IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 447 OF 2018

ZABRON JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court for Tabora at Tabora)

(Mruma, J.)

dated the 24th day of July, 2015

in

Criminal Sessions Case No. 15 of 2013

.....

JUDGMENT OF THE COURT

24th October & 2nd November, 2022

KOROSSO, J.A.:

The appeal arises from the decision of the High Court of Tanzania sitting at Tabora, whereby the appellant, Zabron Joseph was charged together with Budo Somi @ Wilson, Mhangilwa Somi and John Salum @ Nyangamila, all not subject of the instant appeal, with the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022]. The particulars alleged that the appellant and three others, on 4/11/2012 at Muhida Village within Maswa District, Simiyu Region, murdered one Ng'holo Somi. The appellant and his colleagues categorically denied the charges. Moreover, on 5/2/2013, John Salumu @ Nyangalamila, Budo Somi @ Wilson and Mhangilwa Somi were discharged by the District Court of Maswa at Maswa after the Director of Public

Prosecutions (the DPP) entered *nolle prosequi* in terms of section 91(1) of the Criminal Procedure Act [Cap 20 R. E. 2002, now R.E. 2022] (the CPA) in their favour.

The prosecution case against the remaining accused person (the appellant) was unfolded by five witnesses presented, namely; Mlilo Somi (PW1), Singu Sosoma (PW2), D/SSgt Gabriel (PW3), Thomas Mayoga Ochuodho (PW4) and Dr. Mariam Hussein Telaki (PW5). There were also seven exhibits tendered and admitted into evidence. According to PW1, the deceased's brother, on 2/10/2012 at around 8.00 hours, upon visiting his sister's home he discovered that his sister (the deceased) was nowhere to be seen and her house was locked. His second visit to the deceased's home at around 10.00 hours was barren of fruits as he met the same scenario as the first visit. On further checking the house, at the back, he saw an open window which worried him further, and thus proceeded to question some of the deceased's neighbours to find out whether they knew her whereabouts. However, his queries were in vain. This led PW1 to report to PW2, the Sungusungu leader about his missing sister. PW2 proceeded to raise an alarm which gathered the villagers and on being informed that the deceased was not at her home and her whereabouts were unknown, they resolved that the open window of her house be used to enter and check what was inside. According to PW1, upon entering the deceased's house, it was discovered that there had

been a break-in and some of the deceased's properties had been removed leaving only the bed. The search for the deceased ensued but to no avail. PW1 testified that on 2/11/2011, he saw the appellant riding a bicycle which he suspected to belong to the deceased, and thus reported the matter to PW2. This led to the arrest of the appellant, who was then taken to the office of the Ward Executive Officer (WEO) for interrogation. Upon questioning, the appellant claimed that the bicycle belonged to him. He was later taken to the Malampaka Police Post.

Subsequently, the Police searched the appellant's house in his presence and allegedly it is the appellant who led them to where the deceased was buried within the compound of his house. After digging the place, a body was recovered, allegedly that of the deceased. Additionally, during the search, some household items which were identified by PW1 to belong to his deceased sister were seized. PW5, a doctor who examined the retrieved body and prepared the post-mortem report which was tendered and admitted as exhibit P7 testified that having examined the retrieved body he was only able to determine its gender, that it was of a female being, however, in view of its decomposed state, he was unable to conclusively resolve on the cause of death. The prosecution side also relied on the appellant's cautioned and extrajudicial statements. The cautioned statement was recorded and tendered by PW3, and its admissibility was objected to by the appellant, however, it was admitted

as exhibit P5 after the conduct of trial within trial by the trial court and overruling the objection. The extrajudicial statement taken and tendered by PW4 was uncontested and admitted as exhibit P6.

Essentially, the case for the prosecution was that the appellant caused the death of the deceased after having stolen some of her properties including a bicycle, then buried her body within his compound. It was contended further that, the appellant led witnesses including PW1, PW2 and PW3 to the discovery of the deceased body where it was buried in his compound and exhumed from therein. That the exhumed body was identified by PW1 to be that of his sister, the deceased, and upon being examined by PW5, it was found to be the body of a human being of female gender, in essence, Ng'holo Somi.

The appellant's defence was one of total denial of the offence charged. He adduced that on the date and at the time of the commission of the alleged offence he was at Mpanda in Katavi Region having left the village on 28/9/2012. He contended that he came back to the village on 31/10/2012, only to be arrested on 1/11/2012.

The end result of the conduct of the full trial was the conviction of the appellant and being sentenced to death by hanging. This is what prompted the instant appeal where, first, the appellant on 24/12/2018 filed a memorandum of appeal predicated on four grounds of appeal. On

20/10/2022, his counsel lodged a supplementary memorandum of appeal with four grounds of appeal. The grounds of appeal found in the memoranda essentially fronted the following grievances against the trial court: **one**, reliance and bestowing unmerited weight on the evidence of prosecution witnesses and improperly admitted exhibits. **Two**, failure to properly evaluate and analyse the evidence before the trial court without considering the possibility of another person other than the appellant having committed the offence or that the exhumed body was not of Ng'holo Somi. **Three**, there was misdirection and non-direction in the summing up to assessors by the trial court resulting in a defective and faulty decision for want of assessors' participation; and **four**, the trial court's proceedings were conducted in violation of the principles of natural justice.

At the hearing of the appeal, Mr. Kelvin Kayaga learned Advocate, appeared for the appellant. Ms. Sabina Silayo, learned Senior State Attorney who represented the respondent Republic, assisted by Ms. Alice Thomas, learned State Attorney, resisted the appeal.

We find it pertinent to first consider the third grievance that faulted the summing up to assessors by the learned trial Judge. According to Mr. Kayaga, the record of appeal does not show that the trial Judge did properly and sufficiently sum up the substance of the evidence and direct assessors on vital points of law that were apparent in the trial. He

contended that the trial judge also considered extraneous matters which essentially rendered the trial to have been conducted without the full involvement of the assessors. The learned counsel contended that the trial Judge did not address the assessors on such issues as the elements of the offence charged, the import of retracted and oral confessions, and the defence of *alibi,* aspects which the trial court considered in convicting the appellant.

According to Mr. Kayaga, as the vital points were important in determining the case, since they were relied upon by the trial court in the conviction of the appellant, undoubtedly, the trial Judge had the duty to expound them and thus properly direct the assessors on them. He contended that the trial Judge's failure to properly direct the assessors on the same, essentially denied the assessors an opportunity to give an informed opinion to the trial Judge on the verdict of the case based on the evidence adduced in court. The learned counsel asserted further that, such omission by the trial judge rendered the entire trial, a nullity, as the assessors did not fully comprehend the import of ingredients of the offence charged, confessional statements and the defence of *alibi* when deliberating on a charge of murder.

It was his contention that the omission of the trial Judge made the assessors not to have fully participated in the trial as required by law. He thus prayed that under the circumstances, the proceedings of the trial

court should be nullified, the conviction of the appellant be quashed, and the sentence set aside since the appellant was undoubtedly prejudiced.

On the way forward, the learned counsel for the appellant adamantly pressed the Court to set free the appellant for reason that there was no sufficient evidence to prove the charge against him since the prosecution had failed to prove the case beyond reasonable doubt. On his part, he beseeched the Court not to follow the usual way forward meted by the Court in similar circumstances because the prosecution had not proved the case to the standard required and a retrial at any stage will accord the prosecution an opportunity to fill in the gaps in their case.

Mr. Kayaga argued that the prosecution case suffers from a lot of dents which taken into totality should result in the Court finding that the case against the appellant was not proved to the standard required. He challenged the trial court's finding that the body alleged to have been exhumed in the appellant's compound was one of Ng'holo Somi (the deceased). He contended that as adduced by the appellant there was no evidence that proved that the deceased was dead or that the "bones" exhumed from the appellant's compound belonged to a human being and thus the trial court's finding that this fact was not disputed was erroneous. The learned counsel contended further that the trial court's reliance on the evidence of PW1 was faulty since, in his testimony he failed to prove what led him to conclude that the exhumed bones were that of his sister, the

deceased, having failed to provide any details to support such assertions. Regarding the issue of identification of the body, the learned counsel argued that there is nowhere in evidence that PW1 confirmed that the body allegedly exhumed from the appellant's compound was that of the deceased, Ng'holo Somi or that, there was proper identification of the deceased as, Ng'holo Somi.

Mr. Kayaga also challenged the evidence of PW5 who had stated that the retrieved body was of a female and contended that PW5 was not a competent witness to testify since his statement or substance of his evidence was not read at the committal proceedings as legally prescribed. Additionally, he contended that there being no notice to call PW5 as an additional witness filed in the trial court by the prosecution side, renders PW5's testimony improper and in contravention of section 289(1) of the CPA. He thus urged us to expunge PW5's evidence from the record. The learned counsel further urged us, under the circumstances, to find that in the absence of PW5's evidence there was no other evidence that properly identified the remains exhumed from the appellant's compound to belong to a female human being or the deceased, having earlier prayed to find PW1's evidence unreliable.

The learned counsel also implored us to refrain from considering the certificate of seizure (exhibit P1) since perusing its contents, there is nothing to show that the alleged remains of the body were exhumed from

the appellant's compound. He thus maintained that, with no evidence to prove that Ng'holo Somi's body was the one exhumed from the appellant's compound as alleged, it leaves doubt that whatever remains were retrieved could have belonged to another person, doubts which should favour the appellant.

Addressing the Court on the import of the cautioned statement admitted as exhibit P5, the learned counsel for the appellant submitted that the trial court improperly admitted it since the certification that the statement was read over to him after having confirmed the correctness of the contents as required by section 57(3) of the CPA is missing. He cited the case of **Ibrahim Issa and 2 Others v. Republic**, Criminal Appeal No. 159 of 2006 (unreported), to cement his assertion. The learned counsel objected to the learned State Attorney's contention that the evidence of PW3 shows that he had read the statement to the appellant but inadvertently this was not included in exhibit P5. Mr. Kayaga responded by stating that a document should speak on its own, lack of the statement therein means there was no such certification and thus the Court should not accord it any value. He argued that the anomaly renders exhibit P5 improperly admitted and thus prejudicial to the rights of the appellant. He prayed for exhibit P5 to be expunged.

Furthermore, regarding the extrajudicial statement (exhibit P6), the learned counsel for the appellant urged the Court to find that it was

wrongly admitted in evidence since it did not fulfill the prerequisites found in the Chief Justice Guidelines which guide Justices of Peace on the recording of such statements. Mr. Kayaga stated that the recorder had not complied with Rule 6A of the Judges Rules, particularly when it was stated that there must be a letter from the Police to the Justice of Peace and that the statement should be recorded in the absence of anyone else but for the recorder and the suspect. The other anomaly the Court was made aware of, relating to exhibit P6, was the fact that PW4's statement had not been part of the committal proceedings and that the trial court had reminded the prosecution of this at the Preliminary Hearing but there was nothing done to rectify the anomaly. He thus prayed that exhibit P6 should be expunged together with the evidence of PW4.

Mr. Kayaga concluded that should exhibits P5 and P6 be expunged as prayed, there will be no other evidence remaining to prove the charge against the appellant, which should render the prosecution to have failed to prove the case against the appellant beyond reasonable doubt. He concluded by urging the Court, in the circumstances, to nullify the proceedings, quash the conviction, set aside the imposed sentence, and set the appellant at liberty.

Ms. Silayo on her part conceded to the grievance expounded by the learned counsel for the appellant on the trial court's failure to properly direct the assessors on vital points of law relevant to the case which she

argued was a fatal irregularity as stipulated in the case of **Erick Gabriel Kinyaiya v. Republic**, Criminal Appeal No. 668 of 2020 (unreported). She, however, differed with the learned counsel for the appellant on the way forward. The learned Senior State Attorney beseeched the Court to find that since the prosecution had proved the case against the appellant to the standard required, then the remedy should be to nullify the proceedings from the stage of summing up, quash the conviction and set aside the sentence. She further implored the Court to consider the circumstances of the case and the interest of justice and thus order a retrial from the stage of summing up to assessors.

It was Ms. Silayo's further argument that the proposed way forward will alleviate any fears of the prosecution filling any perceived gaps in the prosecution case and will ensure that there is no further delay in finalizing the case, especially considering that, the appellant's trial was conducted in 2014 and 2015 and it may be difficult to trace all the witnesses for the prosecution. She also conceded that the two confessional statements, exhibits P5 and P6 should be accorded no value as they were improperly admitted in evidence and that they should be disregarded. However, she differed with the learned counsel that upon exhibits P5 and P6 being disregarded, the evidence for the prosecution will be weakened.

The learned Senior State Attorney asserted that the remaining evidence for the prosecution would still be sufficient to lead to the conviction of the appellant and thus beseeched us to find that the prosecution case remained very strong for the following reasons: **one**, the fact that Ng'holo Somi was dead was not disputed. She contended that as discerned from the evidence of PW1 that his sister died and that he identified the exhumed body as that of his sister, there is also evidence of the appellant in defence on page 83 of the record of appeal when he stated; "*I knew the deceased. She is Ngh'olo Somi*" and that again, on page 86 when being cross-examined by the learned Senior State Attorney he said; "*when the deceased was killed, I was at Mpanda*".

Two, that it was the appellant who led PW1, PW2 and PW3 to the discovery of the body of the deceased as evidenced by their testimonies. She contended that after the appellant was arrested on 2/11/2012, on 4/11/2012 during the search of his house, various items suspected to belong to the deceased were seized. According to Ms. Silayo, it was testified by PW1, PW2 and PW3, that upon being questioned further, the appellant admitted having killed the deceased and buried her and he then took them to the place where he had buried her, a place within his backyard, and upon digging, a body was exhumed and identified to be the deceased by PW1. She further contended that the appellant admitted that he was the only one who used the pit where the body was exhumed from.

The learned Senior State Attorney cited the case of **Wyclife Salum @ Nyendo and Two Others v. Republic**, Criminal Appeal No. 486 of 2017 (unreported), where the Court cited its holding in **Tumaini Daudi Ikera v. Republic**, Criminal Appeal No. 155 of 2009 (unreported), where it was held that the evidence of an appellant that leads to the discovery of the body of the deceased grounds the conviction of the appellant. The learned Senior State Attorney thus implored us to subscribe to that position and find the instant case to have similar facts.

Three, the bicycle (exhibit P3) that PW1 had recognized to belong to his deceased sister which the appellant was seen riding was seized at his house when the body of the deceased was recovered. Ms. Silayo implored us to find this fact as strengthening the prosecution case positively and affirming the appellant's guilt. **Four,** the oral confession of the appellant as adduced by PW1 and PW2 and the fact that he led them to where the deceased was buried in his house as also expounded by the sketch map admitted as exhibit P4. The learned Senior State Attorney further urged us to find that the credibility of PW1 and PW2 was not shaken and that the trial court found them to be reliable witnesses. She thus implored the Court to grant the prayers sought for reasons that there was ample evidence against the appellant to warrant a retrial as prayed.

The rejoinder by Mr. Kayaga was essentially a reiteration of his submission in chief, stressing his contention that the prosecution had

failed to prove the case to the standard required. Importantly, they failed to prove that the exhumed body was that of Ng'holo Somi. On the oral confession, he contended that as pronounced by various decisions, courts should tread wearily in such confessions and cited the cases of **Ndalahwa Shilanga and Another v. Republic,** Criminal Appeal No. 247 of 2008 (unreported) and **John Peter Shayo and Two Others v. Republic** (1998) T.L.R. 198 to cement his argument. He also contended that there was no evidence to corroborate the alleged oral confession and that the Court should grant the prayers sought by nullifying the proceedings, quashing the judgment and conviction, and setting aside the sentence for reasons advanced and for the appellant to be set free since it is what justice of this case demands.

We have carefully considered the submissions of the learned counsel from both sides, the cited authorities and the record before us and agree with both counsel that the third grievance by the appellant related to the improper summing up of assessors by the trial court should take precedence in our deliberations, being a point of law. Suffice it to say, the learned counsel for the parties are in tandem that the summing up to the assessors by the trial Judge left much to be desired and that it was not properly conducted. The record of appeal shows clearly that while the trial Judge considered the confessional statements (exhibit P5 and P6) from pages 136 to 140 of the record of appeal and accorded them due

weight in determining the guilt of the appellant, he did not direct the assessors on the import of the statements and matters for consideration in relying on such statements in the summing up notes found at pages 99 to 105 of the record of appeal. In addition, while the appellant's defence of *alibi* is deliberated by the trial judge in the judgment found on pages 140 and 141 of the record of appeal including the requirement to give the requisite notice of intention to rely on the defence, the summing up notes to assessors does not include anything related to the said defence.

It is well settled that, at the summing up stage, the trial judge is duty bound to expound to the assessors all salient points of law relevant to the case pertaining to facts of the case. In the case of **Washington Odindo v. Republic** (1954) 21 EACA 392, the erstwhile Court of Appeal of Eastern Africa held:

> *"The opinion of assessors can be of great value and assistance to the trial judge but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the opinion of assessors is correspondingly reduced."*

See also, **Tulubuzya Bituro v. Republic** [1982] T.L.R. 264, **Mashaka Athumani Makamba v. Republic**, Criminal Appeal No. 107 of 2020 (unreported).

As alluded to above, both counsel conceded to the non-direction of the assessors by the trial judge on vital points of law expounded above, and we agree with them that this is the case in the instant appeal. Our finding led us to question whether, in the circumstances, the trial can be said to have been conducted with the aid of assessors as prescribed by section 265 of the CPA which then stated:

> *"All trials before the High Court should be with the aid of assessors, the number of whom shall be two or more as the Court thinks fit."*

The fact that the provision is couched in mandatory terms is not in doubt, a fact also acknowledged by this Court in the case of **Kulwa Misangu v. Republic,** Criminal Appeal No. 171 of 2015 (unreported) where in discussing section 265 of the CPA as it then was, we held:

> *"The wording of the above section is couched in mandatory terms. It will be improper if the High Court conducts a criminal trial, if the CPA is applicable, without the aid of assessors. But what is the role of assessors? The role of assessors is to assist the triai court to arrive at a just decision. And the assessors assist the court in two ways. One, the trial court to avail the assessors with adequate opportunity to put questions to witnesses as permitted by section 177 of the Evidence Act, Cap 6 RE 2002. Two, the trial judge to sum up the evidence for the*

prosecution and the defence and shall then require each of the assessors to state his/her opinion as is provided under section 298(1) of the CPA."

Evidently, where the court fails to ensure the involvement of the assessors in a given trial, the failure vitiates the trial. In the present case, as stated above and conceded by both sides, the trial judge did not address the assessors on the import of confessional statements which were relied upon in the conviction of the appellant nor did he address the assessors on what the defence of *alibi* entails, which is the defence the appellant fronted before the trial court. Thus, it cannot be said that the trial was conducted with the aid of assessors in compliance with section 265 of the CPA. We find this to be an incurable irregularity that cannot be remedied by the provisions of section 388 (1) of the CPA and renders the proceedings a nullity. (see also, **Republic v. Grospery Ntagalinda @ Koro,** Criminal Appeal No. 73 of 2014 and **Charles Lyatii @ Sadala v. Republic**, Criminal Appeal No. 290 of 2011 (both unreported)).

Suffice it to say, we are alive to the amendments to section 265 of the CPA which were ushered in vide Written Laws (Miscellaneous Amendments) Act No. 1 of 2022, whereby now it is no longer mandatory to conduct a criminal trial with the aid of assessors. That notwithstanding, at the time of the trial which is subject to the instant appeal, it was mandatory to conduct a trial with the aid of assessors and the provisions

of section 298(1) of the CPA had to be complied with, necessitating the summing up to be conducted in accordance with the legal stipulations. In the instant appeal, we thus declare the proceedings of the trial court to be a nullity. The proceedings of the trial court and judgment are hereby quashed, and the sentence imposed is set aside.

On the way forward, the learned counsel for the appellant has urged us to refrain from ordering a retrial but set the appellant free, relying on the argument that the prosecution case is weak, and a retrial will afford them an opportunity to fill in the gaps in their case. On the other hand, the learned Senior State Attorney implored us to order a retrial from the stage of summing up, stating that the prosecution case was very strong to lead to the conviction of the appellant. Clarifying the reasons for praying for an order of retrial from the stage of summing up, she stated that since the assessors had fully participated in the conduct of the trial, there is no need for the trial to start afresh but that it should start from the stage of summing up to assessors to also alleviate the appellant's fear of the possibility of the prosecution to present evidence to fill any perceived gaps in the prosecution case.

We are aware that the usual practice of the Court where the proceedings are vitiated due to incurable irregularities, is to order a retrial from whichever stage the Court finds will serve the interests of justice. In the instant case, in determining the way forward, we are guided by the

principles set out in **Fatehali Manji v. Republic** (1966) EA 343. Thus, essentially, the question before us for determination is the sufficiency or otherwise of the prosecution evidence and if it warrants an order of a retrial. In essence, in addressing this issue, we shall also be determining the remaining grievances fronted by the appellant in this appeal.

There is no doubt that the conviction of the appellant was hinged on circumstantial evidence and confessional statements. Having considered the record of appeal, we agree with both counsel that both the extrajudicial statement and the cautioned statement were not properly admitted into evidence. The fact that the certification in the cautioned statement to show that the appellant read the statement and agreed on its content or that it was read to him, and he agreed on its contents is missing therein, is evidence that exhibit P5 was in contravention of section 57(3) of the CPA is clear. The certification by PW3 or his oral testimony that he read to the appellant is not sufficient and the trial court should not have accorded any weight to it. The anomaly is fatal as expounded in the case of **Ibrahim Issa and 2 Others v. Republic** (supra). The cautioned statement is thus liable to be expunged, which we hereby do.

About the extrajudicial statement, we agree with both counsel for the contending sides, that the extrajudicial statement and the statement of PW4, the witness who tendered it were not read over during committal proceedings, nor did the prosecution seek additional evidence vide section

289(1) of the CPA. This should render, as prayed by both counsel for the evidence of PW4 and exhibit P6 to be expunged, as we hereby do.

As regards oral confessions, in the case of **Ndalahwa Shilanga and Another v. Republic** (supra), the Court stated that although oral admissions/confessions are admissible in certain circumstances, extreme care must be taken before taking them on their face value and referred to the holding in the case of **John Peter Shayo and Two Others vs. R.** [1998] TLR 198, where the Court held that:

> *"As a general rule, oral confessions of guilt are admissible though they are to be received with great caution."*

(See also, the case of **Posolo Wilson @Malyengo v. Republic**, Criminal Appeal No. 613 of 2015 (unreported)).

Therefore, what we take from the above decisions of the Court, as regards oral confessions, is that **one**, the reliability of the witnesses to whom the oral evidence was made should be considered, and **two**, that oral confessions must be received with great caution.

In the present case, the oral confession is not without glaring concerns, **first**, there was a police officer when the confession was recorded and the appellant was not cautioned prior to making his admission/confession. **Second**, the oral confession was made in the

presence of a few people, that included PW1, PW2 and PW3 in which case one cannot eliminate or disregard the possibility of intimidating the appellant. Without doubt, such a confession required corroboration before it should have been accorded any weight leave alone being relied upon.

In the absence of the confessional statements the remaining evidence to prove the case for the prosecution is that of PW1, PW2 and PW3 relating to the alleged oral confession of the appellant and evidence that is alleged to have led to the discovery of the body of the deceased. However, we find it pertinent to restate the principles governing the reliability of circumstantial evidence. In the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017 (unreported), the Court held that for circumstantial evidence to sustain a conviction it must point irresistibly to the accused's guilt (See also, **Simon Musoke v. Republic** [1958] E.A 715, **Hamida Mussa v. Republic** [1993] T.L.R. 123 and **John Shini v. Republic**, Criminal Appeal No. 573 of 2016 (unreported)).

In our perusal of the evidence found on record, we have failed to find any evidence to corroborate the oral confession, this is because, **one,** as argued by the learned counsel for the appellant, there is no plausible evidence to prove that the body exhumed from the appellant's house was that of Ng'holo Somi. The certificate of seizure did not record that a body was exhumed from the appellant's compound. While the appellant stated what was exhumed were bones, PW1 and PW2 stated that a body was

retrieved. PW2 stated that he could not identify who it was. PW5, the doctor who conducted the postmortem stated that from the retrieved body she could only identify the fact that it was the body of a female human being and was unable to determine the cause of death. **Two,** although PW1 adduced that he recognized the retrieved body, in his evidence he did not provide any details on what made him identify the retrieved body as that of his sister, Ng'holo Somi. We thus are of the view that had the trial judge carefully examined the evidence, he would have concluded that the retrieved body from the appellant's compound was not properly identified as that of Ngh'oio Somi. With that evidence, it means, the available evidence left doubts and room for the possibility that the exhumed body could have belonged to someone else. Doubts which should invariably favour the appellant. Thus, the evidence which comprises the body of the circumstantial evidence relied upon by the prosecution side cannot be said to have been watertight to the extent of leaving no room for other interpretation but that it was the appellant who murdered Ng'holo Somi.

For the foregoing, it is highly doubtful whether the appellant led PW1, PW2, and PW3 to the recovery of the body of Ng'holo Somi, the deceased in the charges that the appellant faced. Indeed, from what we have strived to discuss, it is evident that with the displayed imperfections

in the prosecution case, the conviction of the appellant by the trial court acting on such evidence was unsafe.

In the end, we are of the view that a retrial is not the best remedy available because it could accord the prosecution opportunity to fill up gaps in its evidence at the first trial to the detriment of the appellant. Plainly, a retrial at whatever stage will not further the interest of justice in the instant appeal. In the end, we allow the appeal and order immediate release of the appellant unless otherwise held for other lawful cause.

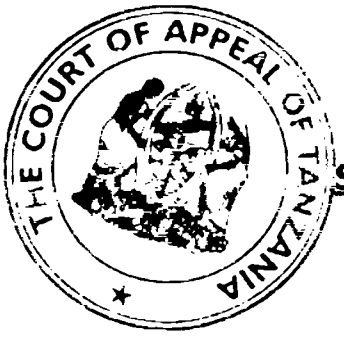
DATED at **TABORA** this 2nd day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of November, 2022 in the presence of the appellant who was represented by Mr. Kelvin Kayaga, learned counsel and Ms. Sabina Silayo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL