IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 220 OF 2020

VASCO LWENJE.....1ST APPELLANT

MANENO CHILUBA .....2ND APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Mbeya)

(Mambi, J.)

dated the 2nd day of April, 2020

in

Criminal Sessions Case No. 63 of 2014

.....

JUDGMENT OF THE COURT

29th November & 8th December, 2022

MWANDAMBO, J.A.:

In Criminal Sessions Case No. 63 of 2014, before the High Court sitting at Mbeya, three men stood charged with the murder of one Tiemu s/o John Ndelwa allegedly killed on 14/03/2012 at a place called Chemchem in Uyole within the city and Region of Mbeya. According to the information, the assailants were the appellants herein and one Almasi s/o Kalinga @ Maneno Kalinga who is not a party to this appeal.

Following a plea of not guilty to the information, the prosecution produced eight witnesses in its quest to prove the offence. The prosecution led evidence intended to prove that the deceased met his

death in the hands of the accused persons who were alleged to have hit him with a piece of timber on the material night before taking away his mobile phone make TNM and cash TZS 50,000.00. The prosecution case went on that after the fateful incident, the assailants disappeared each to his destination after dividing the loot amongst themselves except the mobile phone which remained with the first appellant.

Through the evidence of F.1583 Detective Charles (PW2), the prosecution had it that the first appellant had been wanted for the murder of another person at Airport for which, PW2 and his colleagues were instructed by their superiors to investigate on the offence which resulted into the arrest of the first appellant in Songwe area the morning of 14/03/2012 after the death of the deceased. The prosecution evidence goes further that, afterwards, PW2 accompanied by F 2821 Cpl John (PW7) took the first appellant to Songwe police station. On their way to the police station, one of the mobile phones held by the first appellant rang continuously but he could not answer the call. PW2, grabbed the ringing phone and answered the caller who wanted to know the whereabouts of the deceased Tiemu. Upon asking the first appellant if he was Tiemu, he is recorded to have said no but disclosed to PW2 and PW7 that the phone belonged to someone he and his colleagues had assaulted the previous night and disappeared with his phone. Similarly, the first

appellant allegedly revealed to PW2 and PW7 that he assaulted the owner of the phone in the company of his colleagues mentioning Maneno Chiluba (second appellant) and one Almasi Kalinga (third accused person) who was acquitted by the trial court.

At the police station, PW7 searched the first appellant and seized from him one mobile phone make TNM with serial No. 3588936195499 he listed in a certificate of seizure (exhibit P3). In the meanwhile, PW2 caused an inquiry to be made through E6796 D/Cpl Vincent (PW8) by phone if there was any report of any assault to any person in Uyole area and the response revealed existence of a murder incident. After obtaining the deceased's mobile number through his relatives, PW2 made a call through that number and one of the phones allegedly in possession of the first appellant started ringing. That prompted PW2 to link the death of the deceased with the first appellant. Moments later, PW8 who had been detailed to follow up the incident, dashed to Songwe Police Station where, upon interviewing the appellant, he is recorded to have said that he assaulted the deceased in the company of the second appellant and the third accused before snatching a phone and TZS 50,000.00 as aforesaid. Subsequently, PW8 and his colleagues led by the first appellant, arrested the second appellant and third accused at their respective places in Songwe. They were later on taken to Mbeya Central police station for

further investigative steps before they were charged with the offence of murder of the deceased to which they pleaded not guilty.

The trial began with Korosso, J (as she then was) who sat with three assessors and heard the evidence of PW1, PW2 and PW3. Mambi, J took over the trial sitting with two assessors after the death of the Exson Nazareth; the assessors and continued with the trial to its finality.

In their defence, the appellants distanced themselves themselves from the accusation involving the murder of the deceased. The first appellant for his part denied having been arrested on 14/03/2012 and found with any mobile phone. Instead, he stated that, he was arrested on 17/03/2012 at Songwe in Mbozi by six unknown people who took him to Mbeya Central Police Station where he was tortured to extract a cautioned statement from him. He too denied having mentioned any person in connection with the offence he stood charged with. In effect, he denied knowing any of the co-accused persons before the trial court. On the other hand, the second appellant denied having participated in killing the deceased. He denied knowing the first appellant and stated that he was arrested on 13/03/2012 at night and, like the first appellant, he was tortured by the police forcing him to record a cautioned statement.

At the end of the trial the assessors returned with a non-unanimous opinion on the guilt of the appellants. They did so after the

trial judge had addressed them in terms of section 298 (1) of the Criminal Procedure Act (the CPA).

In the judgment, the trial judge took the view that the case could be determined on what he referred to as key issues namely; **one**, whether there was circumstantial evidence to link the accused with the murder, **two**, whether the doctrine of recent possession could be invoked in determining the guilt of the accused persons; and **three**, whether the accused persons were responsible for the deceased's death and if so, whether they did so with malice aforethought. In convicting the appellants, the trial court relied on circumstantial evidence, doctrine of recent possession connecting the first appellant with the murder, appellants' cautioned statements and, the conduct of the appellants before and after the commission of the offence. However, the trial court found no evidence linking the third accused with the offence charged and acquitted him. Before entering a finding of guilt, the trial court took the view that from the evidence, the prosecution proved the case against the appellants beyond reasonable doubt and thus were responsible for the death of the deceased having done so with malice aforethought. Upon such conviction, the trial court imposed the mandatory death sentence.

Aggrieved, the appellants are before the Court challenging their conviction. Initially, each had lodged his own memorandum of appeal but

subsequently, Messrs. Baraka Mbwilo and Isaya Mwanri, learned advocates assigned to represent the appellants lodged a supplementary memorandum in terms of rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 replacing the previously lodged memoranda by the appellants. The supplementary memorandum raises three grounds on the following complaints, namely;

1. *The trial judge's failure to explain to the assessors on vital points of law from the evidence on record and introducing extraneous matters rendering the whole proceedings a nullity;*
2. *Grounding conviction on cautioned statements which were not admitted as exhibits during the trial; and,*
3. *Error in convicting the appellants on unreliable and weak evidence of the prosecution.*

We heard Mr. Mbwilo who represented the appellants during the hearing of the appeal on the substituted grounds of appeal following a consent order. The respondent Republic was represented by Mr. Baraka Mgaya, learned State Attorney resisting the appeal.

In his address, Mr. Mbwilo pointed out three aspects in support of first ground namely; **one,** failure by the trial judge to address the assessors on vital points of law; **two,** failure to sum up the defence

evidence and; **three,** introduction of extraneous evidence not adduced by the prosecution.

Regarding the failure to explain on vital points of law, the learned advocate argued that, although the trial judge discussed the doctrine of recent possession and the evidence of co-accused in his judgment, he did not address the assessors on the circumstances under which such evidence can be relevant to found conviction. To buttress his argument, the learned advocate referred us to the Court's previous decision on the wanting summing up and effect thereof to the trial to wit; **Lazaro Katende v. Director of Public Prosecutions**, Criminal Appeal No. 146 of 2018, **Galula s/o Nkuba @ Malago & Another v. Director of Public Prosecutions**, Criminal Appeal No. 394 of 2018 and **Philemon Zakaria @ Laizer v. Republic**, Criminal Appeal No. 133 of 2019 (all unreported). Based on the said decisions, the learned advocate urged that, in view of the inadequate summing notes to the assessors, the trial was a nullity as it was tantamount to being conducted without the participation of the assessors contrary to the mandatory requirements of section 265 of the CPA before its amendment vide Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022.

Next, Mr. Mbwilo attacked the summing up notes for omitting to address the defence evidence thereby denying the assessors of their

meaningful participation in the trial before giving their opinions as required of them by section 298 (1) of the CPA.

Finally, the learned advocate faulted the trial judge for referring to some matters in his judgment which did not feature in the evidence adduced by the prosecution. He cited two of such matters; **firstly,** reference to Imei Number of the phone allegedly seized from the first appellant (at page 222 of the record of appeal) instead of a serial number shown in the certificate of seizure and, **second;** reference to a motorcycle at page 188 of the record of appeal as the property recently found in possession of the first appellant. Owing to the shortcomings in the summing up notes, Mr. Mbwilo invited the Court to hold the trial a nullity which will result in quashing conviction and sentences imposed and releasing the appellants.

For reasons he argued in support of ground two and three, the learned advocate argued that this was not a fit case for ordering a retrial.

Addressing the Court on ground two, the learned advocate contended that it was wrong for the trial court to rely on cautioned statements of the appellants which were not admitted as exhibits during the trial to form part of the record. In elaboration, the learned advocate argued and rightly so in our view, that the admission of the cautioned statements in the trial within a trial to test their voluntariness following an

objection by defence counsel which was overruled at the end of such trial did not amount to their admission in a full trial involving assessors. He thus implored the Court to expunge the reference to the cautioned statements in the trial court's judgment since they were not part of the record.

With regard to ground three, Mr. Mbwilo was resolute that the appellants were convicted on weak and unreliable prosecution evidence which did not prove the case on the required standard applicable in criminal cases. To start with, the learned advocate pointed out what he referred to as a variance between the information and evidence regarding the date of the commission of the offence. He argued strongly that, whereas the information alleged that the fateful incident occurred on 14/03/2012, the evidence refers to 13/03/2012 as the date of the alleged murder despite which, the prosecution did not move the trial court to amend the information. Placing reliance on the Court's decision in **Anania Turian v. Republic**, Criminal Appeal No. 195 of 2009 (unreported), the learned advocate invited the Court to hold that there was no evidence proving that the murder was committed on 14/03/2012, subject of the information on which the appellants stood trial.

Secondly, the learned advocate faulted the finding of the trial court on the invocation of the doctrine of recent possession in relation to the

mobile phone which was not produced at the trial for identification by the identifying witnesses particularly, the deceased's wife; Lucia Ndelwa (PW1) who is said to have identified the phone as belonging to her departed husband. Besides, the learned advocate argued that not only did the prosecution fail to lead evidence through PW2 to identify the phone in the course of his testimony but also, neither he nor PW8 mentioned its serial or Imei Number let alone the number that called the deceased's phone while in possession of the first appellant. The Court was referred to its previous unreported decision in **Julius Mwanduka @ Shila v. Republic,** Criminal Appeal No. 322 of 2016 on the particulars of evidence sufficient to identify a mobile phone linking the accused with commission of the offence.

It was the learned advocate's submission that the evidence through PW2 and PW8 left several unfilled gaps which, had the trial court directed his mind to them, it would not have convicted the appellants on the basis of the doctrine of recent possession.

Finally, Mr. Mbwilo argued that, considering the variance between the information and the evidence coupled with the irregular admission of cautioned statements and improper application of the doctrine of recent possession, the remaining evidence will be largely circumstantial which is too weak to return a verdict of guilty. He referred the Court to its decision

in **Joseph Deus @ Sahani & Another v. Republic**, Criminal Appeal No. 564 of 2019 (unreported) on the condition/factors to be considered before a trial court can rely and act on circumstantial evidence to ground conviction. Under the circumstances, Mr. Mbwilo argued that, ordering a retrial of the case after nullifying the trial due wanting summing up notes to the assessor on grounds argued in ground one will not serve the interest of justice. He therefore beseeched the Court to release the appellants after quashing their conviction and setting aside sentences.

For his part, Mr. Mgaya was in agreement with Mr. Mbwilo on the wanting summing up notes. In addition, the learned State Attorney pointed out that the learned trial judge did not explain to the assessors the relevance of oral confessions in grounding conviction. He also pointed out that even though the trial judge relied on the impugned cautioned statements in convicting the appellants, he did not address the assessors on their relevance. Mr. Mgaya conceded to the order quashing the convictions and setting aside the sentences and ordering a retrial or remitting the matter to the High Court for a fresh summing up by the trial judge to the same assessors who sat with him during the impugned trial.

Supporting his stance on oral confession, the leaned State Attorney argued that, even though the trial court relied on the doctrine of recent possession, the first appellant was not arrested on the allegation

concerning the mobile phone rather, in connection with murder of another person during which he made oral confession to PW2. He was emphatic that the oral confession made by the first appellant was sufficient to ground conviction on the authority of the Court's unreported decision in **Posolo Wilson @ Mwalyego v. Republic,** Criminal Appeal No. 613 of 2015.

On ground two, Mr. Mgaya conceded to the complaint that the cautioned statements were not admitted during the trial and thus they could not have been relied upon in grounding conviction against the appellants. Like the appellant's advocate, Mr. Mgaya implored the Court to discard the reference to the impugned statement. Similarly, he pointed out irregularities in the admission of the certificate of seizure (exhibit P3) and the reference to mobile phone which was not admitted in evidence and urged the Court to discard them. Nonetheless, the learned State Attorney made a somewhat novel suggestion urging the Court to retain oral confession made to PW6 when recording the impugned statements but could not go further justifying that course of action in the circumstances of the case. In support of an order for a fresh summing up, Mr. Mgaya relied on our decision in **Geoffrey Ntapanya Another v. Republic,** Criminal Appeal No. 232 of 2019 (unreported).

Submitting in rejoinder, Mr. Mbwilo reiterated his stance against an order for a retrial considering that apart from the weak circumstantial evidence, there was no other evidence to support conviction. He distinguished the reliance on **Posolo Wilson @ Mwalyogo v. Republic** (supra) in which the oral confession was made to a Hamlet Chairman by the appellant as a free agent followed by a promise to compensate the victim which was not the case in the instant appeal. Mr Mbwilo raised concerns on the suggestion to remit the record for a fresh summing up considering that there was no assurance of the matter being placed before the same judge and assessors.

Having heard the submissions from the learned counsel and upon examination of the record of appeal, we begin our discussion with ground two of appeal. There is no dispute in this appeal that, in convicting the appellants, the trial court relied on, amongst others, appellants' cautioned statements, which counsel are agreeable that they were not admitted in the trial. It is glaring from the record of proceedings that, in the course of the trial, the prosecution sought to tender cautioned statements of the first and second appellants. The record shows that, following objections from the defence counsel, the trial court conducted a trial within a trial before admitting the impugned statements and overruled the objections. Needless to say, the record does not show whether such statements were

indeed admitted as exhibits upon resumption of the main trial in the presence of the lay assessors. Without further ado, we find merit in ground two and allow it. We too agree with the learned counsel on the consequences flowing from the irregularity and discard any reference to the impugned statement from the trial courts' judgment. In the same vein, in view of Mr. Mgaya's submission in relation to irregular admission of the certificate of seizure (exhibit P3) we hereby expunge it from the record. Similarly, we discard any reference to the mobile phone not admitted during the trial as part of the record.

Next for our consideration is the validity of the trial and the conviction arising from it in the light of the impugned summing up notes, subject of ground one of the appeal. From the submissions of the learned counsel, there is no longer any dispute that the summing up notes to the assessors appearing at pages 182 to 189 inclusive of the record of appeal are, with respect, wanting in several respects. It is trite law that a proper summing up is one which contains all essential elements/ingredients in a case, explanation on the burden of proof and the duty of the prosecution to prove its case beyond reasonable doubt, elaboration on the cause of death, malice aforethought and the main issue involved in the case but not limited to the nature of the evidence, credibility of witnesses, nature of the defence evidence etc. See for instance, **Lazaro Katende v.**

Director of Public Prosecutions (supra) referring to **John Mlay v. Republic,** Criminal Appeal No. 216 of 2017 (unreported). See also: **Masolwa Samwel v. Republic,** Criminal Appeal No. 206 of 2014 (unreported).

In **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014 (unreported), also referred in **Lazaro Katende** (supra), the Court held that an inadequate summing up with non-direction or misdirection on vital points of law to assessors is equivalent to a trial without the assessors rendering it a nullity. That has been the position of the Court in many other decisions.

As submitted by the appellant's learned advocate and conceded by Mr. Mgaya, it is evident that before narrating the evidence, the trial judge addressed the assessors on the burden and standard of proof, conviction to be on the strength of the prosecution evidence rather than weakness in the defence case, any doubt in the prosecution evidence to be resolved in the accused's favour, ingredients of the offence of murder, reliance on circumstantial evidence to establish existence of certain facts. After the summary of the evidence, the learned trial judge directed the assessors to focus their opinions on three issues; **one,** that the case before the court was mainly circumstantial; **two,** relevance of the doctrine of recent possession in view of the prosecution's evidence that the accused was

found in possession of deceased's motorcycle and; **three,** whether there was sufficient evidence to discharge the prosecution's burden of proof. Before directing the assessors to focus on the identified issues, the learned trial judge stated:

> *"... it is not possible for me to restate every aspects of the evidence I believe, however, that will take a long time. May belief is that what was stated by both prosecution and defence is still fresh in your memories such that you are at liberty to state any fact, which you feel to be material and which I may not have touched". [at page 188 of the record of appeal]*
>
> A head of his conclusion, the learned judge stated:
>
> *"... you are at liberty to raise more issues you wish to address.... Provided that at the end of you* ***submission*** *you should state whether or not the accused* ***person is*** *guilty..." [At page 189].*

It is significant that the above excerpt is identical to what featured in **Malambi s/o Lukwaja v. Director of Public Prosecutions**, Criminal Appeal No. 71 of 2018 (unreported) in which the Court stated at page 16 thus:

> *"Thirdly, whereas it was the duty of the trial judge to sum up to the assessors at the end of*

the trial, he appears to have left the assessors to give their opinions beyond his own summing up notes. We feel constrained to say at this stage that giving the assessors the impression that they were at liberty to wander and resort to their fresh memories by raising issues on which they had not been directed was, with respect an abdication of duty. It was contrary to the dictates of the law which enjoins the trial judge to sum up to the assessors to enable them perform their duty of giving their opinions as required of them under section 298 (1) of the CPA".

We need not say anything more than the fact that the above holds true in the instant appeal. furthermore, as rightly submitted by Mr. Mbwilo, the summing up omitted to explain what it meant by overt act, actus reus in the offence of murder, malice aforethought and circumstantial evidence. One of the points for determination in the trial court's judgment was whether the accused persons were responsible for the death of the deceased and if so, whether they did so with malice. However, there is no mention of malice in the summing up notes to the assessors. Besides, notwithstanding the irregular reliance on the cautioned statements, the trial judge said nothing on the relevance of the evidence in the cautioned statements he relied in convicting the appellants in the summing up notes.

Additionally, as submitted by Mr. Mgaya, the is no mention of the relevance of oral confessions the first appellant allegedly made to PW2 let alone any explanation of the relevance of such confession in relation to the co accused persons allegedly he participated with in assaulting the deceased to death before snatching his mobile phone.

In their totality, the summing up notes were, with respect, inadequate as they were characterized by non-direction and misdirection of the evidence and vital points of law so much so that the assessors were effectively denied their opportunity to make their meaningful opinions as required of them by section 298 (1) of the CPA. Indeed, the effect of the non- direction to the assessors in this appeal becomes more clearer considering the divergent opinion whereby, the first assessor (Maua Mgawe) returned a verdict of guilt based on the alleged confession to PW7 and PW8 as well as the cautioned statements not admitted during the trial neither did the trial judge explain to the assessors on the said confessions. Eliza Kilindu, the second assessor opined the appellants were not guilty because the piece of timber allegedly used to kill the deceased was not tendered in evidence. The net effect was that the trial cannot be said to have been conducted with the aid of assessors having a bearing on the appellants' conviction and the sentences which we hereby quash and set aside.

Having so held, the next issue for our consideration and determination revolves around the way forward considering that the learned counsel expressed divergent views in that regard. Whilst the learned State Attorney touted for a retrial or alternatively, remitting the record to the trial court for a fresh summing up by the trial judge to the same assessors, the appellant's advocate urged the Court to acquit the appellants for lack of evidence warranting a retrial.

We must state at this juncture that a retrial has been held to be viable where it is in the interest of justice doing so upon nullification of the trial. That position has been derived from the holding of the defunct Court of Appeal for East Africa in **Fatehali Manji v. Republic** [1966] E.A. 343 followed in many of the Court's decisions including those referred to us by Mr. Mbwilo in his submissions.

The considerations the Court has taken in ordering a retrial or not revolve around the existence of cogent evidence to sustain a conviction and the possibility of the prosecution filling gaps in its wanting evidence. Needless to say, mindful of the rule in **Manji's** case, the Court has approached the issue on the basis of the peculiarities of each individual case. For instance, in cases where evidence relied upon to convict accused persons has been held to be wanting, the Court has taken upon itself to evaluate it and where it was satisfied that such evidence was

weak, it has acquitted or discharged the appellants whilst in other cases it ordered a retrial. See for instance the previously referred decisions in **Malambi s/o Lukwaja v. Director of Public Prosecutions**, **Galula s/o Nkuba @ Malago & Another v. Republic** and **Lazaro Katende v. Director of Public Prosecutions**.

It will be noted that in **Lazaro Katende**, the Court nullified the trial by reason of irregular selection of assessors and inadequate summing up and ordered a retrial. On the other hand, in **Malambi s/o Lukwaja** even though the trial was held to be a nullity for irregular selection of assessors and wanting and summing up notes, the Court declined to order a retrial due to insufficiency of evidence coupled with fact that ordering a retrial would have subjected the appellant to a third trial which could not be in the interest of justice.

Mr. Mbwilo made arguments aimed at punching holes in the prosecution evidence not favourable for a retrial. Whilst we agree with his approach, we do not think it is necessary discussing every aspect featuring in the learned advocate's submissions. Afterall, Mr. Mgaya made no meaningful argument in rebuttal. We shall pick some of the aspects which we think are sufficient for our purpose without derogating from the learned counsel's submissions.

To start with, in view of our determination of ground two resulting into the expungement of the cautioned statements and the certificate of seizure, there is no longer any evidence to support the confessions and the doctrine of recent possession relied upon by the trial court in convicting the first appellant. With respect, Mr. Mgaya's urging for a retrial on the basis of the evidence of oral confession hangs in the balance as it will become clearer shortly. We are mindful that in law, a confession may be oral or in writing provided it is voluntarily made admitting the ingredients of the offence. See: **Boniface Mathew Malyango & Another v. Republic,** Criminal Appeal No. 358 of 2018 (unreported), **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82 and **Mohamed Manguku v. Republic**, Criminal Appeal No. 194 of 2004 (unreported). The question we have asked ourselves and which Mr. Mgaya did not have regard to is whether the alleged oral confessions be it to PW2, PW6 or PW7 met the threshold of a legally valid confession. Whilst there may be little dispute that the first appellant may have confessed that he assaulted the deceased on the material night, two questions arise for consideration; one, whether the first appellant was a free agent when he made such confession two, whether the confession was an admission to the ingredients of murder.

In our view, the reliance upon our decision in **Posolo Wilson @ Mwalyego** is, with respect, unhelpful to the respondent Republic. Mr Mbwilo's submission in this regard cannot be more right; it is doubtful if there was no oral confession capable of supporting the case for the prosecution let alone the fact that such confession, if any, would only be relevant to the first appellant.

It is evident that, in **Posolo Mwalyego**, the Court accepted that the appellant made the oral confession of rape to, amongst others, a Hamlet Chairman followed by a promise to defray the costs of treating the victim and an offer of groundnuts as compensation as a free agent. The position in this appeal is that, the alleged confession was made to the policemen who had already put the first appellant under restraint in connection with the murder of a person at Airport Area. Mr. Mgaya's suggestion that we should accept that the alleged oral confession by the second appellant to PW6 before he allegedly made a cautioned statement not part of the record cannot be of any help. In **Ndalahwa Shillanga & Another v. Republic**, Criminal Appeal No. 247 of 2008 (unreported) referred in **Ntobangi Kelya & Another v. Republic**, Criminal Appeal No. 256 of 2017 (also unreported), the Court sounded a caution against reliance on confessions made in the presence of Sungusungu militia in the following words:

> *"Equally, the appellant is alleged to have made such confession in the presence of a group of village vigilantes (Sungusungu). In* ***Regina and Another v. Republic****, Criminal Appeal No. 10 of 1998 (unreported), it was held that although in law Sungusungu were not policemen, in real life, they had more coercive power than ordinary citizens and therefore feared. 1. What emerges from the foregoing is that a confession made before Policemen who are taken wield coercive powers is not ordinarily voluntary unless there is evidence proving the contrary. Neither PW2 nor PW7 led evidence suggesting that before making such confession, the first appellant was warned on the effect of such confession against him".*

There is no evidence that the appellants made the alleged oral confessions as free agents. That aside, the first appellant's confession, if any, was on assault of a person by a piece of timber. There was no confession to the ingredients of murder of the deceased or that the death of the deceased was caused by the said assault. As submitted by Mr. Mbwilo, even if there was such confession, it will only be relevant to the first appellant and not the second appellant.

Under the circumstances, in view of the wanting oral confession, we do not think it will be in the interest of justice to order a retrial, for the prosecution may seize the opportunity to fill gaps in its wanting evidence

including admission of the cautioned statements to secure conviction. In the same vein, we do not think this is a fit case ordering a fresh summing up because the evidence remaining on the record is too weak to sustain a conviction.

In the event, we sustain the appeal on all grounds and hold that the trial conducted without the aid of assessors was a nullity from which no judgement convicting and sentencing the appellants could have arisen.

For the reasons stated above, we quash the appellants' convictions and set aside sentences with an order for their immediate release from custody unless lawfully held therein.

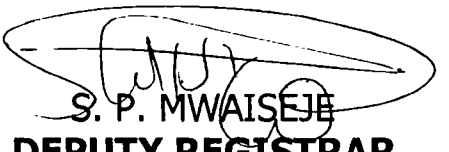
DATED at **MBEYA** this 7th day of December, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 8th day of December, 2022 in the presence of Mr. Issay Mwanri, learned counsel for the 1st and 2nd Appellants and Ms. Anastazia Elias, learned State Attorney, for the Respondent/Republic is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL