, he claimed to have been aided by sunlight and moonlight in identifying the appellant which tells existence of difficult conditions for visual identification. Thus, since the only evidence linking the appellant with the offence is that of PW1, in the wake of the doubtful nature of source of light at the scene of crime whose intensity was not

stated, his evidence has to be tested with great caution. See: **ABDULLA BIN WENDO VS REPUBLIC** [1953] 20 EACA 166 where it was held:

> *"...although a fact may be proved by the testimony of a single witness, this does not lessen the need to test with greatest care the evidence of such witness respecting identification, especially when it is known that the conditions favouring correct identification are difficult."*

We have gathered that, although according to PW1, Mwajabu, Ijumaa and Mwatatu happened to be at the scene of crime were material witnesses, none of them was paraded to testify at the trial. This leaves a lot to be desired. We say so because, those were among listed prosecution witnesses at the committal stage and preliminary hearing. Furthermore, there was no word came from the prosecution if those witnesses were not within reach or could not be found. Besides, even if they could not be found, no effort was made by the prosecution to invoke the provisions of section 34B (2) of the Evidence Act [CAP 6 R.E.2019] to produce and rely on the depositions of the respective witnesses in order to add value on the prosecution case. That apart, it is glaring that, the investigator told the trial court that, upon interrogating the appellant, he confessed to have committed the offence in the cautioned and extra judicial statements. However, although at the committal stage and preliminary hearing the

statements were listed to be among the documentary exhibits to be relied upon by the prosecution, none of the said statements was tendered at the trial. Those statements would have probably corroborated PW1's account as to who had killed the deceased. On account of the missing material evidence, we agree with Mr. Haule that, the Court is entitled to draw an inference adverse to the prosecution. See – **AZIZ ABDALLA VS REPUBLIC** [1991] T.L.R 71 and **PETER MABARA VS REPUBLIC** (supra), which was cited to us by the appellant's counsel. In the premises, it is our considered view that, the prosecution of the homicide case and subject of the appeal was not given deserving attention and seriousness by the prosecution. We say no more.

We would like to address the concern raised by the learned Senior State Attorney who contended that, the prosecution case was carried by the appellant's own admission during cross-examination that he had killed his wife. This was opposed by Mr. Haule who argued that, since from the beginning the appellant totally denied the prosecution accusations on the killing incident he should not be pinned down on what he said after being cross-examined by the prosecutor.

The aforesaid was not the basis of the appellant's conviction by the trial court. We asked ourselves if the admission made during cross-

examination carried the prosecution case as to the guilt of the appellant. Our answer is in the negative and we are fortified in that regard because, apart from the prosecution case lacking material evidence to connect the appellant with the alleged offence, the alleged admission legally, could not be solely relied upon to establish his guilt. See: **AMANI JUSTINE @ MPARE VS REPUBLIC,** Criminal Appeal No. 131 of 2018 (unreported). In a nutshell, it was incumbent on the prosecution to prove the charge beyond reasonable doubt. However, as the onus was not discharged, the alleged admission which surfaced during the cross-examination cannot suffice to establish the guilt of the appellant.

In view of what we have endeavoured to discuss, ordering a retrial is not in congruity with the purpose of a retrial as the prosecution will utilise the opportunity to fill up the pointed out evidence gaps which is not in the interests of justice. See: **FATEHALI MANJI VS REPUBLIC** [1966] 1 E.A whereby the erstwhile Eastern African Court of Appeal categorically stated that, a retrial will not be ordered for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial.

All said and done we find the appeal partly merited and it is hereby allowed. We nullify the trial proceedings on account of inadequate summing up of the prosecution evidence, quash and set aside the

conviction and sentence meted on the appellant and order his immediate release unless if he is held for another lawful cause.

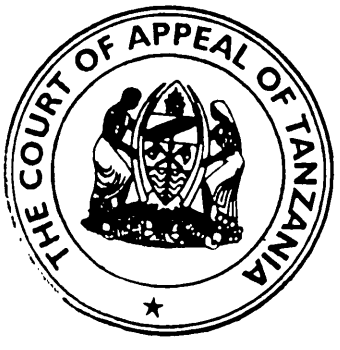
DATED at **DODOMA** this 29th day of April, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 29th day of April, 2022 in the presence of Mr. Leonard M. Haule, learned counsel for the Appellant and Mr. Meshack Lyabonga, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL