IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE J.A., GALEBA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 140 OF 2022

MASHAKA JUMA @ NTATULA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Mkwizu, J.)

dated 11th day of February, 2022

in

Criminal Sessions Case No. 36 of 2016

JUDGMENT OF THE COURT

18th July & 15th August, 2022

MKUYE, J.A.:

The appellant, Mashaka Juma @ Ntalula is before the Court appealing from the judgment of the High Court in Criminal Sessions Case No. 36 of 2016 handed down on 11th February, 2022 by Hon. Mkwizu J. This matter has a chequered history. It is now coming up before this Court for the third time. On the first occasion, the matter had been remitted back to the High Court for retrial on account of inadequate summing up to assessors. The retrial was conducted and the appellant was convicted and accordingly sentenced. On appeal to the Court, yet again, the summing was found to have a shortcoming. The matter was once again remitted back to the High Court for proper summing up and composition of judgment. That was done and the

appellant was convicted and sentenced to death by hanging. As a result, the appellant being aggrieved by that decision, has now preferred the present appeal to this Court.

A brief narration of the facts leading to the present appeal is that, the appellant and the deceased were relatives. The latter being a maternal uncle of the respondent and the former his nephew. On 31st August, 2009 the appellant paid a visit at the deceased's home who at the material time lived at Nyasubi Village. The appellant, then, invited the deceased to accompany him to his home so that he may know where he lived. The deceased could not resist the invitation from his nephew and on 1st September, 2009 they both left together using the deceased's motorcycle. Prior to leaving home, the deceased bid farewell to his wife, Hellena Masanja (PW1) promising to return a day after. However, the deceased failed to return as he had promised. PW1 called him via his mobile phone but could neither reach him nor the appellant.

Luckily, on 3rd September, 2009, PW1 on trying to call the duo she managed to reach the appellant who informed her that the two were involved in an accident and the deceased was at Masumbwe Police Station. He further, told her that he was heading to Bulugwa Village to collect the permits for the motorcycle. On 8th September, 2009 the appellant availed himself at the deceased's home and gave PW1 Tshs.

12,000/= informing her that the deceased had instructed her to go back home to her parents. With arduous search of her missing husband, PW1 proceeded to Masumbwe Police Station where the appellant had alleged that the deceased was being restrained. On arrival there, she was informed that no such incident had been reported at the station. PW1 returned home and called the appellant luring him to come and collect money (Tshs. 500,000/=) that could facilitate in getting out the deceased. The appellant fell into that trap and on 9th September, 2009 availed himself and was put under restraint with help from neighbours and taken to Kahama Police Station.

While at the police station, the appellant was interrogated by Shabu Benevenuto Shabu (PW2) and investigative information indicated that the deceased mobile phone had ceased operation in between Ilamba and Butende Villages. The police began to follow-up and it turned out that the deceased's motorcycle was last seen in that area and had been sold to Lukunja Lukundula (PW4) by the appellant at a consideration of six herds of cattle. PW4 was traced and he unveiled that he had purchased the motorcycle from the appellant in the presence of Peter Makono (PW8) who witnessed the transaction. Incidentally, PW8 was the initial prospective buyer of the said motorcycle as he was also approached by the appellant. A search was

conducted at the appellant's home in Butende Village and one pair of grey trouser and a pair of blue shorts which were identified by PW1 as belonging to the appellant were retrieved.

After this revelation the appellant gave in and explained the truth of the matter in which he revealed that he killed the deceased at Mkweni forest between Wandele and Butende Villages by cutting him with a machete on his head. The appellant, then, led the police officers to the scene of crime and from there a jacket, vest and pair of socks which were identified by PW1 that they belonged to the deceased were retrieved. Also, at the scene of crime a human jaw bone was discovered and the appellant also uncovered from a hidden spot, a panga allegedly used in killing the deceased. Further, the appellant revealed that he had given a pair of shoes to PW8 as a gift and the same was recovered from PW8's home.

The retrieved bone and the clotted blood together with samples of blood from the deceased's child and mother were sent to the Chief Government Chemist (CGC) for deoxyribonucleic acid (DNA) testing and the same was conducted by Gloria Tom Machuva (PW3). The report of the CGC (Exhibit P.3) revealed that the human remains were of a male person related to the samples collected from the child and mother of the deceased and that the margin for error was one in a billion.

The appellant also recorded his Extra Judicial Statement (EJS) (Exhibit P.6) before Hermes Byarugaba (PW9) in which he confessed to have killed the deceased the motive being that he had squandered the estate of the his (appellant's) mother. It is from these facts that the appellant was arraigned before the court for murder.

In his defence, the appellant did not deny leaving with the deceased on the material day by using the latter's motorcycle; only that while they were on their way, they were involved in an accident at Mkweni forest and the deceased got injured. That, when he went to repair the damaged motorcycle while leaving the deceased at the alleged scene of accident at about 19:00 hours, he did not find him when he came back with the motorcycle. He also admitted to sell the motorcycle to PW4 on instructions from the deceased's senior wife in order to get money which would assist to get the deceased back. Nonetheless, the High Court found him guilty, convicted him for murder and sentenced him to death as earlier on intimated.

The appellant being aggrieved by the decision of the High Court and believing to be innocent, has lodged the present appeal to this Court based on five (5) grounds of appeal, as follows:

1. *That, the learned trial Judge erred in law in holding that the circumstantial evidence irresistibly pointed at the appellant as the person who had committed the alleged offence.*

2. *That, on the totality of the prosecution evidence on record, the learned trial Judge erred in law in holding that the prosecution had proved its case beyond reasonable doubts.*

3. *That, there was no cogent evidence holding that, Nshimba Ntalula @ Charles was killed by the appellant with malice aforethought.*

4. *That, the alleged machete (panga) was not tendered before the court of law as a very crucial exhibit to prove the case.*

5. *That, my lord Justice, the learned trial Judge erred in law to convict the appellant relying on the incurable proceedings of this case which led the whole proceedings to be void ab initio.*

When the appeal was called on for hearing, the appellant was represented by Mr. Frank Samwel, learned advocate, whereas the respondent Republic was represented by Ms. Verediana Peter Mlenza, learned Senior State Attorney assisted by Ms. Edith Tuka and Ms. Wampumbulya Shani, both learned State Attorneys.

On being given the floor to expound the grounds of appeal, Mr. Samwel opted to argue the first, second and third grounds together in which the appellant's complaints revolve around one general issue that

the prosecution failed to prove the case against the appellant beyond reasonable doubt.

Mr. Samwel prefaced his submission by stating that this case is based on circumstantial evidence since there was no direct evidence that the appellant killed the deceased. He pointed out that the trial Judge convicted the appellant basing on among others, the evidence of PW2 to the effect that the appellant orally confessed to him to have killed the deceased although he was not the one who recorded his cautioned statement. He submitted further that the trial court also relied on documentary exhibits such as the letter authored by PW2 addressed to the CGC (Exh. P 2), the Report by the CGC (Exh. P 3), the Seizure Certificate (Exh. P 4) and the Emergence Search Warrant (Exh. P 8) but the same were wrongly admitted in evidence since they were not read out to the appellant or listed during the committal proceedings as part of exhibits which would be relied upon at the hearing. The learned counsel took us at page 27 of the record of appeal where it showed that only the sketch map, cautioned statement and the extra judicial statement were listed as intended documentary evidence adding that though the sketch map had been properly admitted in evidence it does not add anything as it does not link the appellant with the offence.

The learned advocate went on assailing Exh. P2 in that at the tendering of the said exhibit, the counsel for the appellant objected to its being tendered but the trial Judge admitted it because the witness was known during the committal proceedings that he would come to testify in court. The learned counsel was of the view that considering that in terms of section 249 of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA), the appellant had a right to be availed with such documents (all documents to be relied upon by the prosecution), the prosecution ought to have brought them as additional exhibits under section 289 of the CPA. He therefore, argued that since the said documents were admitted in contravention of the law, they should be expunged from the record.

Mr. Samwel contended further that, although the EJS (Exh P 6) which was also relied upon by the trial court was properly admitted, the same was flawed as the suspect affixed his thumb print at a place required to be signed by the Justice of Peace (page 128 of the record of appeal). This, he said, could be translated that the Justice of Peace did not comply with the law. The learned counsel went on assailing the manner the appellant was taken to the Justice of Peace contending that it was upon direction made by PW2 and not at the willingness of the

appellant. Due to such shortcomings, he implored the Court to expunge it from the record.

Mr. Samwel did not end there, he also blamed the prosecution for having not tendered as exhibits the physical objects which were alleged to have been retrieved during investigation. He mentioned such objects including the panga allegedly used in killing the deceased; the jacket and socks retrieved from the scene of crime; a pair of trousers, a pair of shorts and t-shirt found at the appellant's residence; and the shoes found at PW8's house after having been given to him by the appellant as a gift. It was his argument that those objects were crucial in proving the offence.

Lastly, the motor cycle allegedly sold to PW4 was not spared. He submitted that although the same was tendered and admitted as Exh. P7, it was neither listed during committal proceedings nor preliminary hearing. Neither was there a notice to tender it. As such, he equally implored the Court to be expunge it from the record.

In response, Ms. Mlenza prefaced by declaring their stance that they supported both the conviction and sentence meted out against the appellant. Before submitting she indicated that she would argue the first, second, third and fourth grounds together and, lastly, the fifth ground alone.

She, in the first place, argued that the case against the appellant was proved beyond reasonable doubt. She also conceded that the conviction against the appellant was based on circumstantial evidence as there was no direct evidence to show that he was the one who killed the deceased. However, she pointed out that not all murder cases are proved by direct evidence. To fortify her argument, she referred us to the cases of **Mathias Bundala v. Republic,** Criminal Appeal No. 62 of 2004 page 15 and **John Shini v. Republic,** Criminal Appeal No. 573 of 2016 page 14 (both unreported) in which, basically, the Court expounded three conditions to be met for the circumstantial evidence to be relied upon.

She explained that in this case, there were several pieces of evidence which amounted to circumstantial evidence. She contended that, there was oral confession by the appellant to PW2 that he killed the deceased. The said confession was witnessed by PW6 and PW10. Most importantly, his confession led to the discovery of the human remains and other physical objects connected thereto which was relevant under section 31 of the Evidence Act, [Cap 6 R.E. 2022] (Evidence Act). Besides that, she argued, according to section 3 of the Evidence Act, a confession need not necessarily be in writing and it can be given to the police or civilians - (See **John Shini** (supra) page 15).

The learned Senior State Attorney went on submitting that, there was evidence of PW4 who bought the motorcycle from the appellant that was proved to belong to the deceased which evidence was not contested in anyhow. She added that even the appellant did not deny that the same was used on the fateful date and that he sold it to PW4. She held a view that the motorcycle linked him with the offence. She, then, countered the argument that the said motorcycle was wrongly admitted in evidence for failure to mention or list it during committal proceedings as that was not a requirement under section 246 (2) of the CPA; and that since it was admitted without any objection, it should not be expunged from the record.

Moreover, the learned Senior State Attorney argued that there was evidence of the EJS (Exh. P6) which was the best evidence as the appellant confessed the commission of the offence voluntarily. On the argument that the appellant was taken to the Justice of Peace upon direction by PW2, she said, it does not connote that the appellant did not go there willingly. As to Mr. Samwel's contention that the Justice of Peace might not have complied with the law because the suspect signed at the place which was required to be signed by the Justice of Peace, she argued that the form, which is a standard form for that purpose did not show who was required to sign. In any case, the learned counsel

challenged the appellant for having not objected to it's been tendered and for failure to cross examine the prosecution to that effect. By the failure to do so, she construed it to be a mere afterthought. She concluded that the EJS was taken in accordance with the law and urged the Court to refrain from expunging it from the record.

Besides that, Ms. Mlenza submitted that there was ample evidence which proved that the appellant committed the offence. In elaboration, she submitted that, PW1 explained on how the appellant left with the deceased by using the deceased's motorcycle who said he would be back on the following day but he did not come back. On asking the appellant on the deceased's whereabouts, he told her about the accident they were involved in at the forest area and that the deceased was at Masumbwe Police Station. On inquiring to the police, they denied to receive any information to that effect. Incidentally, there was no cross examination to that effect.

Although the appellant came with a story that after they were involved in the accident, he went to fix the motorcycle, Ms. Mlenza wondered **one,** why did he leave his injured uncle in the forest alone during the night. **Two,** why did he lie to the deceased's junior wife that the deceased was detained at the police. The learned Senior State Attorney while relying on the case of **Mathias Bundala** (supra), stated

that the lies by the appellant corroborates the prosecution case that he was the one who killed the deceased.

In relation to the exhibits which were tendered without having been read out or listed at the committal proceedings, Ms. Mlenza conceded to it. However, she argued that at the time Exh. P3 was tendered there was no objection to that effect. She contended that, had the appellant objected to it, the trial Judge would have exercised her power under section 169 (1) and (2) of the CPA and determine whether to admit it or not. At any rate, she was of the view that, even if it is disregarded, still there is sufficient evidence to prove the offence.

Regarding physical objects such as a panga, trousers, t-shirt, socks and shoes which were not tendered in court, she countered it arguing that there was ample evidence by PW1, PW2, PW8 and PW10 who witnessed when such objects were recovered. She, therefore, reasoned that failure to produce them does not mean that the evidence of the witnesses who testified on them was not credible. She concluded that, since the appellant did not cross examine the witness, it is taken that he agreed with it. To bolster her argument, she referred us to the case of **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017 (unreported) at page 16 where it was stated that *"it is settled in this jurisdiction that failure to cross examine a witness on a relevant*

matter ordinarily connotes acceptance of the veracity of the testimony"- See also **Nyerere Nyangue v. Republic,** Criminal Appeal No 67 of 2010 (unreported).

In this regard, Ms. Mlenza implored the Court to find that the prosecution proved beyond reasonable doubt that the appellant killed the deceased with malice aforethought. She pointed out further that malice aforethought can be inferred from the fact that the appellant used a panga to cut the deceased on his head, a lethal weapon on a vulnerable part of the human body; his conduct after the commission of the offence whereby he lied to the deceased's wife on the deceased whereabouts; selling the deceased's motorcycle; and asking for money from the deceased's wife.

In the end, she prayed to the Court to find that the appeal lacks merit and dismiss it.

In rejoinder, Mr. Samwel insisted on the importance of tendering a panga which was relied upon by the prosecution to impute malice aforethought. Nevertheless, he conceded that under section 3 of the Evidence Act, a confession can be made orally. He, then, reiterated his earlier stance, for the Court to find the appeal merited and allow it.

We have examined and considered the grounds of appeal, the record of appeal as well as the submissions from either side and, we think, the main issue for our consideration is whether the prosecution proved the case against the appellant beyond reasonable doubt.

We shall begin with the issue relating to circumstantial evidence. In this case, we agree with both counsel that the conviction of the appellant was wholly based on circumstantial evidence. There was no witness who witnessed the offence being committed or rather when the appellant killed the deceased. This Court, in the case of **Mathias Bundala** (supra) made it clear that, that was not fatal since if every killing was to be witnessed by eye witnesses many homicide offenders would have escaped conviction. The Court reasoned that killings could be by poisoning, starving, drowning and many other forms of death in which case such killings may hardly be eye-witnessed by independent witnesses. Yet, in relation to the evidence which is circumstantial, this Court in the case of **Shabani Abdallah v. Republic,** Criminal Appeal No. 127 of 2003 (unreported), stated that: -

> *"The law on circumstantial evidence is that it must irresistibly lead to the conclusion that it is the accused and no one else who committed the crime."*

Likewise, as was rightly argued by Ms. Mlenza, in the case of **John Shini** (supra), the Court while relying on the case of **Jimmy Runangaza v. Republic,** Criminal Appeal No.159 B of 2017 (unreported) gave three conditions for the circumstantial evidence to be relied upon to mount a conviction as follows:

> *"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See **Simon Musoke v. Republic,** [1958) EA 715). Sarkar on Evidence, 19th Ed. 2003 Reprintt Vol. I page 63 also emphasized that on cases which rely in circumstantial evidence, such evidence must satisfy the following three tests which are:*
>
> *1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*
>
> *2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
>
> *3) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."*

In dealing with the issue of whether or not the circumstantial evidence has met the conditions, we shall be guided by the above cited authorities. However, before examining whether the said conditions for the reliance of circumstantial evidence are met or otherwise, we wish to begin with the complaint relating to the irregularities on the exhibits tendered or not tendered in the trial court.

The first complaint relates to unlisted exhibits which were tendered in court. Incidentally, both counsel are at one that the letter authored by PW2 addressed to the CGC (Exh. P 2), the Report by the CGC (Exh. P 3), the Seizure Certificate (Exh. P 4) and the Emergence Search Warrant (Exh. P 8) were admitted in evidence although they were not read out to the appellant or listed as intended exhibits during the committal proceedings. However, Ms. Mlenza is of the view that had the appellant objected to their being tendered, the trial court could have considered whether to admit them or not.

Section 246 (2) of the CPA which governs the manner committal proceedings should be conducted, requires any information, evidence of the intended witnesses and documentary exhibits intended by the Director of Public Prosecutions (the DPP) to be used during the trial to be read out and explained to the accused during committal proceedings. The said provision was discussed in the case of **DPP v. Sharifu and 6**

Others, Criminal Appeal No. 74 of 2016 (unreported) and the Court had this to say:

> *"Our understanding of this provision is that, it is not enough for a witness to merely allude to a document in his witness statement, but that the contents of that document must also be made known to the accused person(s). If this is not complied with the witness cannot later produce that document as an exhibit in court. The issue is not the authenticity of the document but on non-compliance with the law. We therefore agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage."*

In this case, having perused the record of appeal, it bears out that indeed, Exhibit P2, P3, P4 and P8 were not read out to the appellant or listed during committal proceedings as being among the intended exhibits to be tendered in court by the prosecution during the trial. It would appear that even during preliminary hearing the same were not listed. However, basing on the above cited authority, that was not proper. Considering that the requirement is intended to give the accused an opportunity to understand the nature of the case he is facing in advance and prepare an informed defence, we entertain no doubt that failure to read and list such documents must have seriously

prejudiced the appellant. In this regard, we find merit in this complaint and, therefore, the same are hereby expunged from the record.

In relation to the complaint that physical objects such a panga, motorcycle, T-shirt, socks and the pairs of shorts and trousers were not produced in court, Mr. Samwel stressed that the production in court especially of the panga was very crucial since it was used to infer malice aforethought. However, Ms. Mlenza, though did not concede directly, she was quick to submit that despite the prosecution's failure to tender such exhibits in court, there was credible evidence from PW1, PW2, PW8 and PW10 who mentioned them and testified on how they witnessed when they were recovered; and at any rate, she assailed the appellant for not cross examining the witnesses on the issue.

On our part, we think that the law is now well settled. Where material exhibits, particularly which were recovered during investigation are not produced in court, and no reason is advanced for such failure or omission taints the prosecution case with a serious doubt - (see **Kurwa Mohamed Mwakabala and Another v. Republic,** Criminal Appeal No. 542 of 2017 and **Matusela John Balimi and Another v. Republic,** Criminal Appeal No. 755 of 2010 (both unreported). However, it all depends on the prevailing circumstances.

In the instant case, as was rightly submitted by both counsel the panga, T-shirt, socks and the pairs of shorts and trousers which were physical objects recovered during investigation were not tendered in court as exhibits. Nonetheless, looking at the circumstances of the case it is our considered view that failure to tender those objects did not render or did not mean that the witnesses who testified on such exhibits were not credible. Thus, we agree with Ms. Mlenza that despite the fact that the said objects were not tendered in court, there was ample evidence from PW1, PW2, PW8 and PW10 incriminating the appellant. Each of these witnesses testified on how the exhibits were recovered at the scene of crime, at the appellant's residence and at PW8's home and most importantly, after being led by the appellant himself to those places. As such, much as the said objects might not have been tendered in court, the crucial issue to be looked at would be whether the evidence available on record proved the case against the appellant - (See **Abuu Kahaya Richad v. Republic,** Criminal Appeal No. 577 of 2017 (unreported). This issue will be considered in the due course. In any case, the fact that the appellant's advocate did not cross examine the witnesses on the issue, we take it that they admitted to the evidence that was given on that aspect - see **Issa Hassan Uki's** case (supra).

Apart from that, we note that the motorcycle, which is also complained about, was produced in court and admitted as Exh. P6 while it was not listed during committal proceedings conducted under section 246 of the CPA. It is also true that, as was submitted by Ms. Mlenza, the provisions relevant for committal proceedings do not specifically provide for the physical exhibits to be mentioned or listed during committal proceedings.

Fortunately, this is not a new issue in our jurisprudence. Recently, this Court was confronted with akin situation in the case of **Remina Omary Abdul v. Republic,** Criminal Appeal No. 189 of 2020 (unreported) and had an occasion of construing the provisions of Rule 8 (2) of the Corruption and Economic Crime Control (the Corruption and Economic Crime Control (Division) Rules 2016 (GN No. 267 of 2016) which are in *pari materia* with section 246 (2) of the CPA on the issue whether physical exhibits are to be mentioned or listed during committal proceedings. In grappling to get the solution, the Court went further and cited the case of **The Director of Public Prosecutions v. Sharif Mohamed @ Athuman and 6 Others,** Criminal Appeal No. 74 of 2016 (unreported) where it was stated as follows:

> *"It is also relevant to point out that, there are four types of evidence, that is to say, real,*

demonstrative, documentary and testimonial. The general rules of admissibility of relevance materially, and competence, apply to all those types of evidence. In the present appeal two types of evidence come to the fore, namely, real and documentary.

Real evidence is a thing whose characteristics are relevant and material. It is a thing that is directly involved in some event in the case..."

The Court went further to consider the physical exhibit that was under scrutiny then it held that:

"It is for this reason that, during committal proceedings, ***it is now established practice that courts not only read and list potential prosecution witnesses, but also documentary and physical exhibits the prosecution would rely on during trial. We do not therefore share the view that Rule 8 does not require physical exhibits to be listed down during committal and we endorse the view by Mr. Nkoko that it is a mandatory requirement.*** [Emphasis added]

In this regard, going by analogy, we are settled in our mind that the tendering of the motorcycle and its admission as Exh. P6 without first being listed during committal proceedings was in contravention of

section 246 (2) of the CPA. This renders the said exhibit to be liable for expungement. Hence, Exh. P6 is hereby expunged.

The next issue for our consideration is on the circumstantial evidence and in particular whether it was sufficient to prove that the appellant committed the offence. We have already discussed at length about the conditions which must be met for its reliance and at this juncture we need not repeat it.

As was alluded to earlier on, it is not disputed that the appellant was convicted on the basis of circumstantial evidence which was adduced by PW1, PW2, PW4, PW6, PW8, PW9 and PW10.

As to whether the deceased was dead, we understand that the trial court relied on the forensic evidence through DNA test linking the appellant and various samples of blood from T-shirt, a human bone, samples of blood from the panga and blood from deceased's child and mother; and the blood in clothes found with appellant which confirmed that the person killed was the deceased (see Exhibit P3). However, following its expungement of the above evidence for being tendered irregularly, we still find that there is sufficient evidence to show that the deceased died. This is by virtue of the evidence of PW2 to whom the appellant confessed orally to have killed him. We are mindful of the appellant's complaint on the oral confession to PW2, however, as was

rightly submitted by Ms. Mlenza and conceded by Mr. Samwel, oral confession is admissible in evidence under section 3 of the Evidence Act and the evidence of a confessing offender is the best evidence in criminal cases. The appellant had confessed to PW2 to have killed the deceased by cutting him with a panga on his head. Apart from that the appellant did not deny that the deceased was dead. He even testified that the deceased might have been killed by wild animals or rather the deceased's cause of death may have been resulted from wild animals. And most importantly, in the EJS (Exh. P6) the appellant explained on how he killed the deceased in the forest by using panga. With that evidence we find that there was sufficient evidence which proved that the deceased, indeed, died and that his death was unnatural.

Next is who killed the deceased. In his testimony, the appellant linked the death of the deceased with wild animals contending that they might have attacked him in the forest where he left him after the purported accident he was involved in together with the deceased. On the other side, the respondent is of a firm view that he was killed by the appellant. Let us now examine the available evidence from both sides.

PW1, who was the deceased's wife explained on how on the fateful date the appellant left with the deceased heading to the appellant's home but he did not come back on the next day as he

promised. PW1 asked the appellant about his whereabouts and was told by the appellant that they had been involved in an accident and deceased was detained at Masumbwe Police Station. At a certain point, the appellant came and gave her Tshs. 12,000/= with instructions purportedly from her husband that she should go home to her parents. PW1 went to inquire about her husband from Masumbwe Police Station but the deceased was not there and the police informed her that there was no report of accident received at that station. PW1 explained how she managed to lure the appellant to take Tshs. 500,000/= so that it can assist in tracing the deceased and that is when he was apprehended. This witness also witnessed the recovery of the deceased's shoes from PW8; a pair of short, trousers and a T-Shirt from the appellant's home which she identified to belong to the deceased. Apart from that, she was present when the appellant led the search party to the scene of crime where they saw blood and a human jaw bone.

PW2's evidence was to effect that he received PW1's who narrated to him the episode following the disappearance of her deceased husband. He explained on how he initiated investigations of the matter by involving a number of police officers who started tracing the deceased through his mobile phone which led them to a Butende

village. When they went there it was revealed that a motorcycle, which later, came to be identified to belong to the deceased was sold to PW4 who disclosed to have purchased it from appellant and the same was recovered. PW2 also, received the appellant after being arrested and the latter orally confessed to him about his sole involvement in killing the deceased. He was among the people in the search party that was led by the appellant to Mkweni forest where they were shown the point at which the deceased was killed and saw blood, socks and clothes identified by PW1 to belong to her husband and a jaw bone. PW2 further testified on how he participated in the search conducted in the appellant's house and retrieved a pair of trousers, shorts and T-shirt which also belonged to the deceased and lastly, they recovered the deceased's shoes from PW8 which were given to him by the appellant as a present.

Another piece of evidence is from PW4. The gist of his evidence is that he purchased the deceased's motorcycle from the appellant. This witness testified on the manner he questioned the appellant about the difference between his name and the names appearing in the motorcycle's documents because at first, he presented himself as selling his uncle's motorcycle who had instructed him to do so. His further testimony was that on the date of conclusion of their contract of sale

(on 8/9/2009) he came with PW8 who purported to be his uncle and inspected the six herds of cattle which were the value of the said motorcycle.

PW6, No. C9895 D/Sgt Laurent, was involved in the whole process of investigation of this case after being assigned the case by PW2. He testified on how they discovered that the deceased's phone last communication was between Ilamba and Butende villages which made them to conclude that the incident might have happened there. He testified that on going there while being led by appellant, they were informed by motorbike riders of Ilamba village about a motorcycle which was sold to PW4 at Kipangu village and, indeed, the same was recovered from PW4 who admitted to have purchased it from the appellant. He testified on how the said motorcycle T 832 AZG was identified by PW1 to belong to the deceased. PW6 also witnessed the recovery of pairs of trousers and a pair of shorts from the appellant's residence which were also identified by PW1 to belong to the deceased. Although the admission of the said motorcycle is expunged from the record of appeal because it was wrongly admitted, we are certain that this witness gave a cogent evidence regarding the motorcycle at issue, and the appellant did not dispute the fact that he sold the motorcycle to PW4.

PW8 was yet another witness in this respect. He was a Chairman of Nyavivo Hamlet within Butende village and witnessed the sequence of events relating to this case in five stages. **One,** on 3rd September, 2009 the appellant approached him as a prospective buyer of the motorcycle which he purported to belong to his uncle who allegedly instructed him to sell it so that he could buy another motorcycle. **Two,** the appellant gave him a pair of shoes which later was identified by PW1 to belong to her deceased husband. **Three,** on 5th September, 2009 the appellant informed him that the prospective buyer of the motorcycle was found for exchange with six herds of cattle and requested him to pause as his uncle and had first to inspect the said cattle which the purchaser (PW4) had offered. **Four,** on 11th September, 2009 the appellant came under the escort of the police and recovered the said pair of shoes; and **five,** they went to appellant's residence where upon search a pair of trousers and a pair of shorts were retrieved.

PW10's gist of his testimony was almost the same as PW2 and PW6. He added that on 11th September, 2009 the appellant admitted to have killed the deceased and on 12th September, 2009 he took the search party to the forest where a human jaw bone, panga, clotted blood were found; and to PW8 where a pair of shoes was retrieved.

According to PW10, the appellant did not deny to have, on the material date, left with the deceased heading to his home.

According to what we have demonstrated hereinabove, it can be deduced that **one,** the appellant was the last person to be seen with the deceased when he left with him by using the motorcycle heading to the appellant's home. The evidence of PW1 reveals that the appellant was the last person to have been seen with the deceased having left in the company of each other, and thereafter the latter went missing only to be discovered later that the deceased was no more. In the case of **Mathayo Mwalimu & Another v. Republic,** Criminal Appeal No. 147 of 2008, the Court held that:

> *"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."*

Two, the appellant's lies to the deceased's junior wife, PW1, on the deceased's whereabouts. It will be noted that the appellant upon being asked by PW1 as to the whereabouts of the deceased he replied that he had been involved in an accident and was held at the police station, which was not the case and giving PW1 amount of money (Tshs. 12,000/=) while telling her that the deceased had instructed that

she should go to her parents; and later on, in the course of the investigation he led the police to the scene of crime where he had killed the deceased. It will be appreciated as elaborated by case law that, lies of an accused may corroborate the prosecution case. This Court in the case of **Paschal Mwita & Others v. Republic,** [1993] TLR 295 at page 300 citing with approval a decision of the Eastern Africa Court of Appeal, stated:

> *"Although lies and evasions on the part of an accused do not in themselves prove the facts alleged against him, they may, if on material issues, be taken into account along with other matters and the evidence as a whole when considering his guilt."*

Three, the appellant went to look for a prospective buyer of the motorcycle firstly to PW8 and later to PW4 who offered to exchange it for six herds of cattle. But in selling the same he also lied that his uncle had instructed him to sell it because he wanted to buy a new motorcycle. Later he paraded PW8 to pose as his uncle and came to approve the herd of cattle for the purchase of the motorcycle. **Four,** he appellant also volunteered to lead the search party to the scene of crime after he had confessed to PW2 whereas jaw bone, socks and jacket identified by PW1 to belong to deceased and panga were recovered. Not only that, the appellant also led the search party to his residence where

a pair of trousers and a pair of shorts were retrieved and gave to PW8 a pair of shoes as gift while the same belonged to the deceased.

Applying the conditions for reliance on circumstantial evidence to the available evidence, we are satisfied that they are met. We say so because, the circumstances from which an inference of guilty is sought to be drawn, are cogently and firmly established through the testimonies of adduced by PW1, PW2, PW4, PW6, PW8 and PW9 and PW10. The evidence of the said witnesses has shown all the stages from when the deceased left from his home with the appellant until when he met his death. The circumstances of the case no doubt depict a definite tendency unerringly pointing towards the guilt of the accused. Those circumstances taken cumulatively, they create a chain which is so complete to lead to the conclusion that within all human probability the crime was committed by the appellant and no one else. In other words, we find that the evidence available depict inculpate facts which are incompatible with the innocence of the appellant and incapable of explanation upon any reasonable hypothesis than that of guilty. (See **Nkashimana John @ Diodone v. Republic,** Criminal Appeal No. 130 of 2005 and **Ecksevia Silasi and Another v. Republic,** Criminal Appeal No. 93 of 2011 (both unreported).

Apart from the circumstantial evidence, another piece of evidence that was relied upon in convicting the appellant was the EJS in which the appellant confessed to have killed the deceased. We are aware that Mr. Samwel challenged it to be of no evidential value because the suspect (appellant) affixed his thumb print at the place required to be signed by the Justice of Peace. He translated this anomaly as if the Justice of Peace did not comply with the law or rather that the said EJS was not made at all. On her part, Ms. Mlenza, much as she did not object to the anomaly, she contended that the form that was used to record the EJS did not show who was to sign. She also assailed the appellant for having not raised that issue at that particular time or cross examined the witness on it. She was of a view that failure to do so at that time could be construed as a mere afterthought.

Our examination of EJS has vividly revealed that the appellant signed by thumb print at the place where there are words that *(Nimemuuliza mahabusu maswali kama nilivyoonyesha hapo juu ...)* which tend to show that they are supposed to be words of the Justice of Peace to the suspect. Although as was argued by Ms. Mlenza, the said place does not indicate the person who is required to sign, reading those words contextually, we find that they are words of the Justice of Peace which means, it was the Justice of Peace who ought to have

signed and not the suspect. Despite the fact that the appellant might have signed at a wrong space, we are settled in our mind that the anomaly does not raise a serious doubt as the suspect also signed at the end of his confession at page 129 of the record of appeal which signified the authenticity of what was recorded.

Be it as it may, as was argued by the learned Senior State Attorney, the issues relating to anomalies relating to confessions intended to be tendered in court are required to be raised at the time of their tendering in court. This is important in order to enable the court to determine whether or not to conduct inquiry/trial within trial in order to ascertain them. In the matter at hand, neither the appellant nor his advocate raised it at that time. Failure to object to its admissibility at the time of its being tendered deprived the trial court and the prosecution the chance to consider the objection which might have been raised as per section 169 (1) and (2) of the CPA which essentially provide for the manner of dealing with admission or otherwise of evidence obtained in contravention of the law.

Besides that, according to the record of appeal at page 84, there was no cross examination to PW 9 who tendered it on that aspect. And, as was rightly submitted by Ms. Mlenza, the law is well settled that failure by the accused to cross examine the witness on a relevant matter

is translated to acceptance of the veracity of the evidence adduced - See **Issa Hassan Uki** (supra) and **Nyerere Nyangue** (supra). Hence, failure to cross examine the witness is taken as having accepted the prosecution evidence. In this regard, given the situation, we find that Exh. P6 was properly admitted without any objection and therefore was good evidence to be relied upon. In fact, this piece of evidence offered corroboration on the circumstantial evidence we have explained hereinabove.

Lastly, Ms. Mlenza urged the Court to find that the prosecution proved the beyond reasonable doubt that the appellant killed the deceased with malice aforethought. Having considered the available evidence, we are satisfied that the killing was actuated with malice aforethought. We say so because from the day when the appellant availed himself at the deceased home, the fate of the deceased had already been planned. The appellant had already formed the intent to kill him. Further to that the appellant used a panga to cut the deceased on his head as per Exh. P6, which is a vulnerable part of the human body. Also, his conduct after the commission of the offence whereby he lied to the deceased's wife on the deceased whereabouts and the circumstances under which he sold the deceased's motorcycle; and asking for money from the deceased's wife show certainly that he was

involved in deceased's brutal killing – See **Enock Kapela v. Republic,** Criminal Appeal No. 150 of 1994 (unreported). All these factors show also that the appellant had the requisite malice aforethought.

In view of what we have endeavoured to discuss above, we find that the prosecution proved the case beyond reasonable doubt that the appellant killed the deceased with malice aforethought. We therefore find the appeal unmerited and we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 11th day August, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 15th day of August, 2022 in the presence of Mr. Frank Samwel, learned counsel for the Appellant and Mr. Nestory Mwenda, State Attorney for the Respondent/Republic both connected via Video Conference facility from Shinyanga High Court is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL