IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 144 OF 2020

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

MUGANYIZI PETER MICHAEL.....1ST APPELLANT
MAGIGE MWITA MARWA @ TATOO.....2ND APPELLANT
ABDALLAH PETRO @ AMOS ABDALLAH NDAYI.....3RD APPELLANT
ABDULRAHMAN ISMAIL ATHUMAN.....4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Mwanza District Registry at Mwanza)

(Matupa, J.)

dated the 12th day of November, 2019

in

Criminal Sessions Case No. 192 of 2014

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JUDGMENT OF THE COURT

5th July & 9th August, 2022

MWAMPASHI, J.A.:

The appellants, together with three others, namely; Chacha Wekena Mwita (second accused), Buganzi Edward (fourth accused) and Bhoke Marwa Mwita (fifth accused) who are not subject of this appeal, were arraigned before the High Court of Tanzania at Mwanza (the trial court) and charged with murder contrary to sections 196 and 197 both of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022] (the Penal Code). According to the particulars of the offence, it was alleged that on 13.10.2012 at Kitangiri area within the District of Ilemela in Mwanza

Region, the appellants and three other persons jointly and together murdered one Liberatus s/o Lyimo Barlow (the deceased).

The appellants and the above named three others, pleaded not guilty to the charge. Consequently, the trial was conducted whereby the prosecution called a total of twenty five witnesses and relied on thirty five exhibits to prove its case. On the other hand, the appellants and the three other persons were the only witnesses in their respective defence case and they tendered two exhibits in support of their defence, that is, two PF3s in respect of the 2nd accused person and the 1st appellant (exhibits D1 and D3).

After a full trial, the trial court was satisfied that the case against the appellants had been proved beyond reasonable doubt. The appellants were accordingly convicted and sentenced to suffer death by hanging. The three other accused persons were found not guilty and were accordingly acquitted. Aggrieved, the appellants have preferred this appeal.

From a total of 25 witnesses paraded and 35 exhibits tendered by the prosecution, the material facts upon which the prosecution case against the appellants was based and on which the conviction was founded, are as follows: On 13.10.2012 just after midnight, the

deceased and Dorothy Moses (PW1) had returned from a wedding preparatory meeting and were in the deceased's car, a Toyota Hilux Pickup with Reg No. T779 BFY (exhibit P3) in front of the gate of the house of PW1 waiting for the gate to be opened. While in the car, the two were invaded by a gang of five bandits who surrounded the car. Two of them confronted the deceased introducing themselves as policemen. They accused him of beaming and blindfolding them by his car headlights. The deceased, who by then, was the incumbent Regional Police Commander of Mwanza Region, rebuked them and introduced himself. It was at that moment when one of the two gangsters confronted the deceased and shot him at point-blank range to death. Thereafter, the gangsters snatched the deceased's radio call (exhibit P6), car ignition keys (exhibit P4) and robbed PW1's purse and a black cell phone make LG (exhibit P24) before they disappeared in the darkness. PW1 claimed to have identified the two gangsters particularly those who confronted the deceased, that is, the first and second appellants.

Upon being informed of the incident, SP Clephas Alfonce Magesa (PW4) the then OC- CID of Ilemela District rushed to the scene of crime and secured it. PW4 was later joined by other police officers including ACP Michael Joseph Konyo, the then Regional Crime Officer (RCO) of

Mwanza (PW8) who apart from finding that the deceased's radio call and the car ignition keys were missing, he was handed by ASP Kuthema Munna, one spent short gun cartridge (exhibit P2) which had been collected from the scene of crime. The deceased body was taken to Bugando Hospital where the autopsy was performed by Dr Kaima Jackson in the presence of ASP Sylvester Francis Njau the then OCS of Nyakato Police Station (PW5). It was established and not disputed during the preliminary hearing that, the cause of the death was respiratory cardiac arrest due to separation of the trachea and haemorrhage from a gunshot wound. The post mortem examination report to that effect was tendered and admitted as exhibit P1.

Immediately after the incident, that is, in the morning of 13.10.2012, the deceased's car (exhibit P3) was dusted and fingerprints were lifted from the car by No. WP 5127 D/C Salama Ali (PW6) at Mabatini Police Station where it had been pulled from the scene. Fingerprints lift cards to that effect were marked 1-30 by PW6 before they were handed over to PW8.

With the assistance of the cyber-crime unit and by using the International Mobile Equipment Identity (IMEI) number of the cell phone stolen at the scene of crime from PW1, the cell phone was tracked and on 21.10.2012 it was found in possession of one Bahati Augustino

(PW2). Upon being interviewed, PW2 told the police that she bought the cell phone from the 1st appellant on 13.10.2012. Acting on that lead, the 1st and 2nd appellants together with the 2nd, 4th and 5th accused persons were traced and arrested at Dar es Salaam on 24.10.2012 by a team of police officers led by the then Deputy RCO of Dar es Salaam, Salum Rashid Hamduni (PW16), Asst. Insp. Benjamin Kauna of Oysterbay Police Station and Inspector David Paulo (PW11) from the Police Headquarters Dar es Salaam. Before being escorted back to Mwanza by PW11, PW16 and SACP. Robert Mayala (PW20), the 1st appellant's cautioned statement (exhibit P33) was recorded by D/Sgt Fred (PW21) while that of the 2nd appellant (exhibit P32) was recorded by PW20. Exhibit P32 was received in evidence without any objection from the 2nd appellant as it was for exhibit P33 which was also not objected to by the 1st appellant. Both the 1st and 2nd appellants confessed to have participated in the death of the deceased. However, exhibit P33 was objected to by the advocate for the 4th accused person but it was overruled by the trial court.

According to the prosecution, further investigations by the Police led to the arrest of the 3rd and 4th appellants in Mwanza on 03.11.2012. The two confessed and led PW8, PW11 and other police officers to a certain house at Nyashana area in Mwanza belonging to Ikombe Pius

Lukago (PW13) where the deceased's radio call and the car ignition keys were retrieved from a cesspit tank. Inspector Vedastus Pius Bwingo (PW15) recorded the 3rd appellant's cautioned statement (exhibit P25) in which, apart from confessing that he was a member of the gang that invaded and killed the deceased, he also named and implicated the 1st, 2nd and 4th appellants in the killing incident.

There was also evidence from D/Cpl Richard Malundi (PW24) which was to the effect that, he took fingerprints of all the accused persons including the appellants on 30.10.2012 and 03.11.2012. The fingerprints he took were handed by him to (PW8).

On 06.11.2012, PW6 collected from PW8 the fingerprints lift cards and the fingerprints of the appellants and of other three accused persons. She took them to D/Sgt. Hassan Nassoro (PW23), the fingerprints comparison expert stationed at the Tanzania Forensic Laboratory. After the analysis and comparison, PW23 came to a conclusion that the fingerprints of the appellants matched with some of the sampled fingerprint impressions on the fingerprints lift cards. The relevant fingerprints examination report issued by PW23 (exhibit P23(a)) and the fingerprints samples including those taken from the appellants and from the car (exhibit P23(b)) were then handed back to PW6 on 03.10 2013 who returned them to PW8.

In their respective sworn defence, the appellants totally denied to have participated in the murder in question. The 1st and 2nd appellants admitted to have been arrested at Dar es Salaam but not in the manner, time and place claimed by the prosecution. Both the 1st and 2nd appellants stated that on the fateful night, they were at Dar es Salaam and not in Mwanza. While the 1st appellant claimed to have been arrested on 25.10.2012 at Bonyokwa Dar es Salaam, the 2nd appellant said he was arrested on 22.10.2012 at Chang'ombe. They both claimed to have been forced to sign on the cautioned statements tendered against them as exhibits P32 and P33.

On his part, the 3rd appellant claimed that he was arrested on 02.11.2012 in Mwanza for a different petty offence, remanded in custody for two days and was surprised when on 04.11.2012 he was joined with the 4th appellant, led to Nyashana area where he was forced to fish out a radio call and car ignition keys from a cesspit tank. He also maintained that on 05.11.2012 he was forced to append his signature on the cautioned statement he did not make. Despite being repudiated, the cautioned statement was admitted as exhibit P25. The 4th appellant claimed that he was arrested on 04.11.2012 in Mwanza and taken to Nyashana area where he witnessed the 3rd appellant being ordered to fish out the radio call and the car ignition keys from a cesspit tank. He

maintained that he did not commit the murder in question and that he did not know the 1st, 2nd and 3rd appellants before.

Having reached at the height of the trial, the trial court concluded that, given the cautioned statement of the 3rd appellant (exhibit P25), PW1's identification evidence and the unexplained fingerprints which were found on the surface of the car and attributed to the appellants, the case against the appellants had been proved to the hilt. From this conclusion, the trial court convicted the appellants of the offence of murder as charged and imposed a mandatory sentence of death by hanging as we have alluded to earlier. It is against the said backdrop the appellants preferred the instant appeal.

At the hearing of the appeal, Messrs. Anthony Nasimire, Constantine Mutalemwa, Deocles Rutahindurwa and Cosmas Tuthuru, all learned advocates, represented the first, second, third and fourth appellants, respectively. On the other side, the respondent Republic was represented by Ms. Bibiana Kileo and Messrs. Hemed Halid, Ofmed Mtenga, Ignas Mwinuka and Emmanuel Luvinga, all learned Senior State Attorneys.

Initially, there had been lodged two memoranda of appeal. The first memorandum containing six grounds was a joint memorandum by the

appellants which was lodged on 07.08.2020 and the second one, was a supplementary memorandum lodged by the 1st appellant on 28.04.2021 also comprised of six grounds. At the outset, when invited to argue on the grounds of appeal as raised in the two memoranda of appeal, the counsel for the appellants abandoned the supplementary memorandum of appeal lodged by the 1st appellant. They also abandoned all grounds of appeal raised in the joint memorandum of appeal except for the first one which reads as follows:

> *"That, the conviction and sentence was wrongly based on unlawful inconclusive and uncorroborated evidence of visual identification, confession statements and that of fingerprints profile test".*

In support of the above lone ground of appeal, it was Mr. Nasimire, learned advocate for the 1st appellant who addressed the court first. In regard to confession statements, Mr. Nasimire argued that the trial court erred in basing the conviction on the 3rd appellant's cautioned statement (exhibit P25) for three reasons; **one**, there was no independent corroborative evidence to support it and therefore the trial court ought to have warned itself in relying on it; **two**, the statement was recorded outside the prescribed period of four hours because according to the 3rd appellant he was arrested on 02.11.2012 while the statement was

recorded on 05.11.2012; and **three**, according to section 33 (2) of the Evidence Act [CAP 6 R.E. 2019, now R.E. 2022] (the Evidence Act), the cautioned statement required corroboration which, in the instant case, was lacking. He insisted that it was unsafe for the trial court to base the conviction on the third appellant's cautioned statement.

Regarding the fingerprint evidence, Mr. Nasimire submitted that the trial court wrongly based the conviction on fingerprints examination report (exhibit P29 (a)) and on PW23's testimony which was to the effect that, he compared the fingerprints of the appellants with the fingerprint impressions lifted from the deceased's car. He argued that the chain of custody in regard to that evidence was broken because, while according to PW23 the same was received by dispatch from the Tanzania Posts Corporation, PW6 testified to the effect that she handed the same to PW23. Mr. Nasimire further argued that the evidence was not reliable because it appears, the fingerprints samples in question passed through the hands of many unknown people hence raising the possibility of the same being tampered with. To cement his argument, Mr. Nasimire referred us to the case of **Ramadhani Mboya Mahimbo v. Republic,** Criminal Appeal No. 326 of 2017 (unreported).

Turning to PW1's identification evidence, it was argued by Mr. Nasimire that PW1's evidence on identification was weak because she

never described the intensity of the light that enabled her to identify the 1st and the 2nd appellants. He further submitted that, according to the trial court, PW1's evidence required corroboration which was not achieved as the cautioned statements also needed corroboration. It was argued that in the absence of corroboration of both PW1's account and the cautioned statements, the trial court could not have therefore relied on such evidence to ground the conviction. For the above arguments and reasons, Mr. Nasimire prayed for the appeal against the 1st appellant to be allowed as the case against him was not proved to the required standard.

Mr. Mutalemwa for the 2nd appellant associated himself with what had been submitted by his friend Mr. Nasimire. He however added that, the fingerprint evidence was weak and could not corroborate the evidence on the cautioned statements. He argued that while the fingerprints examination report (exhibit P29(a)) was issued on 24.07.2013, the record of appeal at page 35 shows that the fingerprints examination report intended to be tendered at the trial was dated 24.07.2014. Mr. Mutalemwa urged the Court to expunge the report tendered by PW23 because it was not the report that was listed during the committal proceedings.

It was on the 3rd appellant's cautioned statement to which Mr. Mutalemwa had a lengthy submission. He argued that the admission of the statement in evidence was bitterly opposed before the trial court on two grounds. That, it contravened sections 50 and 57 of the Criminal Procedure Act, [CAP 20 R.E.2002, now R.E. 2022] (the CPA), and also that it was not freely and voluntarily made. It was submitted by him that, while the ground on the voluntariness of the statement necessitated a trial within a trial to be conducted, the ground on the violation of sections 50 and 57 which was a procedural flaw had to be determined in the main trial and in the presence of the assessors. He contended that since the ground on the violation of sections 50 and 57 was determined in the trial within a trial in the absence of the assessors, then the whole trial was vitiated. Mr. Mutalemwa further submitted that the trial court did not correctly apply the law and that it failed to discharge its statutory duty which occasioned a miscarriage of justice. He insisted that since the omission affected all the appellants then the remedy is for the case to be retried by another High Court Judge with a new set of assessors. On so arguing, Mr. Mutalemwa relied on the case of **Juma Gulaka and Two Others v. Republic**, Criminal Appeal No. 585 of 2017 (unreported).

While concurring and associating himself with the submissions made by his two learned friends, Mr. Rutahindurwa for the 3rd appellant, intimated that he was not in agreement with Mr. Mutalemwa for the case to be retried. He insisted that the appeal should be allowed because the 3rd appellant's cautioned statement on which the trial court based the conviction was procured out of the prescribed period. Mr. Rutahindurwa explained that while the 3rd appellant was arrested on 02.11.2012 at Soko Kuu Mwanza, the cautioned statement was recorded on 03.11.2012 at 18:00 hours. He insisted that, once the statement is expunged there would be no evidence to prove the case against the 3rd appellant and the retrial of the case, as prayed by Mr. Mutalemwa, will therefore be untenable. He therefore prayed for the appeal to be allowed by quashing the conviction and setting aside the sentence.

Mr. Tuthuru for the 4th appellant agreed with his learned friends that PW1's identification evidence was weak and that the 3rd appellant's cautioned statement should be expunged. His concentration was on the fingerprint evidence. He argued that the evidence was not reliable because the primary material, that is, the fingerprint impressions, were lifted by PW6 from the car at Mabatini Police Station and not at the scene of crime. He insisted that since the car had no ignition key and as it was pulled from the scene of crime to Mabatini Police Station, the fact

that the evidence could have been distorted cannot be ruled out. The learned counsel further argued that there was no background on PW6's qualifications and the fingerprint impressions samples from the car were therefore lifted by an unqualified witness. On this, he referred us to page five of the book titled "*Scientific Crime Investigation & Court Decisions'* by John Raphael Oguda, where the author puts it that a fingerprint expert requires a lot of learning on that field. He also cited the case of **DPP v. Shida Manyama @ Selemani Mabula,** Criminal Appeal No. 285 of 2012 (unreported).

Still on the fingerprints evidence, Mr. Tuthuru faulted the relevant report by PW23 arguing that the same was not conclusive as PW3 neither explained the methodology used in reaching at his conclusion nor testified on the principle on which his conclusion was based. He also argued that there was a complaint that the appellants' fingerprints were taken after the appellants have been arraigned before the trial court which was not addressed by the trial court. He therefore prayed for the appeal to be allowed because the case against the appellants was not proved beyond reasonable doubt.

Mr. Halid, learned Senior State Attorney for the respondent Republic, began by expressing the position that the respondent Republic was opposing the appeal. He then argued that the trial court did not err

in convicting the appellants basing on PW1's visual identification evidence, the 3rd appellant's cautioned statement and the fingerprint evidence.

As regards to the 3rd appellant's cautioned statement, Mr. Halid submitted that the statement was properly received in evidence and that the rest of the appellants were implicated in that statement. He further argued that the trial court based the conviction on the 3rd appellant's cautioned statement after it had properly warned itself on the danger of relying on such evidence.

Regarding the fingerprint evidence, Mr. Halid contended that PW6 was qualified on lifting fingerprints from scenes of crime and therefore that she properly lifted the leftover fingerprints from the relevant car. He argued that the authorities cited to fault PW6's expertise are irrelevant because they relate to expertise on analysis, evaluation and comparison of fingerprints and not on taking, collection or lifting fingerprints from the scene of crime. He further argued that while it cannot be disputed that there might have been many people who could have touched the car when it was being pulled from the scene of crime to Mabatini Police Station, PW6 lifted many leftover fingerprints from every part of the car and it was among those fingerprints that PW23 found some of them matching the appellants' fingerprints. He insisted that PW6 and PW23

were qualified experts in their respective fields and that they had acquired their expertise not only from experience but also from relevant studies within and outside the country. Mr. Halid did also discount the complaint that the appellants' fingerprints were taken after the trial had been commenced because the evidence from PW24 is to the effect that the same were taken on 03.11.2012 and 30.10.2012 which is well before the commencement of the trial in 2016. He also submitted that, the chain of custody was not broken because the fingerprint samples were directly taken by PW6 from PW8 at Mwanza to PW23 at Dar es Salaam and then back to PW8.

In addition to what was submitted by Mr. Halid, Mr. Mtenga argued that fingerprint evidence is unique and is a kind of evidence that cannot be easily tampered with. He insisted that it was established by the evidence on record that the chain of custody was smooth and not broken. On this, he referred us to the cases of **Mashaka Pastory Paulo Mahengi @ Uhuru and Five Others v. Republic**, Criminal Appeal No. 49 of 2015, **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017 and **Chacha Jeremiah Murimi and Three Others v. Republic,** Criminal Appeal No. 551 of 2015 (all unreported).

Responding to the submissions made by Mr. Mutalemwa on the manner the 3rd appellant's cautioned statement was admitted in

evidence, Mr. Mtenga argued that the way the statement was admitted after the objections to its admissibility had been overruled, did not prejudice or occasion any failure of justice. He contended that the application of sections 50 and 57 of the CPA entailed legal issues for which the participation of assessors was not required. Referring us to page 264 to 266 and then to the relevant trial court's ruling on page 410 of the record of appeal, it was argued by him that in any case, the issue was properly dealt with and addressed by the trial court following the extensive submissions made by the counsel for the appellants on that issue. To concretize his arguments, he referred us to the decision of the Court in **Bahati Ndunguru @ Moses v. Republic**, Criminal Appeal No. 361 of 2018 (unreported). Mr. Mtenga did also argue that the 3rd appellant was arrested on 03.11.2012 and not on any other date as claimed by him.

As on the difference of the dates of the fingerprint examination report (exhibit P29 (a)) *vis-a-vis* that what is shown in the list of exhibits intended to be relied upon by the prosecution in the trial, it was argued by Mr. Mtenga that, the difference was occasioned by a typing error and also that it was an issue of fact which was not raised before the trial court. He insisted that the appellants had ample time to raise it before the trial court or even cross-examine PW23 on it. On this, he relied on

the decision of the Court in **Sospeter Nyanza v. Republic,** Criminal Appeal No. 289 of 2018 (unreported).

In rejoinder, it was argued by Mr. Nasimire that, while it is true that the trial court warned itself on acting on the 3rd appellant's cautioned statement, it failed to abide to the warning. In regard to the fingerprint evidence, he insisted that the chain of custody was broken and that the collection of the same from the source was doubtful. Mr. Nasimire reiterated his earlier position that the 3rd appellant's cautioned statement and the fingerprint evidence was not free from reasonable doubts.

On his part, Mr. Mutalemwa, stuck to his guns insisting that there was a violation of sections 50 and 57 which could not be decided in the trial within a trial. He argued that whether the statement was illegally procured or not was a point of law which ought to have been decided from submissions made by the parties and not in the trial within a trial. He also argued that the issue has been properly raised before this Court and at this stage because it is on a point of law.

We have dispassionately heard the submissions for and against the appeal and after considering the ground of appeal and also the basis for the trial court conviction, we find that the determination of this appeal centres on three areas which are; **first,** the weight and reliability of

PW1's visual identification evidence; **two**, the probity and reliability of the cautioned statement of the 3rd appellant; and **three**, the reliability of fingerprint evidence. All these issues boil down to an ultimate major general issue on whether the charge against the appellants was proved to the required standard.

However, before we proceed, we find it apposite to preface our deliberations by restating the well settled principle of law that this being a first appeal, the Court is mandated and obligated to re-evaluate and analyse the facts and the whole evidence advanced in the trial court resulting in the impugned judgment. In so doing, the Court is also mandated to even arrive at its own decision which may not necessarily be the same as that of the trial court. See- **D.R. Pandya v. Republic** (1957) E.A. 336, **Hassan Mzee Mfaume v. Republic** [1981] T.L.R. 167, **Joseph Stephen Kimaro and Another v. Republic,** Criminal Appeal No. 340 of 2015**, The Director of Public Prosecutions v. Stephen Gerald Sipuka,** Criminal Appeal No. 373 of 2019 (both unreported) and also rule 36 (1)(a) of the Tanzania Court of Appeal Rules, 2009 which provides that:

> *"36-(1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may-*

(a) re-appraise the evidence and draw inferences of facts;

Guided by the above position, we propose to begin with the issue on PW1's identification evidence which, to our considered view, need not detain us at all. It is a settled position that, visual identification is of the weakest kind and most unreliable. For the court to act and rely on such evidence, it must be satisfied that all possibilities of mistaken identity have been eliminated and that the evidence is absolutely watertight. See- **Waziri Amani v. R.** [1980] T.L.R. 250 and **Kamuli Mashamba v. Republic,** Criminal Appeal No. 325 of 2013 (unreported).

In the instant case, it is common ground that the incident happened at night and therefore for PW1's visual identification evidence to be acted upon, it required a cautious approach. The record is clear that PW1's evidence that she identified the 1st and the 2nd appellants at the scene of crime was acted upon by the trial court and it formed the basis for the conviction. In acting on it, the trial court found it corroborated by the 3rd appellant's cautioned statement (exhibit P25) and the fingerprint evidence. The question we have asked ourselves is whether such evidence was cogent and watertight to be acted and relied upon by the trial court in convicting the appellants. Fortunately, enough, the answer to the above posed question is not farfetched. It was given by the trial

court itself. The fact that the prevailing conditions were unfavourable for positive identification was acknowledged by the trial court. In its judgment at page 562 of the record of appeal, the trial court is on record making the following observations:

> *"There is no doubt that the identification was done under unfavourable conditions. The murder took place at night, there was a short conversation which the witness said that it took place between the two accused persons and the deceased person".*

Again, at page 596 of the record of appeal, the trial court observed as follows:

> *"There is no denying the identification by the said PW1 Dorothy was done under unfavourable conditions, as it was in the night, she identified persons she did not know in advance and that she only gave general description of the persons who she identified".*

If we may add to what the trial court observed as above demonstrated, PW1's identification evidence was so weak and unreliable because there is evidence from PW4 that when he rushed and got at the scene of crime, PW1 never described to him any of the bandits she claimed to have identified. There is also no evidence that when her

statement was being recorded at the police station, she gave any description of the persons she claimed to have identified at the scene of crime. It should be emphasized that one of the factors an identifying witness should fulfil for his identification evidence to be held watertight and reliable is that he should give the description of the assailant, such as body build, complexion, size, attire, or peculiar body features, to the next person that he initially encounters and should repeat the description at first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence. In the instant case, PW1 did not offer adequate description of the bandits she alleged to have identified. See- **Omari Iddi Mbezi and Three Others v. Republic**, Criminal Appeal No. 227 of 2009 (unreported).

The trial court having properly found that PW1's identification evidence was shaky, doubtful, not watertight and insufficient to prove that the 1st and 2nd appellants were correctly identified at the scene of crime, it erred when it acted upon it after finding that it was corroborated, firstly, by the 3rd appellant's cautioned statement and secondly by the fingerprint evidence. Since PW1's evidence was found weak, unreliable and not watertight, the same could not have the evidential value to corroborate or be corroborated by any other piece of evidence. We therefore agree with the counsel for the appellants that

PW1's evidence was unreliable and it ought not to have been acted upon by the trial court in convicting the appellants. PW1's evidence is therefore discounted and shall be disregarded.

The appellants' complaint about the 3rd appellant's cautioned statement (exhibit P25) which basically is on the procedural aspect, is twofold; **firstly**, that the statement was recorded outside the prescribed period of four hours in contravention of section 50 (1) (a) of the CPA; and **secondly**, that the trial court improperly and unprocedurally determined the admissibility of the 3rd appellant's cautioned statement, which had been objected for contravening sections 50 and 57 of the CPA, in the trial within a trial and in the absence of the assessors. It has been argued on the second limb of the complaint that, by determining the issue on the contravention of sections 50 and 57 of the CPA in the trial within a trial in the absence of the assessors, failure of justice was occasioned and the whole trial was vitiated.

Regarding the first limb of the complaint about the 3rd appellant's cautioned statement being made outside the prescribed period, the relevant provision of the law is section 50 (1)(b) and (2) (a) of the CPA which provides that:

"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 offender;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person or causing the person to do any act connected with the investigation of the offence-

(a)While the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation".

In the instant case, the complaint that the 3rd appellant's cautioned statement was recorded out of time is based on the claim by the 3rd appellant that he was arrested on 02.11.2012 and that his statement was recorded on 05.11.2012. However, as opposed to what is being claimed by the 3rd appellant, there is evidence in abundance from the arresting officers including PW11 and the witnesses who saw him being arrested, his house being searched and who also saw him fishing out the radio call and the car ignition keys from the cesspit tank. This is as well evident in the account of PW12, PW13 and PW14 which is to the effect that the 3rd appellant was arrested on 03.11.2012. We therefore find it established from the evidence on record that the 3rd appellant was arrested on 03.11.2012 and not on 02.11.2012 as claimed by him. We also wish to restate, at this juncture, that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him. See- **Goodluck Kyando v. Republic**, [2006] T.L.R. 363. We find no reason to disbelieve the coherent and consistent account of the stated prosecution witnesses on the arrest of the 3rd appellant and his lead to where the alleged belongings of the deceased were discovered and retrieved from a cesspit tank at PW13's house.

As regards to the time the 3rd appellant was under restraint, the evidence shows that he was arrested in morning hours of 03.11.2012 as it was testified by PW12 who was awakened by the police officers to go and witness the search being conducted in the 3rd appellant's house. This witness also told the trial court that the exercise of retrieving the radio call and the car ignition keys at PW13's house, which he also witnessed, lasted up to 13:30 hours. There is also evidence from PW13 to the effect that he was called by his wife at 12:30 hours and asked to return home as the police officers were looking for him. Basing on the above evidence, it is clear that from the time the 3rd appellant was arrested up to 13:30 hours, he was being taken to different places for investigation purposes and therefore such period should not be reckoned as part of the prescribed period of four hours as provided by section 50 (2) (a) of the CPA.

The 3rd appellant's cautioned statement (exhibit P25) was recorded by PW15. According to him, after the 3rd appellant had been brought at the Police Station and handed over to him by the RCO (PW8), he began to record the statement at about 15:20 hours to 18:02 hours. This is also evident in the relevant cautioned statement (exhibit P25). From the above evidence, and on account of the fact that the investigations had been going on, before the 3rd appellant could be conveyed to the police

station, we find that the delay in recording his statement was justified in terms of the dictates of section 50 (2) (a) of the CPA. We therefore find the complaint that the 3rd appellant's cautioned statement was recorded out of time unfounded and baseless.

We should now turn to the second limb of the complaint concerning the manner the trial court determined the objection raised by the defence that the 3rd appellant's cautioned statement should not be admitted in evidence on the ground that sections 50 and 57 of the CPA had been contravened. There is no dispute that the said point of the objection was determined by the trial court in the trial within a trial and in the absence of the assessors together with the point on the voluntariness of the cautioned statement. Admittedly, when a court has to make a decision either to admit a cautioned statement in evidence or not and where there is an objection for the same not to be admitted on a ground that it was not freely and voluntarily made, a trial within a trial has to be conducted to determine its voluntariness. A trial within a trial is conducted in the absence of the assessors mainly for purposes of preventing them from being prejudiced should the objection on the admissibility of the statement be sustained. In the case of **Lutamla Basu @ Ivinzi v. Republic**, Criminal Appeal No. 128 of 2008 (unreported), the Court, apart from stating that the practice of

conducting a trial within a trial stem from section 27(1) of the Evidence Act, it also observed that:

> *"In terms of section 27(1) of CAP 6, it is only confessions made voluntarily to a police officer which are admissible in evidence. Section 27(2) imposes the burden on the prosecution to prove that the confession was made voluntarily. Section 27(3) indicates what factors make a confession to be not voluntary. It is when it is obtained by threat, promise or other prejudice held out by the police officer to whom it is made.* ***This means that a trial within a trial is conducted purposely to establish whether or not the confession was made voluntarily.*** *The onus of proving that the confession was made voluntarily lies on the prosecution".*
>
> [Emphasis supplied]

From the above, it is therefore clear that a trial within a trial is conducted within the main trial only when an objection to the admissibility of a cautioned statement is raised by the defence on the ground that the same was made involuntarily. That being the position, it therefore goes without saying that in the instant case, the trial court committed a procedural irregularity when it heard and determined in the

trial within a trial the point of objection which was not grounded on the voluntariness of the 3rd appellant's cautioned statement.

However, much as we agree that there was such a procedural irregularity, we think the issue, under the circumstances of this matter, is whether by dealing and determining the objection raised and grounded on the contravention of sections 50 and 57 of the CPA, in that manner, the trial court committed a fatal irregularity occasioning a miscarriage or failure of justice.

After examining the record of appeal, particularly on how the objection was raised and how the trial court dealt with and determined it, we are satisfied that the appellants were not prejudiced in any way and no failure of justice could be said to have been occasioned. In that regard, we are fortified by the fact that in the trial within a trial, the parties were afforded the right to give evidence, the counsel for the parties made extensive submissions for and against the objection and in its ruling, the trial court, having considered the submissions made and the relevant law, properly ruled that the objection was unmerited. In the same vein, we also find the complaint that the assessors were not involved, immaterial because we do not see that, under the circumstances of this matter, the assessors could have rendered any

useful assistance to the trial court on the issue which was mostly on a question of law and not facts.

We also find the complaint unmerited because we are mindful of the position of the law under section 169 (1) of the CPA where trial courts are given absolute discretion to decide whether or not to admit evidence of which its admissibility is objected on the ground that the evidence was obtained in contravention of the provisions of or failure to comply with the provisions of the CPA or any other law. In the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported) where the Court was faced with a complaint of a similar nature, it was not only observed that not every contravention of the provisions of the CPA leads to the exclusion of the evidence in question, but it was also stated that:

> *"It follows in our view therefore that the admission of evidence obtained in contravention of the CPA is in the absolute discretion of the trial court and that before admitting or rejecting such evidence the parties must contest it and the trial court must show that it took into account all the necessary matters into consideration and is satisfied that if it admits it, it would be for the benefit of public interest and the accused rights and freedoms are not unduly prejudiced".*

We have also noted that in his argument that the trial court erred in determining the objection grounded on the contravention of sections 50 and 57 of the CPA in the trial within a trial in the absence of the assessors and therefore that the case should be retried, Mr. Mutalemwa placed much reliance on the case of **Juma Guluka and Two Others** (supra). With due respect, we find the case cited distinguishable from the instant case. In **Juma Guluka and Two Others**, the trial was commenced and conducted to its finality without the appellants having been called to enter their respective plea to the information. It was under those circumstances that the Court, in allowing the appeal and ordering a retrial, observed that, where the court substantially omits to perform a prescribed obligation in accordance with the law, depending on the circumstances of the case, a retrial is in the interest of justice. In the instant case, there is no such fatal irregularity and it is for that reason that we find the case cited by Mr. Mutalemwa distinguishable to the circumstances of the instant case.

For the above given reasons and relying on the position stated in **Nyerere Nyague** (supra), we find the complaint relating to the determination of the point of objection on contravention of sections 50 and 57 of the CPA in the trial within a trial and in the absence of the assessors, of no merit and we accordingly dismiss it.

Next is a complaint on the fingerprint evidence which, it is argued, came from unqualified witnesses and that its chain of custody was broken.

Beginning with the complaint on qualifications of PW6 who lifted the fingerprint impressions from the car and PW23 who analysed and compared the fingerprint impressions lifted from the car and the appellant's fingerprints, it is our observation from the record of appeal that the witnesses were experts in their respective fields and therefore they were qualified witnesses. Though it is true that PW6 was not led in examination-in-chief to lay the foundation on her qualifications and expertise in fingerprints taking, she stated in cross-examination that she holds a certificate in fingerprints taking. She gave elaborative and detailed evidence on the procedure of taking fingerprints from scenes of crime and its preservation. As for PW23, who had 21 years experience in fingerprint comparison and who had attended trainings in that field within the country and abroad, questioning his qualifications and competence is absolutely out of place. PW23 had attended trainings in his respective field in India, Botswana and Turkey and he is a gazetted expert in fingerprint comparison and analysis. It is unfortunate that the counsel for the appellants are questioning the competency of these two witnesses without displaying the nature of qualifications such witnesses

are required to possess. Further, the evidence of PW6 and PW23 was not challenged by any other expert evidence and we therefore find their evidence cogent and credible. We have no reason to doubt neither their credibility, see- **Goodluck Kyando** (supra) nor their expertise and we are satisfied that PW6 and PW23 were experts in their respective fields and further that they were qualified witnesses for that purpose. The complaint about the competency of PW6 and PW23 is therefore found unmeritorious.

Turning to the chain of custody, we are mindful that a chain of custody entails the handling of what is seized as an exhibit from a source or scene of crime up to the time of its analysis in the laboratory or otherwise to the time of tendering it in court as evidence. It is all about ensuring that what is tendered in court as evidence is the same which was seized or collected from the scene of crime or source and which was analysed in the laboratory or otherwise. It is also a settled principle of law that chain of custody can be established by documentation (paper trail) or oral account. See- **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017 and **Marceline Koivogui v. Republic,** Criminal Appeal No. 469 of 2017 (both unreported).

In the instant case, it is being complained that the chain of custody of the fingerprint evidence (exhibit P29(b)) was broken hence

the possibility of the same being tampered with. In so complaining, the appellants banked on the varying account from PW6 and PW23 whereby while PW6 claimed that she physically handed the exhibit to P23 at Dar es Salaam, PW23's evidence is to the effect that the same was brought to him through the Tanzania Posts Corporation.

Admittedly, there is a varying account between PW6 and PW23 to that effect. However, the question that we have asked ourselves is whether, under the circumstances of this case, the varying account and the inferred break of chain of custody raises any possibility of the exhibit being tampered with and hence denting the prosecution case against the appellants. In our respective view and basing on the circumstance of this case, we find the varying account and the inferred break of the chain of custody not fatal. We will explain.

First of all, the nature and the uniqueness of the relevant exhibit, that is, fingerprints, makes it very impossible to even think that it could be tampered with. It is common ground that no two persons including twins have ever been found to have the same fingerprints. It is also scientifically proven that fingerprints also vary between one's own fingers. See- ***Hillary Moses, Fundamentals of Fingerprint Analysis***, CRP Press, 2015 and **Robert John Buckley v. Regina,** [1999] EWCA,

Crim 1191), cited by the Court in **Mashaka Pastory Paulo Mahengi @ Uhuru and Five Others** (supra).

Putting its uniqueness aside, fingerprints are good source of evidence because for centuries forensic scientists have used fingerprints in criminal investigations as a means of scientific identification. Fingerprint identification is one of the most important criminal investigation tools due to two features: their persistence and their uniqueness. A person's fingerprints do not change over time. The friction ridges which create fingerprints are formed while inside the womb and grow proportionally as the baby grows. (See- https://www.crimemuseum.org.)

In the instant case, there is no complaint from the appellants that, at any time after being arrested and before the exhibit had reached PW23, the appellants were forced to touch or place their fingerprints on the relevant car or that they accidently or innocently came into contact with the car. That being the case, the possibility of the fingerprint impressions lifted from the car on 13.10.2012 by PW6 being tampered with by planting and replacing them with the appellants' fingerprints, is something unthinkable. We are of a considered view that considering the uniqueness of every human being's fingerprint and the fact that there is no evidence that the appellants came into innocent contact of

the car after the incident, the prosecution varying account on how exhibit P29(b) reached PW23, is immaterial.

There should also be a differentiation of chain of custody in respect of exhibits which can change hands and be tampered with easily and those which cannot. In this respect, the Court in **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported) observed that:

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

Further, in **Abas Kondo Gede** (supra) the Court stated that:

> *"Therefore, even where the chain of custody is broken, the court may still receive the exhibit into evidence depending on the prevailing circumstances in every particular case provided it*

is established that no injustice was caused to the other party".

We have also taken in consideration the fact that while PW6 gave her testimony four years after she had lastly handled the exhibit, PW23 testified after the lapse of seven years. Under those circumstances, as lapse of time undeniably goes with lapse of memory, the variation in the evidence between PW6 and PW23 on how the exhibit reached PW2 which does not go to the root of the case, is very minor and inconsequential. See- **Kiroiyan Ole Suyan v. Republic**, Criminal Appeal No. 114 of 1994 and **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (both unreported).

For the above given reasons, we are therefore satisfied that the chain of custody of exhibit P29(b) on fingerprint evidence was intact. There was sufficient oral account from the prosecution explaining how the fingerprint evidence (exhibit P29(b)) was collected by PW6 and PW24 and then handed over to PW8 for storage. Thereafter, the exhibit was handed to PW6 who took it to PW23 for comparison and analysis. PW23 later handed back the exhibit to PW6 who took it back to PW8 who kept it till when he handed the same to PW23 who finally tendered it to the trial court.

Other complaints on the fingerprint evidence were that the appellants' fingerprints were taken after they had been arraigned before the committing court and also that the date of the fingerprint examination report (exhibit P29(a)) which is 24.07.2013 differs from the date of the examination report which was mentioned during the committal proceedings as one of the exhibits the prosecution would tender and rely upon in the trial which is shown to be 24.07.2014.

We have carefully examined the record of appeal and found that the complaints are baseless. Firstly, there is ample evidence which is to the effect that while the 1st and 2nd appellants' fingerprints were taken by PW24 on 30.10.2012, the two appellants were arraigned before the committing court on 31.10.2012. Further, while the 3rd and 4th appellants' fingerprints were taken on 03.11.2012, these two appellants were joined to the charge and arraigned before the committing court on 06.11.2012. It cannot therefore be complained by the appellants that their fingerprints which are part of exhibit P29(b) were taken from them after they have been arraigned before the committing court. Nevertheless, even if that would have been the case, we do not see if, under the circumstances of this case, it would have been of any fatal effect. It should be borne in mind that one's fingerprints are persistent, unique and they never change over time. For that reason and under the

circumstances of this case, the issue whether the appellants' fingerprints were taken before or atter the arraignment becomes pointless.

We have, as well, noted the difference between the date indicated in the fingerprint examination report (exhibit P29(a)) and that shown to have been the date of the examination report the prosecution indicated, during the committal proceedings, as one of the exhibits intended to be tendered in the trial. However, we agree with the learned Senior State Attorneys for the respondent that, under the circumstances of this case, the difference is inconsequential. We have observed the two dates in question, that is, 24.07.2013 and 24.07.2014 and came to a considered view that the difference might have been occasioned by a slip of a pen which is human and there was no failure of justice. This complaint therefore, fails too.

We also note that there has been a complaint that since the car (exhibit P3) was moved from the scene of crime to Mabatini Police Station before the fingerprint impressions could be lifted from it by PW6 then the possibility of distortion of the leftover fingerprints on the car cannot be ruled out. On this, it is our considered view that basing on the evidence from PW4 which is to the effect that the scene of crime including the relevant car were secured immediately after the happening of the incident and also from PW8 that the car was moved from the

scene of crime by lifting it to Mabatini Police Station, then the possibility of the evidence being distorted is minimal. We are also of the view that due to the nature of the evidence in question, that is, fingerprints, the possibility of the distortion of the evidence caused through the process of moving the car, if any, would have been to the benefits of the appellants or to anyone who might have left his fingerprints on the car. We think that the process would have caused the leftover fingerprints on the car to either be totally erased or smudged hence could not be detected during the dusting and fingerprints lifting by PW6 which, as we have alluded to above, would have been to the appellants' benefit. We therefore find this complaint unmerited.

Having reassessed the evidence on record, the final issue for disposition is whether the charge against the appellants was proved to the hilt. Since it is already settled that the evidence on visual identification was weak as it could not in the circumstances, be solely acted upon to ground the conviction of the appellants, thus, the remaining evidence for our consideration is on the confessional statements and the fingerprints.

As for the confessional statements and as earlier stated, the 1st, 2nd and 3rd appellants confessed to have been involved in the fateful incident in which the deceased was killed. A follow up question is what is

the evidential value of such confessions. In **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007 (unreported) cited by the Court in **Majid Hussein Mboryo and Two Others v. Republic,** Criminal Appeal No. 141 of 2015 (unreported), it was stated, among other things, that:

> *"...the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt".*

Confessional statement is therefore regarded as the best evidence because it comes from an accused himself who admits to have committed the offence in question. The confessional statement must however, be both voluntary and must provide a true account. In **Joseph Stephen Kimaro and One Another v. Republic,** Criminal Appeal No. 340 of 2015 (unreported), the Court subscribed to what was earlier stated in **Juma Magori @ Patrick and Four Others v. Republic,** Criminal Appeal No. 328 of 2014 (unreported) that:

> *"...We take it to be trite law that for a confessional statement to be proof of commission of an offence by its maker, it must not only have been made freely and voluntarily but must also be nothing but true".*

Further, in **Emmanuel Lohay and Udagane Yatosha v. Republic**, Criminal Appeal No. 278 of 2010 (unreported), the Court observed that:

> *"...the court described the essence of confessional statements as such that they should shed some light on how the deceased concerned met his death, role played by each of the accused person, such details as to assure the courts concerned that the person making the statement must have played some culpable role in the death of the deceased".*

We subscribe to the above position of the law and conclude that the confession by the 1st and 2nd appellants in their respective cautioned statements where each of them, in clear terms, confessed to have actively participated in the murder of the deceased, was sufficient to find them guilty of the murder in question. In his detailed cautioned statement (exhibit P33) appearing at page 752 of the record of appeal, the 1st appellant confessed to have shot the deceased after being so ordered by the 2nd accused and he also implicated the 2nd appellant. The 2nd appellant's cautioned statement (exhibit P32) appears at page 742 of the record of appeal. In his statement the 2nd appellant gave account on what happened on the fateful night to the day he was arrested and he confessed to have participated in invading and surrounding the

deceased car. He also confessed that he saw the 1st appellant shooting the deceased at point-blank range to his death.

On his part, the 3rd appellant also confessed to have been among the bandits who invaded and murdered the deceased and in his statement he named and implicated the 4th appellant and the 1st appellant, whom he claims is his brother. We are mindful of the trite law that a repudiated confession can still form the basis for conviction even without corroboration but after the court has warned itself of the danger of basing conviction on such evidence. We are also aware of the position that as a matter of practice a retracted or repudiated confession requires corroboration. See- **Ali Salehe Msutu v. Republic** [1980] T.L.R.1. The law on repudiated or retracted confession was restated by the Court in **Flano Alphonce Masalu @ Singu v. Republic,** Criminal Appeal No. 366 of 2018 (unreported) thus:

> *"The law is trite that where an accused person retracts/repudiates his confession, the court can convict him on the uncorroborated confession provided that it warns itself of the dangers of acting solely on such confession and if it is fully satisfied that the confession cannot be but true".*

In conclusion on the 1st, 2nd and 3rd appellants' cautioned statements, we have thoroughly passed through them and observed that the said three appellants gave account in detail on what transpired on the fateful night to the time they were arrested. They explained the role each of them played. Some of the details given by the 1st, 2nd and 3rd appellants in their respective cautioned statements could not be given by any other person but by the appellants themselves. From what we have observed we are satisfied that, as rightly found by the trial court, the statements contained nothing but the truth.

It is our further observation that, in the 1st, 2nd and 3rd appellants' cautioned statements it is not only the accounts of how and why the deceased was murdered which was given, but in the statements, all the ingredients of the offence of murder were also established. The appellants stated in their respective cautioned statements that in the fateful night they had been on the robbery spree whereby having invaded and committed robbery at different places including a certain bar at Pasiansi Kiseke area, a kiosk at Lumala and a bar/supermarket of Mama Mzungu, they went and settled at Kitangiri cemetery for dividing among themselves the loot. From the cemetery they again entered in the streets and that is when they encountered the deceased who was in the company of PW1 in his car parked in front of the gate of PW1's

house. The appellants regarded the encounter as another robbery spree opportunity. They therefore invaded and surrounded the car and started by accusing the deceased of beaming and blinding them by his car headlights. When asked by the deceased to introduce themselves the appellants said they were police officers. The deceased who by then was the incumbent Region Police Commander of Mwanza Region, realized that the appellants were not police officers. He rebuked them and it was when he bent down looking like he was picking something under the car seat when the 1st appellant shot him in the neck. In the nutshell that is what the 1st, 2nd and 3rd appellants stated in their respective cautioned statements. In his cautioned statement, for instance, the 1st appellant confessed and gave the following explanation of the incident:

> *"...tulipofika makaburini tulikaa pale hadi majira ya kama saa 00.30 hrs ya 13/10/2012 lengo letu ni kujua kila mmoja amepata kitu gani ili tukusanye. Tulishafikisha simu kumi na nne pamoja na fedha taslimu 300,000/=. Tulikubaliana kugawana palepale. Mimi nilipata 50,000/= tulipomaliza tukaulizana pa kupitia. Tulikubaliana tupitie Kitangili Kirumba Makongoro hadi Isamilo kuelekea nyumbani. Hapo tulipotoka pale makaburini kuingia barabarani ndiyo tukakakutana na gari moja pick-up ikiwa inapiga honi kukaribia gate la nyumba lakini mwanga wa*

taa ulielekezwa kwetu watu tukasema hela hiyo na kuzingira gari na kutoa sauti kali kwa kusema kwa nini unatumulika. Yeye dereva kwa kuwa alikuwa ameshusha vioo vya gari alituuliza nyinyi akina nani? Sisi tukasema sisi ni askari. Yeye akasema nyinyi ni Polisi wa wapi? Wapumbavu nini. CHACHA akafungua mlango na kumvuta chini kabla hatujampiga risasi na akawa anakataa huku anainama chini ya kiti chake cha gari kama anataka kuokota kitu akijitambulisha kuwa ni Kamanda wa Polisi Mwanza. CHACHA akatoa amri piga risasi ndipo mimi nikampiga risasi shingoni kwa kutumia bunduki aliyonipa CHACHA ambayo ni shotgun greener....".

It is therefore clear from the three cautioned statements that the appellants had a common intention to rob the deceased and in the process they ended up murdering him. The weapon used and the part of the body the deceased was shot, clearly show that the appellants intended not only to cause or do grievous harm to the deceased but also that they intended to cause his death.

Regarding the 4th appellant's conviction, we find that the trial court rightly acted on the confession by the 3rd appellant which also implicated the 4th appellant, to find the 4th appellant guilty after the same has been

corroborated by the fingerprints evidence. This was in terms of section 33 (1) and (2) of the Evidence Act under which it is provided that:

> "33. -(1) *When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.*
>
> *(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co accused."*

Finally, in our respective view, we find the fingerprint evidence quite reliable as it placed the appellants at the scene of the killing incident. See- **Mohanlal v. Ajit Singh,** 1978 SC 1183 and **Jaspal Singh v. State of Punjabc,** AIR, 1970 SC 1708), cited in **Mashaka Pastory Paulo Mahengi @ Uhuru and Five Others** (supra). From the totality of the prosecution account drawn from the confessional statements of the 1st, 2nd and 3rd appellants as corroborated with the fingerprint evidence of all the appellants, the charge against the appellants was proved to the hilt. The appellants' defence is not at all

compatible with their innocence. Thus, we find no reason to fault the trial court's finding on this.

In the final analysis, the appeal therefore fails and it is accordingly hereby dismissed in its entirety.

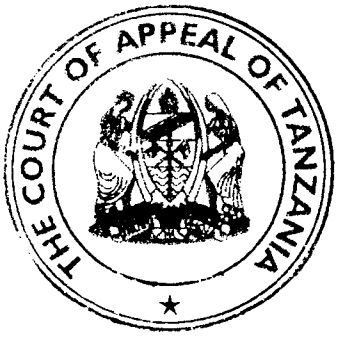
DATED at **DAR ES SALAAM** this 2nd day of August, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgement delivered on 9th day of August, 2022 in the presence of Mr. Constantine Mutalemwa, learned counsel for the 2nd appellant via-video conference who is also holding brief for learned counsels of the 1st, 3rd and 4th appellants and Ms. Mwanahawa Changale, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL