IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MASOUD, J.A.)

CRIMINAL APPEAL NO. 207 OF 2019

HAMIS CHACHA WISARE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Matogolo, J.)

dated the 3rd day of June, 2019

in

Criminal Sessions Case No. 48 of 2018

.....

JUDGMENT OF THE COURT

25th August & 1st September, 2023

MWAMBEGELE, J.A.:

The appellant, Hamis Chacha Wisare, together with two other persons who are not parties to this appeal, was charged with and convicted of murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). It was alleged in the particulars of the offence that on 6th September, 2017 at Himo area within Moshi District in Kilimanjaro Region, they murdered one Humphrey Makundi. The appellant was found guilty as charged, convicted and sentenced to the mandatory death sentence in terms of section

197 of the Penal Code. His co-accused persons were convicted of accessory after the fact to murder in terms of section 387 (1) and 388 of the Penal Code and were sentenced to a prison term of four years each. Aggrieved, the appellant has come to this Court on a first and last appeal. His appeal was, initially, premised on twenty grounds comprised in a memorandum of appeal with six grounds lodged in the Court on 9th August, 2019 and a supplementary memorandum of appeal with fourteen grounds lodged on 1st November, 2019. However, at the hearing of the appeal, his advocate decided to abandon all but two which he argued as shall come to light shortly.

The material background facts to the arraignment of the appellant and the appeal before us, as gleaned from the record of appeal, are fairly simple. We wish to state them here before going into the nitty gritty of the appeal. They go thus: the appellant was a security guard at Scholastica Secondary School situate at Himo area in Moshi District in Kilimanjaro Region. On 6th September, 2017 at about 08:00 pm, while on duty and patrolling his area outside the school compound, he heard a sound like someone had dropped from the wall fence. He went thither to see what was it. No sooner had he realized what was amiss than he saw a person running away from the place he heard the landing sound. He pursued him and upon getting closer, he hit that person on his back with the flat side of the machete he was wielding. That person kept

on taking to his heels. After a short distance of the pursuit, that person tripped and fell down after which the appellant, once again, hit him with the flat side of the machete. That person did not rise again. The appellant, a short while thereafter, realized that he had already expired. He called the owner of the school, Edward Isaack Shayo, who was the second accused person at the trial and Laban Elima Nabiswa, the discipline master of the school, who was the third accused person at the trial to attend to the situation. Both showed up after a short while. They also discovered that the person was no more. It was not immediately realized who that person was. Upon a short conversation on the way forward, the trio agreed to, and did drop the body of that person in river Ghona which was in the vicinity. The body was discovered on 12th September, 2017 in the river and it had started to decompose. That is when it was learnt that the body was that of Humphrey Makundi, a student at the school.

After some police investigations, the trio were arrested and arraigned. In his defence, the appellant, essentially, dissociated himself with the death of the deceased. He simply stated that on the material time and date, he saw a person he could not identify dropping from inside the school fence and thereafter running away outside the school compound. He called his colleague, a certain Mchamungu Kiwelu and told him that he heard a sound of an unidentified person landing from inside the school fence wall and running away outside the

compound. Their effort to pursue that person, according to him, was barren of fruit. He was surprised when he was arrested in connection with the death of the deceased. After their arraignment, a full trial ensued, at the end of which they were found guilty, convicted and sentenced in the manner stated above.

When the appeal was placed before us for hearing, the appellant appeared and was represented by Mr. David Shilatu, learned advocate and on the adversary side of the respondent Republic, Ms. Cecilia Mkonongo, learned Principal State Attorney, assisted by Messrs. Peter Utafu and Philbert Mashurano, learned State Attorneys, appeared.

As already alluded to above, Mr. Shilatu decided to argue only two grounds. The first ground seeks to fault the trial court for convicting the appellant on the strength of the extrajudicial statement without any corroborative evidence, the subject of ground one of the memorandum of appeal. The second one is a general ground; it challenges the trial court for convicting the appellant on an information for murder which was not proved beyond reasonable doubt.

Addressing the first ground, Mr. Shilatu started by challenging its admissibility; that it ought not to have been admitted in evidence and that is the reason why they objected at the trial. We understood him as amending the ground of appeal as the aspect of admissibility was not part of it. However,

given that the challenge was, essentially, on failure of the case being proved beyond reasonable doubt, we allowed him to proceed. The learned counsel contended that the way the extrajudicial statement (Exh. P1) was recorded, flouted the Guide by the Chief Justice on the procedure to record them contained in a directive called **A Guide for Justices of Peace** (the Guide by the Chief Justice). He submitted that in recording an extrajudicial statement, a Justice of the Peace is required to record the time and place of arrest, where the maker of the statement slept prior to appearing before the Justice of the Peace, whether any person forced him to make the same, if he wished to make the statement on his own free will and that it may be used as evidence against him. The learned advocate buttressed this proposition by our decisions in **Khalid Mohamed Kiwanga & Another v. Republic** (Criminal Appeal No. 223 of 2019) [2021] TZCA 467 (14th September, 2021) TanzLII and **Peter Charles Makupila @ Askofu v. Republic** (Criminal Appeal No. 21 of 2019) [2021] TZCA 197 (12th May, 2021) TanzLII, in which we held that the recording of extrajudicial statements should be compliant with the Guide by the Chief Justice referred to hereinabove.

The learned advocate submitted further that the extra judicial statement which was tendered and admitted in evidence as Exh. P1 as appearing at p. 283 of the record of appeal, flagrantly disregarded the Guide by the Chief Justice in

several aspects. He referred us to p. 571 where paragraph 7 of Exh. P1 shows that the appellant had been beaten before making it and Irene Mushi (PW 14), the Justice of the Peace who recorded it, filled it to the effect that the appellant had "alama za uvimbe wa fimbo"; that is, the appellant had swellings showing that he was caned. That shows that Guidelines 4 and 5 of the Guide by the Chief Justice were not complied with.

Mr. Shilatu submitted further that PW 14 did not ask the appellant where he slept before being brought to her to make the statement. That omission, he argued, offended the Guide by the Chief Justice which provides that the maker of the statement must be asked such a question. Mr. Shilatu went on to submit that PW14 did not indicate the time which the appellant started to make the statement as required by the Guide by the Chief Justice and that she admitted so in cross-examination as appearing at p. 292 of the record of appeal. Worse more, the appellant was not a free agent when making the statement, Mr. Shilatu argued; Exh. P1 shows so and at p.188, PW14 testified that the appellant was under the custody of an office attendant. That was also against the Guide by the Chief Justice, he argued. He also complained that at p. 575 of the record of appeal, the Justice of the Peace indicated "PTO" suggesting that the page overleaf would show continuation of the appellant's narration but it is empty. To make matters worse, Mr. Shilatu added, Exh. P1 was not read to the

appellant before he signed it and PW 14 admitted so when cross-examined at p. 293 of the record of appeal.

Having submitted on the areas of the Guide by the Chief Justice which were not followed in recording Exh. P1 by PW 14, Mr. Shilatu argued that the alleged confession of the appellant in the extrajudicial statement (Exh. P1) is a major evidence on which the appellant was convicted. In view of the fact that the recording did not follow the letter of the Guide by the Chief Justice as indicated above, Mr. Shilatu prayed that it be expunged from the record. If Exh. P1 is expunged, he argued, the remaining evidence will not suffice to prove the case against the appellant to the required standard; that is, beyond reasonable doubt. In the premises, the learned counsel besought us to find and hold that the prosecution case did not suffice to mount a conviction against the appellant, allow the appeal and, consequently, set him free.

Despite praying as above, the appellant's counsel did not stop there. He went on to argue the second complaint as enumerated above to the effect that the case against the appellant was not proved beyond reasonable doubt, the subject of ground six in the substantive memorandum of appeal. He set the foundation of his argument in support of this ground with our decision in **Amos Alexander @ Marwa v. Republic** (Criminal Appeal No. 513 of 2019) [2021] TZCA 620 (29th October, 2021) TanzLII in which we restated the position of the

law on the burden of proof in criminal law in terms of section 3 of the Evidence Act, Cap. 6 of the Laws of Tanzania to the effect that it is always on the prosecution and that it never shifts. In the case at hand, he submitted, there was a serious shift of the burden of proof from the prosecution to the appellant. He, however, did not go further to tell us areas in which that burden shifted.

Still in an endeavour to demolish the prosecution case, the learned counsel added that the evidence regarding DNA brought by Hadija Said Mwema, a chemist working in the Government Chemist Laboratory Agency (GCLA) and testified as PW12, did not connect the appellant with the commission of the offence for which he was arraigned. He contended further that F. 3988 D/Cpl Louis (PW10) and PF. 18243 Insp. Leons Rehani Mwamunyi (PW13) should have brought evidence relating to finger prints if they were observed in the machete that was employed in hurting the deceased. All these shortcomings, he argued, made the prosecution case shaky, incapable of founding a conviction against the appellant. This said, Mr. Shilatu, once again, urged us to allow the appeal and release the appellant, for he was convicted on weak evidence by the prosecution.

The Republic responded to the appeal with vigour, submitting at the outset that the prosecution case did not fall short of proof of the case against the appellant beyond reasonable doubt. It was Ms. Mkonongo who addressed

us first. She addressed us in respect of the first ground argued by Mr. Shilatu. She submitted that the confession by the appellant in the extrajudicial statement (Exh. P1) was corroborated by circumstantial evidence even though it could suffice to mount a conviction on its own. Corroboration of a confession by an accused person in an extrajudicial statement, she submitted, is not a legal requirement. The learned Principal State Attorney agreed with Mr. Shilatu that in situations as the present where the evidence of confession in an extrajudicial statement is at the centre of controversy, as held by the Court in **Khalid Mohamed Kiwanga** (supra) at p. 27, the Court must ask itself as to the compliance with the Guide by the Chief Justice.

In the present case, Ms. Mkonongo argued, the Guide by the Chief Justice, unlike what Mr. Shilatu impressed upon us to believe, was followed to the letter. The Guide by the Chief Justice, she submitted, has a standard form which is reproduced at p. 14 (in English) and p. 21 (in English) of our decision in **Peter Charles Makupila** (supra). The sample reproduced at p. 21 is the one which was used in the present case which appears at p. 571 of the record of appeal and was tendered and admitted in evidence as Exh. P1. She conceded that in paragraph 7 of Exh. P1 at p. 571 it is indicated that the appellant was beaten and had such marks as swellings caused by the caning. She clarified that the record has it that the appellant was beaten by the police when resisting arrest.

She directed us to p. 297 of the record of appeal where F. 9022 D/Cpl Enock (PW16) so testified. Ms. Mkonongo, however, was quick to submit that the beating of the appellant by the police had no bearing with the voluntariness, or otherwise, of his making a statement before the Justice of the Peace in that he was not beaten by the said Justice of the Peace and was ready to make the same on his own free will as appearing in paragraph 8 of Exh. P1 at p. 571. She added that, after all, it was Insp. Waziri Ibrahim Tenga (PW 19) who took the appellant to the Justice of the Peace, not PW16 who participated in beating him when resisting arrest. In the premises, she contended, the appellant had no reason for fear when he was before the Justice of the Peace and that is perhaps the reason why in paragraph 9 of Exh. P1 at p. 571 of the record of appeal, he indicated that he wished to make the statement on his own free will.

With regard to Mr. Shilatu's submission to the effect that the appellant was not asked where he slept in terms of the Guide by the Chief Justice, Ms. Mkonongo responded that the answer appears at paragraph 8 (3) of Exh. P1 at p. 571 where it is indicated that the appellant after he was arrested, he was taken to Himo and later to the Moshi Central Police Station where he stayed until when he was taken to the Justice of the Peace.

As regards the complaint by the learned counsel for the appellant to the effect that PW14 did not record the time when the appellant started to make

the statement, Ms. Mkonongo submitted that that was not a legal requirement. To buttress the argument, she referred us to our decision in **Joseph Stephen Kimaro & Another v. Republic**, Criminal Appeal No. 340 of 2015 (unreported) at p. 20 where we held that, unlike cautioned statements, no time limitation is provided for making extrajudicial statements. She added that we reiterated that standpoint of the law in **Vicent Ilomo v. Republic**, Criminal Appeal No. 227 of 2017 (unreported) at p. 28. In the premises, she argued, failure by the Justice of the Peace to record time was not a legal requirement and therefore not fatal.

As regards the complaint by Mr. Shilatu that the appellant being under custody of the office attendant when making the statement, Ms. Mkonongo submitted that that was a requirement of the Guide by the Chief Justice which PW14 was required to, and did follow it to the letter. To buttress the point, the learned Principal State Attorney referred us to paragraph 3 of the standard form where it is indicated that the appellant was put under the custody of an office attendant and the police officer who brought him was asked to leave the office.

On the fact that the Justice of the Peace wrote "PTO" and nothing is found overleaf, Ms. Mkonongo submitted that the sample to the Guide by the Chief Justice at p. 571 has only two pages. Knowing that the appellant had a long narration, PW14 knew that she would not use the second page (p. 575 of the

record of appeal) as the space would not be enough. That is the reason why she used pp. 572, 573 and 574 of the record of appeal, she argued. The use of "PTO" was a misnomer, she meant the narration is continuing elsewhere; in this case pp. 373 and 374, she argued. The use of "PTO" therefore did not offend the appellant, she contended.

With regard to the complaint by the learned counsel for the appellant to the effect that the statement was not read to the appellant and that PW14 admitted so, Mr. Mkonongo submitted that PW14 agreed that it was recorded nowhere that the statement was read to the appellant. But Ms. Mkonongo was quick to submit that the statement that it was not recorded anywhere that the statement was not read to the appellant does not necessarily mean it was not read to the appellant. There was a possibility, she argued, that it was read but that act was not recorded inadvertently. After all, she argued, reading it is not a legal requirement as held by the Court in **Peter Charles Makupila @ Askofu** (supra) at p. 24.

Surmising, Ms. Mkonongo submitted that the Guide by the Chief Justice was not flouted but was followed to the letter and therefore the extrajudicial statement (Exh. P1) was made voluntarily and was correctly admitted in evidence. She argued that the trial court rightly convicted the appellant on its strength because, as we held in **Nyerere Nyague v. Republic**, Criminal

Appeal No. 67 of 2010, CAT (unreported) at p. 8, everything being equal, the best evidence in a criminal trial is a voluntary confession from the accused person himself.

Having submitted as above, Ms. Mkonongo submitted that the first ground of complaint by the appellant was without merit and urged us to dismiss it.

Lending Ms. Mkonongo a helping hand, Mr. Utafu addressed us on the second ground of complaint. He submitted that there was no dispute that Humphrey Makundi was indeed dead and that his death was not natural. He submitted further that the appellant narrated the story in his confession on how he attacked the deceased several times until his death. That narration depicts malice aforethought. What happened after killing the deceased, that is, disposing of the body by throwing it in river Ghona, also depicts malice aforethought, he argued. The learned State Attorney argued further that the appellant does not deny the contents of the extrajudicial statement but only how it was taken. With regard to the evidence on DNA, Mr. Utafu submitted that it was meant to prove the samples sent to the GCLA to prove that the body was that of Humphrey Makundi and not to prove the involvement of the appellant in the killing. Thus, even if the DNA evidence is discounted, the prosecution case cannot fall, he argued.

Having submitted as above, Mr. Utafu urged us to dismiss the appeal arguing that the case was proved by the prosecution beyond reasonable doubt.

Mr. Shilatu's rejoinder was short; he submitted that it was not proved that the killer was the appellant and that malice aforethought was also not proved. If anything, he submitted, the forehead of the deceased was broken after he fell down when running away, it was not caused by the hit from the appellant. He reiterated that the Guide by the Chief Justice was not followed to the letter thus Exh. P1 should be expunged and, having so done, the prosecution case will be deficient and incapable of mounting a conviction against the appellant. He urged us to allow the appeal and set the appellant free.

We have considered the contending arguments by the trained minds representing the parties to this appeal. In determining this appeal, we shall take the path taken by Mr. Shilatu and which was also opted in response by the learned Principal State Attorney and State Attorney.

Mr. Shilatu attacked the way the extrajudicial statement (Exh. P1) was taken and contended that it should not have been received in evidence. As already alluded to above, the original complaint was that it was used to mount the conviction of the appellant without it being corroborated. However, as we have already stated, the amended complaint falls within the scope and purview of the general ground that the prosecution evidence did not prove the case

against the appellant beyond reasonable doubt. Luckily, Ms. Mkonongo responded to the arguments by the learned counsel for the appellant as required.

The taking of Exh. P1 has been attacked for not complying with the Guide by the Chief Justice in several aspects. We must state at the outset of the determination of this ground of appeal that any Justice of the Peace is mandatorily required to follow the letter of the Guide by the Chief Justice when recording extrajudicial statements. We held so in **Japhet Thadei Msigwa v. Republic,** Criminal Appeal No. 367 of 2008 (unreported) and restated for emphasis in **Peter Charles Makupila @ Askofu v. Republic** (supra) and reiterated in **Khalid Mohamed Kiwanga & Another v. Republic** (supra) as well as in **Vicent Ilomo v. Republic** (supra). The learned counsel for the parties to this appeal are at one and indeed that is the standpoint of the Court as stated above. The only point on which the learned counsel for the parties have locked jaws is that, while the learned counsel for the appellant strongly feels that the Guide by the Chief Justice was not complied with to the letter when the extrajudicial statement (Exh. P1) was being recorded and he forcefully so submits, the learned Principal State Attorney, is of a different stance and submits so with equal force.

We shall start with a complaint that the appellant was beaten before making the statement before the justice of the peace. Indeed, as conceded by the learned Principal State Attorney, the appellant was beaten before being brought before the Justice of the Peace. The record shows in the testimony of PW 16 that the appellant was beaten by the police during the arrest as he was resisting it. However, we are of the considered view, as was the Principal State Attorney, that despite being so beaten by the police during the arrest, he was a free agent before the Justice of the Peace when recording Exh. P1 and, to vindicate our stance, he indicated that he wished to make the statement on his free will. That is evident at para 9 (1) of Exh. P1 as appearing at p. 571 of the record of appeal when he answered in the affirmative the question whether he was free to make the statement. He also answered in the affirmative to the same question when he was told that the statement might be used as evidence against him at the hearing of a case against him in court. That is evident at para 9 (3) of the statement as also appearing at p. 571 of the record of appeal. In the circumstances, we agree with the learned Principal State Attorney that despite evidence to the effect that the appellant had been beaten before being brought before the Justice of the Peace, that beating did not have any impact in the voluntariness or otherwise of the extrajudicial statement (Exh. P1); put differently it did not make the appellant make the extrajudicial statement involuntarily.

There was another complaint by Mr. Shilatu that the recorder of the statement did not indicate the time when he started to record the statement. Ms. Mkonongo conceded to this argument but she was quick to state that that was not a legal requirement as it is not appearing in the sample made under the Guide by the Chief Justice as appearing in **Peter Charles Makupila @ Askofu** (supra). Likewise, we faced an akin complaint in **Joseph Stephen Kimaro** (supra) and we observed at p. 20 of the typed judgment that recording time on which the making of an extrajudicial statement commenced was not a legal requirement. In that decision, we made it clear that the requirement was applicable to the making of cautioned statements in terms of sections 50 and 51 of the CPA but "no such limitation is imposed in extra-judicial statements recorded before Justices of the Peace". In the premises, failure by the Justice of the Peace (PW14) to record the time on which she commenced to record Exh. P1 did not offend any law and therefore it was not fatal.

As to the complaint to the effect that the appellant was not asked where he slept in terms of the Guide by the Chief Justice, we agree with Ms. Mkonongo that the answer to the question can be deciphered at para 8 (3) of Exh. P1 at p. 571 where the appellant answered to the question where he was taken after the arrest. He stated that he was taken to Himo and later taken to Moshi Central Police Station. We agree with Ms. Mkonongo that, read in context, answers by

the appellant depicted that he slept at Moshi Central Police Station before he was taken to the Justice of the Peace to make his statement.

The complaint as to the appellant being not a free agent when making Exh. P1 because he was under the custody of the office attendant will not detain us, for Ms. Mkonongo respondent to it very well. That is a requirement provided by the Guide by the Chief Justice in the standard form. It appears at para 3 of the standard form which gives an option of the maker of the extrajudicial statement to be under a court office attendant or a court clerk. In the case at hand, the appellant was put under the "custody" of an office attendant. The term "custody" here is used just for convenience purpose. The proper term should have been "care" in its stead. So that an accused person is placed under the care of a court office attendant or court clerk when making an extrajudicial statement instead of being only two in a room; the accused person and the Justice of the Peace. It is also indicated at the same paragraph that the policeman who brought him was asked to leave the premises. For clarity, we wish to reproduce the paragraph as it appears in the standard form at p. 571 of the record of appeal. It reads in its Kiswahili version:

> *"Mahabusu amewekwa chini ya ulinzi wa ..... Mhudumu/Karani na Polisi ameelezwa kuondoka eneo la Mahakama".*

Its corresponding English version as appearing in **Peter Charles Makupila @ Askofu** (supra), reads:

> *"(3) The prisoner is placed in the custody of ..... and the police are directed to leave the premises. I am satisfied that there is no police officer in this office nor in any place where these proceedings can be seen or heard".*

Flowing from the above, it is obvious that the fact that the appellant was left under the custody of the office attendant was meant to comply with the letter of the Guide by the Chief Justice. That course of action did not offend the appellant and, if anything, in our well considered view, made justice smile.

The complaint by Mr. Shilatu to the effect that the Justice of the Peace wrote "PTO" at p. 575 and that nothing is found overleaf will also not detain us. Ms. Mkonongo was quite explicit in her response to this complaint and we are prepared to go along with her reasoning. PW14, knowing that the space at p. 2 of the standard form will not suffice to fill the appellant's long narration, she proceeded from p. 572, to empty sheets at pp. 573 and 574. We do not think by not proceeding overleaf of p. 575 to give meaning to the "PTO" indicated at that page, did not offend anybody, not even the appellant. It is a misnomer comprising an excusable slip which did not leave justice crying. For that reason, it can be glossed over and we so find and hold.

Next for consideration is Mr. Shilatu's complaint that the extrajudicial statement was not read over to the appellant. Much as we agree with Mr. Shilatu, as supported by Ms. Mkonongo, that the record of appeal does not show that the extra judicial statement (Exh. P1) was read to the appellant, we agree with the latter that that does not mean it was not read and that, after all, that is not a requirement. It may not be irrelevant to refer to what we held in **Peter Charles Makupila @ Askofu** (supra) in which there arose an akin argument. We made this observation:

> *"... as opposed to cautioned statements,* ***there is no requirement that the statement should be read to the suspect after its completion****. Instead, it is the Justice of the Peace who is obligated to sign at the end of the statement. Even the time the recording starts and ends need not be shown".*
>
> [Our emphasis].

In view of the above, we agree with Ms. Mkonongo that the extrajudicial statement of the appellant was recorded in compliance with the Guide by the Chief Justice. We also are of the considered view that it was correctly admitted in evidence as a voluntary confession of the appellant. In the circumstances, we think, and in line with what we held in **Nyerere Nyague** (supra) relying on our previous decision in **Paulo Maduka and 4 Others v. Republic**, Criminal

Appeal No. 110 of 2007 (unreported), it was the best evidence against the appellant, for, the best witness in any criminal trial is an accused person who confesses his guilt.

We are therefore satisfied that the evidence brought to the fore by the prosecution case was sufficient to mount a conviction against the appellant for causing the death of the deceased. The confession of the appellant, though corroborated by circumstantial evidence, did not require any corroboration to give it strength to found the conviction. We, like the trial court, are satisfied that the deceased Humphrey Makundi died an unnatural death and the perpetrator of his death is none other than the appellant.

We now turn to determine the issue of malice aforethought. Mr. Utafu argued strongly that the death of the deceased was orchestrated by the appellant and given the persistent beating he gave the deceased even when he fell down, it is no doubt that the appellant intended to, at least, cause grievous harm which constituted malice aforethought in terms of section 200 (a) of the Penal Code. Mr. Utafu did not stop there; he added that the disposition of the body in the nearby river also constituted malice aforethought. On the adversary side, Mr. Shilatu, strongly urged us to find that the killing was without malice aforethought because the deceased broke his forehead when he fell down while

running away from the appellant. It was not caused by the hit from the appellant.

We wish to make it clear at this juncture, that we are alive to the legal position founded upon prudence in this jurisdiction that malice aforethought may be imputed from the conduct of an accused person immediately before or after the commission of the offence. Mr. Utafu addressed us so but did not cite any authority for that proposition. We think the learned State Attorney had in mind our previous decisions in **Obadid Kijalo v. Republic**, Criminal Appeal No. 95 of 2007 (unreported), **Keneth Jonas v. Republic** (Criminal Appeal 156 of 2014) [2014] TZCA 227 (26 September 2014) TanzLII, and **Augustino Lodaru v. Republic** [2014] T.L.R. 37. In **Obadid Kijalo**, for instance, we held:

> *"It suffices to state that malice aforethought may be demonstrated by looking at the motive for the offence and the conduct of the suspect immediately before and after the act or omission ..."*

However, as will become apparent shortly, we are of the view that the above authorities are distinguishable from the present case.

The trial Judge, in imputing malice aforethought, had this to say in his judgment as appearing at p. 885 of the record of appeal.

"The act of the 1st accused persistently beating the deceased desplte the fact that he had fallen down until he died import mallce on his part. There is no doubt that the 1st accused knew who had jumped from inside the school is a student. But even if he did not know that he was a student, the deflnition given under section 200 above covers the situation".

We are afraid we are not prepared to sail the same boat with the learned State Attorney and the learned trial Judge on this. Both of them are of the view that we can impute malice aforethought from the "persistence" of the beating of the deceased by the appellant. We have carefully read the appellant's confession which is the major evidence on which we can impute malice. Having so done, we have failed to see any persistence there. We will let it speak for itself. The appellant is recorded as saying:

"... [I]ilikuwa siku ya Jumatatu tarehe 6/11/2017 muda wa saa 2:58 usiku nilikuwa nimeenda kuangalia eneo ia nje baada ya kufika eneo niiisikia kishindo cha mtu akishuka tii!! na kwenda kupiga tochi (kumulika) akatoka akikimbia na mimi ndipo nilianza kumkimbiza baada ya hapo kuna kona alifika na nilikuwa na silaha panga na nilimpiga bapa mgongoni na aliendeiea kukimbia nilikimbizana nae na kuna sehemu alifika na kujibamiza chini hapo akiwa katulia nikampiga bapa la pili ndipo umauti ukamkuta palepale".

The foregoing excerpt from the confession of the appellant in Exh. P1, which explains how the deceased was chased and at a corner he beat him with the flat side of the machete and thereafter, after a short while of pursuit, he fell down and he, once again, beat him with the flat side of the panga, does not depict any persistence in the beating as perceived by the learned State Attorney and the trial court. If anything, it shows only beating twice, the first one at the corner and the second one after the deceased fell down. In both beatings it was a flat side of a machete which was used. The appellant did not hack the deceased; he just beat him with the flat side of the machete. If he had any intention of killing him or causing grievous bodily harm to the deceased, he would, in our view, have hacked him instead of using the flat side of the machete. We do not therefore think what happened immediately before the act and immediately thereafter, imputes malice aforethought. On the contrary, we think the trial court should have convicted the appellant of causing the death of the deceased but that the killing fell short of the requisite malice aforethought to constitute murder. The appellant should, in the circumstances, have been convicted of a lesser offence of manslaughter and sentenced accordingly. We so find and hold.

With regard to the sentence, we have considered the time the appellant has spent in prison ever since he was convicted on 3rd January, 2019. We feel

that he has spent enough time commensurate with the sentence that would have been imposed in the circumstances. We thus partly allow the appeal by quashing the conviction for murder and setting aside the sentence of death meted out to the appellant. We substitute therefor with a conviction for manslaughter and a sentence that would result in the appellant's immediate release from prison forthwith unless otherwise lawfully held.

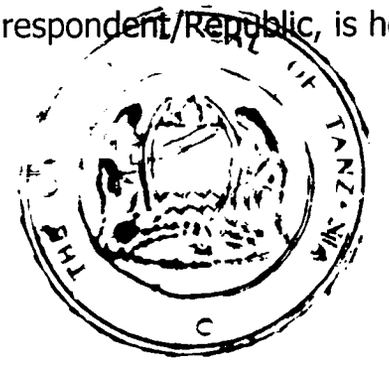
DATED at **MOSHI** this 1st day of September, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 1st day of September, 2023 in the presence of Mr. Mussa Mziray holding brief for Mr. David Shilatu for the appellant and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL