IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 393 OF 2019

MARIKI PETER OLOMI @ MAPANKI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Amour, J.)

dated the 12th day of September, 2019

in

Criminal Sessions No. 33 of 2018

.....

JUDGMENT OF THE COURT

21st August & 01st September, 2023

MASOUD, J.A.:

The application of the doctrine of last person to be seen with a deceased alive in the instant case saw the appellant, who stood charged with the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E. 2002 now R.E. 2022], being convicted of the offence and sentenced to death by hanging. It was the prosecution case that the appellant, who pleaded not guilty to the information, on 21st May, 2015 at Katanini Karanga area within Moshi

Municipality in Kilimanjaro Region murdered, the deceased, one, Fratern Theodore Massawe, a boy of 11 years of age.

The evidence of the prosecution which grounded the conviction was from a total of six witnesses and Postmortem report which was admitted as Exhibit P1. The evidence pertaining to the defence case was only from the appellant who testified under oath as DW1. The evidence was purely circumstantial and was essentially from Magdalena Rashid Abuu Massawe (PW2) and Jastine Theodory Massawe (PW5). It was built on the doctrine of the last person to be seen with the deceased alive. The trial judge was satisfied that the evidence was incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis other than guilty of the appellant who was the last person seen with the deceased alive on 21st May, 2015.

It was in the testimony of PW5 that on 21st May, 2015 at afternoon hours he heard and saw the appellant with the deceased alive at the homestead of Theodore Ismail Massawe (PW1). The evidence of PW5 was supported by PW2 whose testimony is also to the effect that she saw the appellant entering but not leaving the PW1's homestead on the said date.

It was after two days of the disappearance of the deceased on 21st May, 2015, that the body of the deceased was discovered on 23rd May, 2015 by PW1 who is the deceased's and PW5's father. The body was found lying on the

ground naked in the maize farm belonging to the Roman Catholic Sisters situated at Ng'ambo village within Moshi District, Kilimanjaro Region, about 250 paces, according to E 7718 SGT Ally Idd Kaburu (PW3), from the residence of PW1.

At the crime scene there was, according to PW1, PW2, PW3 and Jonathan Elikana Makupa (PW6) along with the body, a number of items. They included, a pair of shorts and a shirt belonging to the deceased, a pair of gumboots identified by PW1 as belonging to him, a black plastic bag stuffed into the mouth of the deceased, and the lining of the deceased's pair of shorts with which the deceased's mouth was tied up to prevent the stuffed plastic bag from getting out of the mouth as testified by PW1.

The police who were informed by PW1 on 22nd May, 2015 about the mysterious disappearance of the deceased were notified of the discovery of the his body. They managed to come at the scene, drew the sketch map, collected the items found at the scene, and took the body to KCMC hospital for postmortem examination. The report of the postmortem examination conducted revealed that the cause of the death was asphyxia due to secondary strangulation by rope around the neck and suffocation (Exhibit P1).

The rest of the testimony of PW1, PW2, PW5 and the other witnesses (PW3, PW4 and PW6) was only with regard to how the incident was reported to the police, how the search around for the deceased until PW1 discovered the

body of the deceased on 23rd May, 2015 was conducted, and how the body was like when it was found and the items that were found at the scene of crime which PW3 said they did not carry any investigation value. As such, the DNA test on the collected items as it was not conducted as was not important. The other evidence was from PW6 which is among other things about how the appellant was ultimately arrested at his second residence at Kilimani Street, Moshi, Kilimanjaro.

The other evidence which emerged partly from PW2, PW5 and PW6 related to the appellant's character and conduct before and after the incident. There was similarly, as to his conduct after the incident, the evidence of PW3, PW5 and PW6, claiming to have learnt from people, that the appellant was on the run and hiding out, and that he had moved his residence from where he was originally residing.

The appellant who pleaded not guilty to the charge and denied everything during the preliminary hearing, save for his name and the unnatural death of the deceased as per Exhibit P1, testified under oath at his trial. Unlike the evidence of PW5 and PW2 suggesting the appellant being the last person to be seen with the deceased alive, the appellant on his part testified that he was not the last person, as he left the residence, leaving behind PW5, PW2 and the deceased alive as soon as the deceased replied to him that his young brother had not been there. The appellant also claimed to have been framed because of political reasons for in the last general election, he campaigned for the ruling

party. He wondered why the items found in the scene were not used to lead to the true culprit.

In convicting the appellant, the trial court found that the prosecution evidence was sufficient to sustain the charge against the appellant as, being circumstantial as it is, it led to only one irresistible conclusion pointing to the appellant's guilt. The trial court was, on the authority of **Mathayo Mwalimu and Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported), settled that the evidence of PW2 and PW5 sufficiently proved beyond any reasonable doubt that the appellant was the last person to be seen with the deceased alive and was therefore responsible for the brutal killing of the deceased.

The trial judge was firm that the evidence from PW3 and PW5 was consistent with the evidence of the appellant which was to the effect that he spoke to the deceased while "...*PW2 was in the house's veranda on which she had placed her vegetable's container.*" The trial judge relied among other things on the evidence by PW5 that his bedroom and living room doors were both closed from outside and had to be broken by PW5. In relation to such evidence, the trial judge inferred that the doors were so closed by the appellant and nobody else in order to prevent possible interference in the execution of his premeditated plan of killing the deceased. In the end, while convicting the appellant, the trial judge stated that:

"In my view, bearing in mind a described manner of the deceased's death; strangulation by the neck, soaking of plastic bag in a mouth to prevent noises, and a fact that the accused was the last person to be seen with the deceased alive, locking doors of the house in a way described by PW5 was premeditated move by the accused towards harming and killing of the deceased and intended to prevent a possible interference of his barbaric and unlawful plans by PW5.

On the strength of the foregoing, I am of a settled view that the circumstantial evidence on record is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than guilty of the accused".

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal to this Court. He initially lodged a memorandum of appeal comprising a total of seven (7) grounds. It was however later complemented by a supplementary memorandum of appeal comprising a total of eight (8) grounds. It is common ground that the grievances in both memoranda boiled down to only one major complaint as conceded to by Mr Elia John Kiwia, learned advocate for the appellant, and Ms. Cecilia Mkonongo, Principal State Attorney, who was assisted by Ms. Grace Kabu, learned State Attorney, for the respondent Republic. The complaint is to the effect that the appellant was

convicted on the basis of the inconclusive circumstantial evidence relied on by the prosecution and accepted by the learned trial judge, which did not irresistibly point to the guilt of the appellant beyond any reasonable doubt.

Outrightly, Mr. Kiwia pinpointed the grounds of the appeal in both memoranda that the appellant abandoned and hence not forming part of the major complaint adopted for the purpose of this appeal. These were the first, second, third, fourth and eighth grounds in the supplementary memorandum of appeal, and the sixth ground in the original memorandum of appeal which is on the record.

In arguing the appeal, Mr. Kiwia, was brief and focussed. He took us through a handful of issues which he believed that they establish serious doubts on the circumstantial evidence relied on by the trial court in grounding the conviction. They were as follow:

One, it was argued generally that there was no cogent evidence establishing beyond reasonable doubt that the appellant was the last person to be seen with the deceased alive and therefore responsible for the brutal killing of the deceased. Mr. Kiwia contended that since PW5 went to bed after having lunch at 1.00pm and woke up around 5.00pm, about four hours later, there was no evidence pinpointing that within the four hours when PW5 was asleep in his bedroom, there was nobody else who was with the deceased other than

the appellant and who might have left with the deceased and killed him at the crime scene.

Fortifying the above argument, Mr. Kiwia submitted that there was no evidence neither from PW5 nor from PW2 to the effect that the appellant was the one who left with the deceased alive. Rather, the evidence on the record by the appellant was that he met the deceased at the homestead of PW1 and left him there alive.

Two, the circumstances in which the deceased was found at the maize farm belonging to the Roman Catholic Sisters and the items that were found around the place and taken by the police on 23rd May, 2015 did not have anything linking the appellant to the brutal killing of the deceased. Thus, there was nothing from the scene of crime linking the appellant to the killing, the learned advocate argued. Although there was in his view need for DNA test of the items that were found at the scene of crime and taken by the police to link the results with any suspect, the same was, Mr. Kiwia argued, neither conducted nor produced in evidence despite their bearing on the brutal killing. He in the end attributed the failure to poor investigation of the incident.

Had the items been taken for DNA tests, the learned advocate argued, the results would have provided a link to the culprit and would have shown that the appellant had nothing to do with the killing of the deceased and was not the last person to be with the deceased alive. Thus, the absence of such results

raises serious doubts to the whole prosecution case and raises a question as to whether the circumstantial evidence on the record conclusively point to the appellant as the culprit and nobody else. As is dictated by the rule of practice, the learned advocate seemed to argue, these doubts must be resolved in the favour of the appellant.

Three, Mr. Kiwia faulted the trial judge's finding on the evidence relating to the doors closed from outside to prevent PW5 from getting out and which doors, according to the trial judge, had to be broken by PW5. Since there was no evidence from the prosecution that the doors were certainly closed from outside and had truly to be broken, inference drawn by the trial judge, Mr. Kiwia submitted, was unfounded and had no basis from the evidence of the prosecution. Apart from the absence of the proof that the doors were indeed closed and eventually had to be broken by PW5, there was nothing from the prosecution evidence linking the appellant to the closing of the doors if at all, and to the allegedly premeditated plan brought into place by the trial judge when convicting the appellant.

With the foregoing submissions, Mr. Kiwia invited us to find that it was not safe in view of the circumstantial evidence led by the prosecution to find that the appellant was the last person to be seen with the deceased alive on 21st May 2015, and was responsible for the brutal killing as the said evidence was not incompatible with the innocence of the appellant. He therefore implored

us to find that the prosecution case was not proved beyond any reasonable doubt.

Opposing the appeal, Ms. Mkonongo, learned Principal State Attorney, submitted generally against the appeal. In her arguments, the information levelled against the appellant was, by virtue of the circumstantial evidence relied on by the prosecution, established beyond any reasonable doubt. In her submission, she contended that regardless of matters raised by Mr. Kiwia, the evidence adduced by the prosecution exclusively pointed to the fact that the appellant was the one who killed the deceased and nobody else.

Ms. Mkonongo referred us to the evidence of PW2 and PW5, for it was such witnesses who saw the appellant entering the compound of PW1 and being left behind with the deceased alive on 21st May, 2023. As to PW5, Ms. Mkonongo brought our attention to his evidence that when he woke up at around 5.00pm on the material day, he found that neither the appellant nor the deceased was within the compound of PW1's residence. In her view, the evidence of PW5 was consistent with the evidence of PW2 who also testified that the appellant was the last person she saw with the deceased alive as she saw him entering in the PW1's compound and not leaving the compound on the material day.

In Ms. Mkonongo's view, the evidence supported the trial court's finding that the appellant was indeed the only last person to be seen with the deceased alive on the fateful day and nobody else. In any case, Ms. Mkonongo argued,

there was no evidence whatsoever suggesting that the deceased met any other person after being seen with the appellant before he was brutally killed and his body discovered lying at the farm, about 250 paces from PW1's residence.

On the failure of the prosecution to bring the evidence of DNA tests for the items seized by the police from the scene of crime, Ms. Mkonongo argued that there was from the evidence no item identified as belonging to the appellant. In addition, since the days had passed following the brutal killing, the DNA could not be useful. What is crucially important in this case, the learned Principal State Attorney argued, is that the circumstantial evidence led by the prosecution was sufficient in itself to ground the conviction as found by the trial judge and there was no need of evidence of DNA test results of the collected items to corroborate it.

To bolster her argument that there was overwhelming evidence that the appellant was the last person to be seen with the deceased alive and therefore responsible for the murder of the deceased, Ms. Mkonongo hinted to us the evidence on the record about the appellant's conduct after the incident, the evidence that it was not the deceased habit to absent himself from home as it happened on 21st May, 2015, the denial by the appellant during preliminary hearing that he had been at the compound of PW1 with the deceased on the fateful day, and the absence of grudges between the appellant on one hand and PW1 and PW5 on the other. In the end, Ms. Mkonongo asked us to dismiss the appeal.

Mr. Kiwia's rejoinder submission in essence reiterated his submission in chief in a nutshell. The exception was his reaction to the argument by Ms. Mkonongo that the appellant was a liar. The reaction was against the argument that the appellant was a liar because in the preliminary hearing he denied that he had been at PW1's compound, while in his testimony under oath he told the trial court that he had actually been there on 21st May 2015. Mr Kiwia had it that his denial at the preliminary hearing does not mean that the appellant was a liar. He added that it is common ground that however weak the defence case was, it could not in the instant case be taken to prove the prosecution case. Further, that the allegation as to the conduct of the appellant cannot hold unless there is cogent evidence that he had information about the disappearance and the death of the deceased, which evidence is lacking, as was the evidence that he was, as is alleged, on the run and had moved his residence to somewhere else.

We, on our part, considered and re-evaluated the entire evidence on the record against the backdrop of the rival submissions which centred on the issue as to whether the circumstantial evidence relied on by the prosecution and accepted by the learned trial judge did not irresistibly point to the guilt of the appellant beyond any reasonable doubt. Incidental to this issue is whether the said evidence, being circumstantial as it is, conclusively established that the appellant was indeed the last person to be seen with the deceased alive on 21st

May, 2015 and therefore responsible for the brutal killing of the deceased whose body was discovered about two days later on 23rd May, 2015.

The substance of the prosecution evidence which grounded the application of the doctrine of the last person to be seen with the deceased alive and which we are enjoined to re-evaluate and arrive at our own conclusion is essentially circumstantial. See: **Dinkerrai Ramkrishan Pandya v. R** [1957] 1 EA 336, **Demeritus John @ Kajuli and Three Others v. Republic**, Criminal Appeal No. 155 of 2013 (unreported). We are aware that a charge of murder can as in this case very well be proved by circumstantial evidence as long as the trial court does what is expected of it and is fully satisfied that the evidence proves the charge beyond any reasonable doubt. We made this position clear in **Said Bakari v. Republic**, Criminal Appeal No. 422 of 2013 (unreported) when we said, and also restated the position in **Sikujua Idd v. Republic**, Criminal Appeal No. 484 of 2019 (unreported), thus:

> *"It is established law that a charge of murder can be fully proved by circumstantial evidence. In determining a case centred on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality, and not to dissect and consider it piece meal or in cubicles of evidence or circumstances".*

The law is, in particular also, settled about a situation where the circumstantial evidence concerns an accused person who is, allegedly, the last person to be seen with the deceased alive. Thus, in **Mathayo Mwalimu and Another v. Republic** (supra), we held that:

> *"In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of Hamis Mnino, like the court below, we too are satisfied that they are the ones who killed him".*

Regarding other conditions which must be taken into account when the trial court is satisfied that an accused person was indeed the last person to be seen with the deceased alive, this Court in **Lukas s/o Njowoka v. R**, Criminal Appeal No. 220 of 2008 (unreported) as well as in **Misoji Ndebile @ Soji v. Republic**, Criminal Appeal No. 75 of 2013, referring to its earlier decision in **Richard Matangule v. Republic** [1992] T.L.R. 5, stated that:

> *This Court authoritatively laid down and in the clearest language in the case of **Richard Matengule v. R.,** Criminal Appeal No. 73 of 1991 (unreported) that:*
>
> *"That fact that the appellants were the last known persons to have been with **the deceased casts very***

> ***grave suspicions on them, but it is in itself not conclusive proof that they killed the deceased...***
>
> ***Other cogent corroborating evidence is necessary,*** *for a suspicion, however ingenious can never be a substitute for proof beyond reasonable doubt".*

(See also: **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010, **Nathaniel Alphonce Mapunda and Another v. Republic** [2006] TLR 391, **Shaibu Zuberi @ Kipande v. Republic**, Criminal Appeal No. 77 of 2012- all unreported).

In view of the above authorities, the issue is whether the trial court in convicting the appellant complied with the above statement of principle to the letter. The answer to this question will become clear afterwards.

We are settled that, from the record of the appeal before us, the circumstantial evidence was essentially from the testimony of PW2 and PW5 who allegedly saw the appellant with the deceased alive at the residence of PW1 on 21st May 2015. It is on these key witnesses' evidence, therefore, that the appeal before us stands or falls. We say so because it is such evidence that influenced the trial court's conclusion that the appellant was the last person to be seen with the deceased alive and was thus responsible with the death of the deceased. In relation to such evidence, we wondered as to whether the evidence is conclusive on the allegation levelled against the appellant, regard being also had to the testimony of the appellant under oath exculpating himself

from the death of the deceased, which appears not to have been considered by the trial judge, if we go by what appears on page 177 up to 184 of the record of appeal. See, **Mathayo Mwalimu and Another v. Republic** (supra).

It is in the testimony of both PW2 and PW5 that on the material day the appellant was with the deceased at the residence of PW1 and was the last person to be seen with the deceased before his death. On the contrary, it is the evidence of the appellant when testifying as DW1 that although it is true that he was at such residence with not only the deceased, but also with PW2 and PW5, he left the residence leaving behind PW2, PW5 and the deceased alive as soon as the deceased replied to him that his young brother, Godfrey @ Kiwaria Olomi, had not been there. The inquiry about his young brother, Godfrey Olomi, that the appellant made to the deceased was consistent to the testimony of PW5. As to whether this was plausible explanation by the appellant exculpating himself from the allegation that he was the last person to be seen with the deceased alive was not at all considered by the trial judge as afore stated. Had the trial judge done so, we believe he would have arrived at a different conclusion favourable to the appellant.

We gather from the testimony of not only PW2 and PW5, but also DW1, looked as a whole, that the deceased, PW2, PW5, and the appellant (DW1) had all, at some point, been at the same time at the residence of PW1 for one reason or the other. It would appear that while PW5 and the deceased were there at home where they lived with their father (PW1), PW2 was there to offer

for sale her vegetables to PW5 as per her own testimony in cross-examination, and as per the testimony in chief of PW5. As to the appellant, it emerges from PW5 and his own sworn testimony as DW1 that he was at such residence to inquire from the deceased about the whereabouts of his young brother. It was also not disputed in evidence that the appellant was related to PW1, PW5 and the deceased and that the appellant had always been visiting them at such residence.

The evidence that all the deceased, the appellant, PW2, and PW5 had at some point in time all been at the residence of PW1 before the disappearance of the deceased, begs a question as to who was ultimately left with the deceased alive and who was indeed the last person seen with the deceased alive at least at the homestead of the PW1 and who subsequently left with him to the scene of crime to carry out the brutal killing. It is on the record that while PW5 said that the appellant was left with the deceased when PW2 departed from their homestead and he, on his part, retreated and fell asleep inside his room, the appellant is in his evidence clear that upon getting the response of his inquiry from the deceased as to the whereabouts of his young brother, he instantly left the residence, leaving behind the deceased alive, PW5 and PW2. Unfortunately, this evidence emerging from the appellant was not considered by the trial court.

It is clear on our part that on the basis of the above evidence, there is room for other hypotheses other than one pointing exclusively to the appellant

as the culprit. As such and as a matter of hypotheses, it could be the appellant who committed the murder; it could also be PW2, it could also be PW5 pretending to have been locked inside his bedroom from outside by unknown person, or any other person from the time the deceased disappeared from home to the time PW1 discovered his body. There could also be another room for another hypothesis as may become apparent afterwards.

Notably, it was not in the evidence in chief of PW2 that she left the residence leaving behind the appellant with the deceased and did not see him leaving. It was also not in her evidence in chief as to where exactly she was when she saw the appellant entering the PW1's homestead at around 3.00pm on the material day, and continued with her business. Rather, the evidence in respect to the former and the latter emerged from PW2 as an afterthought in cross-examination. PW2 said when cross-examined that it was when she was walking out of the PW1's homestead that she saw the appellant entering into PW1's residence and that she did not see the appellant leaving after entering the residence. One wonders whether PW2 had been there just keeping an eye for him and if so for what motive. It was not clear why in her testimony in chief, PW2 did not give the details she gave while in cross-examination for she was not re-examined at all. Indeed, PW2's testimony looked at as a whole and in the light of the entire evidence on the record raises issues of her credibility.

As to how PW5 ably noticed the presence of the appellant in their compound, a further and close look at the testimony of PW5 would herein after

provide an answer which in the result raises questions as to the weight to be attached to his testimony. While it is common feature of the testimony of PW5 and PW2 in examination in chief and cross-examination that PW5 was inside his room as he strived to sleep in the afternoon hours as he had a night shift to cover at his work place, PW2 was outside as was the deceased and as was also the appellant who, according to PW2, come at the residence when PW2 was on her way out and according to PW5 when PW2 had already left. In the evidence of PW5 and PW2, the deceased at all material time was outside within PW1's compound playing, according to PW5, and climbing a guava tree according to PW2.

It is not clear in the evidence of PW5 that as he was inside his room falling asleep, he actually saw PW1 departing from the PW1's homestead and leaving behind the appellant and the deceased. Whilst PW5 said that the deceased did wake him up when PW2 came asking whether they would wish to buy some vegetables, there was nothing that the deceased informed him that PW5 had already left. Similarly, while PW5 was clear about how he ably saw the appellant and the deceased talking having peeped through his bedroom door, there was nothing similar as to how he knew and satisfied himself in his bedroom as he was sleeping that PW2 had already left the compound when the appellant came.

There is moreover nothing in the evidence on the record ruling out the possibility of PW2 being within the compound where PW5 could not see her

from his bedroom. It is instructive that the appellant in his evidence in this respect had it that PW2 was at the veranda of PW1's house on which she placed her container containing vegetables that she was selling. We could not see anything from PW5's testimony that while he was in his bedroom sleeping, he could still peep through the window and see PW2 who was at the veranda if we go by the uncross-examined evidence in this respect of the appellant. The latter in our view bolsters the hypothesis that when PW5 said that PW2 left leaving behind the appellant as the last person, PW2 was actually still in the verandas as per the evidence of DW1. Again, in the evidence of DW1 which was not cross-examined upon, he left leaving behind the deceased alive, PW2 at the veranda, PW5 in his bedroom sleeping, and the deceased playing within the compound of the PW1's residence.

It is furthermore the evidence of PW5 that he woke up at around 5.00pm on the material day having gone to bed after having lunch at 1.00pm, and managed to get out the house after forcing the two doors which were closed from outside to open. According to PW5, it was then that he noticed the absence of the deceased and the appellant, as PW2, as is in his earlier testimony, had already left whilst he was still inside his bedroom sleeping.

In so far as the above pieces of evidence are concerned, we wondered as to whether PW5's testimony ruled out the possibility of anyone else coming to the PW1's homestead while PW5 was asleep, who could have been the last person to be with the deceased before his death. In doing so, we further

wondered whether the doors were indeed locked from outside as testified by PW5 and relied upon by the trial court in its decision against the appellant. We equally wondered how the doors were ably forced to open from inside by PW5 mindful that there was no evidence led by the prosecution to the effect that the doors were actually broken. Not only that but also, we thought that, if the doors were indeed locked, whether there was any evidence that they were locked by any other person other than the appellant or the deceased. Clearly, this meant a gap in the evidence of the prosecution.

It is on the record that when PW5 confirmed the absence of the deceased, he assumed that the deceased had gone to play with his peers in the neighbourhood. The latter was, according to PW5, the assumption that PW1 also had when he come back from work and upon informing him that he did not see the deceased since he woke up at 5.00pm. The latter tells a loud and clear that the deceased had a habit of playing in the neighbourhood away with his peers. Had it not been so, the presumption that PW1 and PW2 made would not have been made. Consequently, if the deceased had such habit, there is thus a possibility of other hypotheses as to who was the last person with him alive prior to his death. This, to us, gain prominence in view of the fact that the crime scene was, according to PW3, about 250 paces away from the residence of PW1.

PW5 also testified how on the following day upon returning home from work and realising that the whereabout of the deceased was still unknown, he

went to the appellant's resident to inquire from him if at all he had been with the deceased. However, PW5 testified that he found the appellant's place closed and no one was around. We do not think that the absence of the appellant in his residence suggested that he was on the run and was therefore the culprit. After all, as it turned out from the prosecution witnesses, in particular, PW6, the appellant had other places known to belong to him. This also renders the claim that as he was not found in his residence near PW1's residence, it meant that he was on the run, notwithstanding the absence of evidence from those people who were referred to as saying that the appellant was on the run.

Having re-evaluated the chain of circumstantial evidence on the record characterised by the testimony of PW2 and PW5, we are satisfied that there are just lots of gaps in the chain. It therefore means the evidence does not irresistibly conclude that it was only the appellant and nobody else who was the last person seen with the deceased alive and responsible for the brutal killing of the deceased. We agree with Mr. Kiwia that it was just unsafe to link the appellant with the brutal killing of the deceased based on the evidence of PW2 and PW5 which does not irresistibly point to the appellant as the person who had anything to do with the deceased's death. With this determination, we need not deal with other aspects raised on the issue by both sides.

For the reasons we have given, our inevitable conclusion is that the appellant's conviction by the trial court on the basis of the doctrine of last person to be seen with the deceased alive and therefore, circumstantial

evidence, cannot stand. We hereby allow his appeal, quash his conviction for murder and set aside his sentence of death by hanging. The appellant shall immediately be set free, unless he is otherwise lawfully in prison.

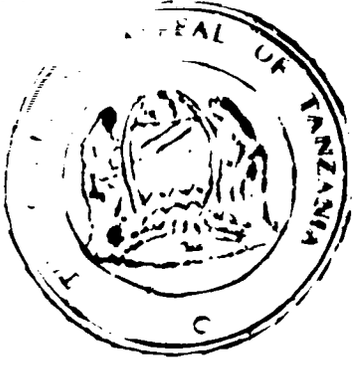
DATED at **MOSHI** this 01st day of September, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 01st day of September, 2023 in the presence of the Appellant who appeared in person 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