IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

(CORAM: MUGASHA, J. A., SEHEL, J.A And MWAMPASHI, J. A.)

CRIMINAL APPEAL NO. 172 OF 2022

OSCAR s/o CHRISTOPHER..... 1st APPELLANT
MAULID s/o SAID @ BANDIKO..... 2nd APPELLANT
ABDALLAH s/o ISSA @ NDIMU..... 3rd APPELLANT
JUMA s/o HAMISI YAKOBO..... 4th APPELLANT
JOVIN s/o DEO MNYANUNGU..... 5th APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Mlacha, J.)

dated the 29th day of March, 2022
in
Criminal Sessions Case No. 23 of 2021

.....

JUDGMENT OF THE COURT

30th & 13th .June, 2023.

SEHEL, J.A.

This first appeal is from the decision of the High Court of Tanzania at Kigoma (the trial court). The appellants were charged and convicted of murder, an offence under sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2019 [now R.E. 2022]. They were each sentenced to death by hanging.

The information had alleged that on 15th May, 2021 at Mwanga centre area within the District and Region of Kigoma the five appellants

murdered one Nuru s/o Noel (henceforth the deceased or Nuru). As to how the deceased met his death, Shemkiwa Lameck (PW1), a watchman at Marungu market, Kigoma, recounted that while on duty on 14th May, 2021, he was approached by the 3rd appellant and Mateo who asked him to go to Mwanga area at the 2nd appellant's place to assist his friend, Nuru, who was in trouble. PW1 obliged. Upon reaching there, he said, he saw Nuru on the ground and the 5th appellant beating him with a piece of a pipe, all over the body except the head. There and then, the 1st appellant started attacking him with a piece of iron bar while Mateo tied Nuru's hands and legs with a rope and then together with the 3rd appellant joined to attack Nuru.

According to PW1, the beatings went on till dawn when the 1st appellant suggested that they should wait for their boss. After Fajr prayer, the boss, the 2nd appellant arrived dressed in a long white Muslim robe and ordered the 1st appellant to take Nuru to the scrap metal store which was just across the road. Mateo picked Nuru and PW1 was ordered to follow them which he did. While in there, PW1 saw the 2nd appellant changing his white robe into work clothes and joined others to attack both of them with an electric wire. While they were still in the store, thereby came the 4th appellant who joined others to beat Nuru using an electric wire. At that time, he said, Nuru's condition was

worse as his right hand seemed broken and his shirt was torn apart. PW1 also claimed to have seen the 5th appellant joining others and briefly beat Nuru and left the place. PW1 further recounted that they were beaten till around 08:00hrs when the brother of the 2nd appellant, Musa Bandiko arrived and pleaded with the appellants to stop the beatings. That is when, the 2nd appellant ordered Nuru to be taken home. Mateo untied Nuru and carried him into a motorcycle while leaving behind Nuru's torn shirt. Since Nuru was very weak, Mateo held him in the motorcycle in which the 3rd appellant was riding. PW1 was also sent home but he did not go straight there, passed by Msufini Police Post to report the crime but he was not assisted. He thus decided to go first to Msufini Dispensary where he was diagnosed and injected with tetanus vaccine, then, went to his sister's place to treat his wounds. PW1 said that he stayed there for five days.

While PW1 was treating his wounds, in the morning of 15th May, 2021, a Police Constable (PC) Henry Mnyeti (PW8) was on his way to work and saw a group of people gathered on the road side. He went closer to see what was happening. Upon reaching there, he saw a dead human body lying on the road side to Mjimwema area. It was a male's body with swollen legs, hands and face. The dead man had on a dark blue trouser without a top. PW8 called the Assistant Commanding Officer

from the Criminal Investigation Department (Assistant, OC-CID), Afande Msangi who responded to the call and arrived at the scene together with the Assistant Inspector of the Police, A/Inspector Thomas Wilfred Mpinga, (PW7). PW7 drew a sketch map of the area which was tendered and admitted as exhibit P4. The police took the body to Maweni Regional Referral Hospital (Maweni hospital) and kept it in the morgue pending investigation.

After five days, PW1 went to Nuru's mother, one Benadeta to check for his friend but he was told that his friend had not been seen for a while. With that information, PW1 together with Benadeta started searching for Nuru. They visited the police and Maweni hospital. At the hospital, they were told that a male body was received nine days ago and had been kept in the mortuary. So, they were advised to go and check if it was the person they were looking for. They went and identified the body of Nuru. Dr. Bongo conducted an autopsy and on 26th May, 2021 they buried him at Mji mpya.

According to the evidence of Assistant Superintendent of Police (ASP) Menas Temba (PW11) who led the team of investigation of the death of Nuru, he said that on 2nd June, 2021 he received a complaint from the mother of the deceased, one Benadeta. Upon receipt of such complaint, he visited the crime scene, that is, the 2nd appellant's store to

conduct investigation. He went there with three other police officers. He tried to interrogate the neighbours but they all refused to cooperate except A.M. (PW2), a child aged 12 years old. The evidence of PW2 was to the effect that on 14th May, 2021, while asleep she was woken up by a voice saying "Nisaidieni" coming from the 2nd appellant's store. She peeped and saw PW1 being beaten but could not see other people who were in there.

On the next day, PW11 went again to the crime scene in order to draw a sketch map. While he was there, he was informed by a bystander that the deceased's shirt was inside the 2nd appellant's store. Right there, PW11 decided to conduct an emergency search. He summoned the street chairperson, one Karume Shabani Karume (PW3) who witnessed the search. Therefrom, PW11 collected a blue shirt with long sleeves allegedly belonging to the deceased that had some blood stains (exhibit P3) and six sulphate bags of scrap metals with some blood stains (exhibit P5). PW11 took the exhibits to the police and handed over to A/ Inspector Moka Charles (PW9), exhibits keeper on the same date.

In his investigation, PW11 said that he reviewed the Post Mortem Examination Report (PMER) prepared by Dr. Bongo and found it not depicting the truth. Therefore, he wanted to satisfy himself on the cause

of death of the deceased. He sought a second opinion from Dr. Frank Martin Sundai (PW4) from Maweni hospital as such, exhumation of the deceased body was done on 12th June, 2021 in the presence of PW1, PW11, PW4 and Ali Omari Kanenda (PW10), a Government Chemist from the office of the Chief Government Chemist Laboratory Agency (CGCLA). PW4 examined the body and took samples for DNA test. According to PW4, he observed that the body had fractures on the bone of the right leg, at the bottom and a broken bone joining the right hand. He formed his opinion that the cause of death was respiratory and heart failure caused by bleeding following the breaking of some bones. He recorded his findings in PMER, exhibit P1.

PW10 took the samples to Leonida Daniel Michael (PW5), also a Government Chemist from CGCLA for the DNA testing. After the test, she observed that the profiling of blood samples found on the torn shirt and from the sulphate bags collected from the second appellant's store matched with the profiling of the blood samples taken from the deceased's body more than one billion times. She recorded her findings in the DNA test report from CGCLA (exhibit P2).

On the defence side, the appellants denied the allegations. The 1st appellant, a watchman at Mwanga Community Centre admitted to know PW1 as a street boy who used to work for the brother of the 2nd

appellant. He also said that he knew the 2nd respondent because he used to buy scrap metals from him. On 14th May, 2021, he claimed to be at work and around 02:00 am, heard a loud sound. He went to check and saw about four people near the 2nd appellant's store. He raised an alarm. People gathered and chased them away. He was arrested on 1st June, 2021 after being called by the police.

The 2nd appellant admitted dealing with scrap metal business at Mwanga area. He said that he knew the 1st appellant as his customer in his metal business, the 3rd appellant was the watchman of his brother and 4th appellant was his welder. He did not know the 5th appellant. On the 14th May, 2021 he said, he was at his senior wife at Mlole Block "C". While there, he received a call from the 1st appellant informing him that there was a problem at his store. He went on the next day and found a crack at his store. He was also arrested on 1st June, 2021 after being called by the police.

The 3rd appellant told the trial court that he was employed by the 2nd appellant's brother, Musa Said Bandiko as a watchman. On 14th May, 2021 he was at work and heard alarm but did not respond to it because it came from far. He knew all the appellants except the 5th appellant. He was arrested on 4th June, 2021 by the police at his office by PW11.

The 4th appellant claimed that in the night of 14th May, 2021 till dawn of 15th May, 2021 was at home and he was arrested on 1st June, 2021 when he went to report at the police station.

The 5th appellant, a motorcycle rider, claimed that he was at home on 14th May, 2021 night till dawn of 15th May, 2021 and that he was arrested on 5th June, 2021 at his usual pickup point waiting for prospective passengers in Mwembe Togwa area.

The gentleman and the lady assessors who sat with the trial judge unanimously returned a verdict of not guilty to all the appellants. Essentially, they both doubted the evidence of PW1 more particularly as to why he took time to report the incident to the police. However, the learned trial judge found PW1 was credible witness. He said:

> *"This takes us to credibility of witnesses. Looking carefully, I could not doubt the credibility of PW1 Shemkiwa Lameck. He spoke with lots of pains with his scar on the face. He appeared credible. He gave a clear account of what happened that night and in the morning."*

Having believed the evidence of PW1 and PW2, the learned trial Judge concluded as follows:

> *"The evidence of the existence of the shirt and the six sulphate bags at the store of the 2nd*

accused person [now the 2nd appellant] and the DNA evidence bring strong circumstantial evidence against the 1st, 2nd, and 4th accused who worked there. The evidence of PW1 and PW2 give the connection to the rest of the accused. It is also clear that they acted together. The evidence of PW1 and PW2 show that they had a common intention to cause grievous harm to Nuru Noel for reasons best known to themselves whom they decided to damp at the road side after finding that he was dead. This evidence suggest that they planned to create a fake picture of an accident to cover up the matter. It is a conduct which resulted full malice necessary to prove the crime of murder. That said, with much respect to the assessors, I find that the prosecution have proved their case beyond reasonable doubt..."

With that finding, the learned trial judge found the appellants guilty, convicted and sentenced them to death by hanging. The decision aggrieved the appellants. Each appellant lodged separate notice of appeal followed by a separate memorandum of appeal. However, their grievances are the same and we conveniently paraphrased the grounds of appeal as follows:

1. *That, the case for the prosecution was not proved against the appellants beyond reasonable doubt as required by the law*

2. *That, the learned trial judge did not address his mind on the issue of the cause of death of the deceased as testified by PW4*
3. *That, the learned trial judge erred in law and fact for failure to resolve the material contradiction regarding the identity of the corpse as narrated by PW8, PW1, PW11 and PW4*
4. *That, having rejected the order of exhumation, the exhumation of the body of the deceased was illegal same as admission into evidence of exhibit P1*
5. *That, the chain of custody of the samples and exhibits was broken*
6. *That, the learned trial judge erred in fact and law to impose upon the appellant the doctrine of recent possession in lieu of the fact that the search was conducted illegally*
7. *That, PW5 did not testify whether he conducted test to establish relationship as can be gleaned from exhibit P2*
8. *That, the learned trial judge erred in law and fact for failure to address his mind to a litany of material discrepancies in the case of prosecution*
9. *That, the learned trial judge erred in fact and law for failure to take cognisance of the defence of alibi put forth by the appellants in their defence.*

At the hearing of the appeal, Messrs. Ignatus Kagashe and Sadiki Aliki, both learned advocates appeared for the appellants, whereas, Ms. Amina Xavery Mawoko, learned State Attorney represented the respondent Republic.

When invited to submit on the grounds of appeal, Mr. Kagashe informed the Court that, having discussed with their clients, they agreed that they will conjunctively argue all the grounds of appeal raised in the five memoranda of appeal into one ground, that, whether the offence of murder was proved by the prosecution beyond reasonable doubt, against all the appellants. He further clarified that in arguing the said ground they will also be addressing some of the issues raised in the memoranda of appeal.

Kicking the ball, Mr. Kagashe submitted that the conviction of the appellants rests on two pieces of evidence, **one**, direct evidence of Shemkiwa Lameck (PW1) and Anjela Masumbuko (PW1), and **two**, circumstantial evidence.

Mr. Kagashe argued that the evidence of PW1 and PW2 was not coherent, neither credible nor consistent and as such, their evidence cannot be relied upon to convict the appellants. Elaborating as to why the evidence of PW1 should not be acted upon, he contended that the record of appeal bears out that PW1 did not report the incident at the earliest opportunity. Mr. Kagashe submitted that while PW1 claimed to have gone to Msufini Police Station to report the crime only to find no assistance there is no concrete evidence to that effect that, indeed, PW1 went there to report a crime. This is because, he said, none of the

investigative officers, namely PW7, PW8, PW9 and PW11 said PW1 was their source of information. He pointed out that PW11 told the trial court that on 2nd June, 2021 a woman called Benadeta arrived at his office complaining that his son had been killed by known people and it was from this complaint the search mount for the perpetrators that led to the arrest of the appellants. He went on explaining that even when PW11 went to drew a sketch map at the 2nd appellant's place, it was a mere passer-by who informed PW11 that the deceased's shirt was left inside the scrap metal store. He contended that this demonstrates that PW11 did not receive any information from PW1. Mr. Kagashe wondered as to why PW1 did not report the crime at the earliest opportunity and waited until the mother of the deceased went to complain then he started to be actively involved in assisting the police in their investigation and not Benadeta who was the complainant. He added that even the 2nd lady assessor queried why it took PW1 time to report the crime while he said that he witnessed the crime. To bolster his argument that PW1 was not a reliable witness because he failed to report the crime at the earliest opportunity, he referred the Court to its previous decision of **Marwa Wangiti Mwita & Another v. The Republic** [2002] T.L.R. 39.

In regard to the evidence of PW2, Mr. Kagashe was very brief that PW2 cannot corroborate the evidence of PW1 because it was obtained

by inducement as PW11 gave the child money to buy soda in order for him to record PW2's witness statement. Also, he argued, although PW2 claimed to have identified PW1 by his voice but such evidence was of the weakest kind. He therefore urged the Court to not give weight to the evidence of PW1 and PW2.

Arguing on the circumstantial evidence, Mr. Kagashe contended that the trial court relied on the report of the CGC on the human Deoxyribonucleic Acid (the DNA) where it was opined that the blood samples taken from the torn shirt found at the 2nd appellant's store, sulphate bags picked from the appellant's store and deceased body resembled. He contended that although the said exhibit P2 confirmed that the blood samples found on the shirt and the sulphate bags matched that of the deceased, the same cannot be acted upon because the samples were illegally obtained. He explained that PW11 claimed to conduct an emergency search on the premises of the 2nd appellant and therefrom he retrieved the torn shirt and the sulphate bags alleged to contain blood but the search was not urgent because the 2nd appellant at that time was at the remand of the police. He contended that there was no valid explanation given by PW11 as to why they had to break the locks while the owner of the premises was in their custody. It was his submission that since the samples were illegally seized the Court should

expunge the illegally procured exhibits. In the alternative, he argued, while the evidence shows that two people were beaten but the samples was taken from one person only that is the deceased's body which is inconceivable.

Mr. Kagashe also argued that there is material discrepancies on the evidence of PW1, PW9, PW6, PW7 and PW11 on the description of the deceased's torn shirt. He pointed out that PW1 said the shirt was black with lines while PW3, the street chairman who witnessed PW11 retrieving the shirt said it was a blue shirt with blood stains but the exhibits keeper, PW9 said he was handed over a blue shirt with long sleeves.

Lastly, Mr. Kagashe contended that the defence case was not considered by the trial court. He thus implored the Court to step into the shoes of the trial court and consider it.

Mr. Aliki added to the submission of learned friend that some of the material witnesses were not called by the prosecution such as Benadeta, the complainant and the Doctor Bongo who first examined the deceased body and prepared the Post Mortem Report (PMER) which according to PW11 the said report was not correct. With the

submissions, the counsel for the appellants urged the Court to allow the appeal and set aside the conviction and sentence of death by hanging.

Ms. Mawoko prefaced her submission by expressing the stance of the respondent that they oppose the appeal. In responding to the grounds of appeal, the learned Senior State Attorney adopted the mode which the counsel for the appellants submitted. Responding to the argument that the evidence of PW1 and PW2 was incredible and thus not reliable, she contended PW1 could not report the incident on time because he was treating his wounds and was not aware that Nuru was no more until when he saw the body at the morgue on 25th May, 2021. She further added that PW1 was with the deceased when they were both being beaten at the 2nd appellant's store and that the witness was not stranger to the appellant because he at one time worked with the 2nd appellant and resided in the same area with the appellants. Thus, they knew each other very well.

On the evidence of PW2, the learned State Attorney contended that PW2 properly identified the voice of PW1 and responding to the allegation that the evidence of PW2 was obtained through inducement, she contended that it was not an inducement because PW2 was paid after recording her witness statement to PW11.

On the evidence of circumstantial evidence, initially the learned State Attorney submitted that the trial court was correct in convicting the appellants basing on the DNA samples collected from the torn shirt and the sulphate bags picked from the 2nd appellant's store then compared with the blood samples of the deceased taken after exhumation of the deceased body. When probed by the Court as to whether the search was proper, she changed her stance and conceded that the search was not an emergency thus she implored the Court to expunge exhibit P2 from the record which if expunged the DNA test report from the CGCLA (exhibit P2) will not add any value or weight to the prosecution case. She therefore agreed with the submission of the counsel for the appellant that the circumstantial evidence was not there to support the conviction. Nonetheless, the learned State Attorney insisted that the remaining direct evidence of PW1 and PW2 is enough to sustain the conviction of murder and the death sentence imposed against the appellants.

As regards to failure to consider the defence case, the learned State Attorney admitted that it was not considered and prayed to the Court to consider it. She further added, given that the identification of the appellants was watertight the defence of alibi raised by the appellants dies natural death because they were all placed at the scene

of crime by PW1. To cement her submission, she referred the Court to the case of **Fred Mathias Marwa v. The Republic**, Criminal Appeal No. 136 of 2020 [2022] TZCA 317 (3 June, 2022; TANZLII). At the end, the learned State Attorney urged the Court to dismiss the appellants' appeal.

In rejoinder, Mr. Aliki briefly rejoined that the facts in the case of **Fred Mathis Marwa v. The Republic** (supra) are not the same with the present appeal as in the said case the defence of alibi was raised during the cross examination of the accused person which is not the case in this appeal.

Having carefully considered the rival arguments for and against the appeal, the grounds of appeal and the record of appeal before us, we now turn to consider the merit or otherwise of the appeal. Before doing so, we are mindful that the duty of the first appellate court, such as, what we are now, is to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusion of fact bearing in mind that the first appeal is in the form of a re-hearing as the Court never saw the witnesses as they testified – see: the cases of **D.R. Pandya v. R.** (1957) 1 E.A. 336 and **Iddi Shabani @ Amani v. The Republic**,

Criminal Appeal No. 111 of 2006 and **Maramo Slaa Hofu & 3 Others v. The Republic,** Criminal Appeal No. 246 of 2011 (both unreported).

In this appeal, it is not in dispute that, Nuru s/o Noel is dead and his death was due to unnatural cause as testified by PW4, the doctor who performed the autopsy, PW7 and PW8 who saw the deceased body lying on the side of the road with swollen legs, hands and face. The crucial issue is whether the appellants murdered Nuru s/o Noel.

The trial court relied on the direct evidence of PW1 and PW2 and circumstantial evidence to convict the appellants. The appellants contended that PW1 and PW2 were not reliable witnesses and that the exhibits used in testing DNA which the trial court considered as circumstantial evidence were illegally obtained.

We shall start with the circumstantial evidence for the obvious reason that the learned State Attorney conceded on the illegal search conducted by PW11 that led to the retrieval of the blue shirt with long sleeves with traces of blood (exhibit P3) and six sulphate bags with traces of blood (exhibit P5) from the 2nd appellant's store. We are alive that, under certain circumstances, an emergency search under Section 42 of the CPA dispenses with search warrant requirement. But we hold the firm view that the circumstances in this case do not fall into that exception. The emergency search warrant (exhibit P6) appearing at

pages 183-184 of the record shows that exhibits P3 and P5 were retrieved from the 2nd appellant's store. The explanation given by PW11 who conducted the emergency search was that the owner of the premises was at the police lock up hence he could not call him. On our part we find such excuse, not a good cause for non-compliance of the mandatory provision of section 38 (1) of the CPA. We say so because the owner of the premises was within reach in the hands of the police hence, PW11 could have easily gone and fetched him. There was no need of breaking the locks and having a forceful entry. The police ought to have complied with section 38(1) of the CPA. Since in the matter at hand the procedure of obtaining exhibits P3 and P5 was flawed, we have no hesitation to hold that they were improperly obtained thus wrongly acted upon by the trial court. Consequently, we expunge them from the record. After expunging the said exhibits, the DNA test report from CGCLA (exhibit P2) will not have any value on the prosecution case because the said report is based on the illegally obtained exhibits. That said, given that the blood samples were retrieved from a room in which the deceased and PW1 were beaten, the CGCLA DNA report on solely the deceased, is highly suspect.

We now turn to the re-evaluation of the direct evidence of PW1 and PW2 which the trial court found conviction of the appellants. At first,

we wish to restate the salutary principles of law that will be guiding us in re-evaluation of such witnesses' evidence. **One**, the credibility of any given witness is the monopoly of the trial court and it is always in a better position to assess it in terms of the demeanour of such witness - see: **DPP v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149; **Shabani Daudi v. The Republic**, Criminal Appeal no. 28 of 2001 (unreported); and **Benedict Buyobe @ Bene v. The Republic,** Criminal Appeal No. 354 of 2016 [2018] TZCA 338 (18 September, 2018; TANZLII), and **two**, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believe the said witness, such as, the witness had given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses – see: **Shabani Daudi v. The Republic** (supra) and **Goodluck Kyando v. The Republic** [2006] T.L.R. 363.

According to the evidence of PW1, the incident of beating the deceased occurred on 14th May, 2021. He stayed at his sister's place until 24th May, 2021 when he went to the deceased's mother, one Benadeta, to check on his friend only to be told that he has not been seen for a while. From that date, him together with the deceased's mother, started searching for Nuru and on 25th May, 2021 they found his

body at the mortuary of Maweni General Hospital. Further, the evidence on record shows that investigation of the case that led to the arresting of the appellants started on 2nd June, 2021 after a complaint lodged by the mother of the deceased, one Benadeta. From the sequency of evidence, it was not PW1 who reported this serious murder crime to the police. We wonder why he kept quiet until the mother of the deceased decided to report it. If he truly knew the perpetrators, why did he not report them at the earliest opportunity? If the trial court had subjected this conduct of PW1 to close scrutiny it could not have reached to a finding that the witness was credible. As it is well settled, that delay in naming a suspect at the earliest opportunity dents a witness's credibility, especially where the identification of the suspect is in issue -see: **Marwa Wangiti Mitwa & Another v. The Republic** (supra) and **Jaribu Abdalla v. The Republic**, Criminal Appeal No. 220 of 1994 (unreported).

Further, we find that Benedata who was the complainant was a material witness for the prosecution but was not paraded as a witness. We strongly believed that her evidence would have shed light as to why there was a delay in reporting this serious murder crime and who were the perpetrators because according to PW11, Benadeta had disclosed that PW1 mentioned to her the culprits.

That said, let us now turn to the evidence of PW2, the trial court found that PW2 identified PW1 by his voice thus corroborated the evidence of PW1 who claimed that he was beaten on that night. However, upon a close scrutiny of the evidence of PW2, we find that she did not mention the appellants. Neither did she say that she identified PW1 by his voice. In her evidence, she told the trial court the following:

> *"On 15/5/2021 at morning hours, I was at home. I heard sounds **'nisaidieni'**. They came from **"kwa Mau"**. Mau is that guy with a white cap (**Baraghashia nyeupe**). The houses are adjacent. I woke up Loutila. We moved at the window of Mau store. There was a small window. We saw a person being beaten by an iron pipe. They chased us and went to take bath. I could not identify the one who was beating because the window was small. Someone said **'tokeni'**..."*

Deduced from the above evidence of PW2, it is obvious the witness did not say that the voice she heard was that of PW1. Neither did she say that she was familiar with the voice of PW1. Without prejudice, in the case of **Stuart Erasto Yakobo v. The Republic,** Criminal Appeal No. 202 of 2004 (unreported), when dealing with the voice identification, the Court said:

> *"For voice identification to be relied upon it must be established that the witness is very familiar*

with the voice in question as being the same voice of a person at the scene of crime."

See also: the cases of **Kanganja Ally and Juma Ally v. Republic** [1980] T.L.R. 270, **Nuhu Selemani v The Republic** [1984] T.L.R. 93 at P. 94 and **Baldwin Komba @ Ballo v. Republic** (CAT) Criminal Appeal No. 56 of 2003 (unreported).

Further to that, there is evidence showing that the witness received money to buy soda after she had recorded her witness statement to PW11. The law on evidence is clear that a witness's credibility may be impeached because he/she had received or received an offer of inducement to give his/her evidence – see: section 164 (1) (b) of the Tanzania Evidence Act, Cap. 89 R.E. 2022. Given that there is evidence of PW11 paying money to PW2, we are satisfied that PW2 was untruthful witness. With that evidence on record, we find it unsafe to uphold the finding of the trial court that the offence of murder against the appellants was proved beyond reasonable doubt by the prosecution.

Having found that the prosecution failed to prove the offence against the appellants on the required standard, that entirely disposes the appeal, we do not see the need to determine the complaint regarding failure by the trial court to consider the defence case.

At the end, we find that the appeal has merit. We therefore allow it and proceed to quash the conviction and set aside the death sentence imposed on the appellants. Accordingly, we order that the appellants, namely; **Oscar s/o Christopher, Maulid s/o Said @ Bandiko, Abdallah s/o Issa @ Ndimu, Juma s/o Hamisi Yakobo** and **Jovin s/o Deo Mnyanungu** be released forthwith from prison, unless they are otherwise lawfully held.

DATED at **KIGOMA** this 13th day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 13th day of June, 2023 in the presence of Messrs. Ignatus R. Kagashe, assisted by Sadiki Aliki, both learned advocate for the appellants and Mr. Shaban Juma Masanja, learned Senior State Attorney for the respondent Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL