IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 195 OF 2021

DAUD s/o KAPEJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania at Tabora]

(Bahati, J.)

dated the 5th day of March, 2021

in

Criminal Session Case No. 50 of 2017

.....

JUDGMENT OF THE COURT

29th September, & 5th October, 2023

LILA, JA:

The appellant, **DAUD S/O KAPEJA,** is still languishing in prison awaiting to suffer death by hanging on account of having been convicted and sentenced by the High Court of Tanzania sitting at Tabora of murder charged under section 196 of the Penal Code. The charge alleged that he murdered one BARESA RASHID @ BAKAR (the deceased) on 20th day of April 2014 at about 08:00hrs at sub village Mfuto Mlimani, Mfuto Village,

in Ufuluma Ward within Uyui District in Tabora Region which accusation he denied.

To establish the appellant's responsibility with the charged murder, the prosecution marshalled seven (7) witnesses and tendered three documentary exhibits namely; report on post mortem examination (Exhibit P1), the appellant's cautioned statement (Exhibit P2) and Sketch Map of the scene of crime (Exhibit P3). The appellant was the sole witness for the defence and did not tender any exhibit.

The evidence by both sides singled out the following facts as being uncontroverted. **One**, the deceased, PW3 and the appellant were familiar to each other and PW3 was the second wife of the deceased. **Two**, on the fateful night, that is at around 22.00hrs, the appellant visited the deceased's house and met PW3 and her husband (the deceased) and the appellant and the deceased left together on a motorcycle to the house of Juma Busiga (PW7) to buy tobacco, **three**; the two truly visited PW7's house in that night. PW3, PW7 and the appellant are very clear and consistent on these facts PW7 saying he was so informed by his son one Doy as he was not at home at that particular time. Doy did not, however, testify. We shall revert and discuss the significance of this fact later on. **Four**, the appellant was not in the village when the deceased's body was

discovered and did not participate in the funeral of the deceased only to be arrested on 17/1/2015 and interrogated on 21/1/2015.

It was PW3's testimony that ever since the deceased left with the appellant that night to PW7 he never returned home which was something unusual to the deceased. That, on the next morning, she learned of her husband having been killed at Mfuto Kilimani from her father in-law one Rashid Bakari who went to inform her. She went to the scene where she found her husband's body and a motorcycle and also the body of PW7's wife lying in the small bush.

PW3 stated that the first wife of the deceased disappeared following the persistent misunderstanding she had with the deceased which was associated with her having affairs with one Ndebile.

According to DC Omary Matesa (PW1) who together with DC Rajabu (PW4), DC Matiku (PW6) and the Doctor one Sindabakila (PW2) who went to the scene, after the appellant had been named by PW3 to have been left with the deceased on the fateful night, they unsuccessfully traced for the appellant hence concluded that he disappeared. PW1 also said the appellant resurface after seven (7) months in a barbershop at Kanyenye where he went and arrested him while led by PW7. He said that upon interrogating the appellant, he named Ndibile to be the one who planned

the killing of the deceased because he had money while PW7's wife one Stumai was killed because she saw them when killing the deceased. The efforts to trace and arrest Ndebile in different villages proved futile. PW2's autopsy report established the deceased's death to have been caused by excessive bleeding caused by injuries in various parts of the body hence unnatural. PW4 gave similar evidence to that of PW1 and PW6. The appellant's cautioned statement was recorded by SGT Wilbroad Kimonge (PW5) on 21/12/2015 at around 12.45hrs in which he said the appellant admitted to have told the deceased that there was tobacco business at PW7's house and when he got out of the house, Ndebiie killed him. We would hurriedly hold this to be doubtful for had the deceased been killed just outside his residence, his wife (PW3) would have said so and the deceased's body could not have been found in the bush. The statement was admitted after a trial within trial following an objection that it was recorded in violation of section 50(1) of the CPA that it was taken out of the prescribed four hours' time. PW6 drew the sketch map of the scene of crime (exhibit P3).

It was against the above backdrop that the appellant was said to be the last person to be seen with the deceased, then he disappeared from the village and, upon his arrest, he confessed to commit the offence, hence charged.

In his defence, the appellant, as demonstrated above, had no quarrel with the prosecution story until he together with the deceased arrived at PW7's house on the fateful night. He parted way with the prosecution's view that he was responsible with the death of the deceased by presenting as his defence that after the tobacco business at around 22.30hrs, he parted ways with the deceased who left for his home and he went to a certain Center where he continued refreshing himself until the next day when he went back home and, on the same day travelled to Mtakuja to meet his lover where he stayed until 2015 when he went to Nzega where his brother resided. He further said he had no reason to go back because he had no wife. He claimed that he came to learn about the deceased's death when he was arrested. In essence, the appellant had raised a defence of alibi and tried to explain away his involvement with the murder, which defence, if accepted, disapplies the doctrine of last person to be seen with the deceased principle against him.

Notwithstanding his defence, the trial High Court, held the appellant responsible for the deceased's death resulting in his conviction and sentence as above indicated. That was after it had appraised itself on law on burden of proof that it rests on the prosecution citing various case decisions pronouncing that position and appreciated that this was a no-

show incident leaving it for the prosecution to prove the appellant's guilt circumstantially.

The appellant's conviction was founded on three pieces of evidence, **one**; the appellant's confessional statement (exhibit P2) in which the appellant was said to have admitted committing the offence in the company of Ndebile, **two**; the corroborative evidence by PW1, PW3 and PW7 that he was last seen with the appellant and, **three**; that his conduct of disappearing from the village was inconsistent with a behaviour of an innocent person. The defence that he was not a party to the deceased's cause of death as he parted ways with the deceased at PW7's house and latter on travelled, sunk in a deaf ear and to the contrary, his travelling outside the village after the incident was taken to have advanced the prosecution case that he disappeared after the incident, a conduct not expected of an innocent person.

The findings of the High Court being not in accord with his expectation of being seen to be innocent, aggrieved the appellant and he now seeks, before us, to upset those findings relying on five points of grievances to be outlined hereunder.

Ms. Flavia Francis, learned advocate argued the appeal on behalf of the appellant who was also present in person in Court. In addition to the

memorandum of appeal lodged by the appellant which had five grounds, she sought and was granted leave to argue two new grounds making a total of seven (7) grounds. But she was selective on which grounds to argue and she chose to argue the new grounds and grounds one (1), two (2) and four (4) in the memorandum of appeal initially lodged by the appellant. She abandoned the rest of the grounds. In the circumstances, she argued the following grievances: -

From the initial memorandum of appeal had these complaints: -

> *"1. That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*
>
> *2. That, the appellant was not accorded a fair trial as at the time of the ruling whether he had a case to answer, was convicted unheard.*
>
> *4. That, the learned trial High Court erred in fact and law to invoke, upon the appellant, the doctrine of the last person to be seen with the deceased."*

And, the new grounds are: -

> *"1. That, the trial Judge erred in law by convicting the appellant basing on a cautioned statement which was not tendered by the witness.*

2. *That exhibit P1 was not read out after being admitted as exhibit."*

The respondent Republic had Ms. Alice Thomas, learned State Attorney, to represent it. She supported the appeal.

It is worth noting from the outset that both learned brains were in agreement that there was no single witness who came forward to lead evidence that he witnessed the appellant kill the deceased and therefore the prosecution relied on circumstantial evidence to establish the appellant's responsibility with the murder which they, however, argued that it was full of potholes rendering it unable to found a conviction.

Submitting in respect of grounds one (1) and four (4) of appeal of the initial memorandum of appeal, the first attack was directed to the charge and evidence and both learned counsel concurred that they were plainly at variance in two aspects. **One**; the place where the incident occurred as stated in the amended charge is Kalola Village while the prosecution witnesses (PW1 at page 53, PW2 at page 57 and PW3 at pages 59 and 60, PW4 at page 63) and exhibit P2 indicated that it was at Mfuko Mlimani. **Two**, time of the occurrence of the incident was shown in the charge to be 08.00hrs as opposed to PW3 who said it was at 22.00hrs. It was their firm view that these variances could have been cured by amending the charge which was not done leaving uncertainty to

prevail over those two aspects. We entirely agree with them. The record is vivid on those two facts and the prosecution failed their duty to resolve them by amending the charge in terms of section 234 of the CPA. This created doubts in the prosecution case [See **Leonard Raphael and Another vs Republic**, Criminal Appeal No. 4 of 1992 cited in **Sylvester Albogast vs Republic**, Criminal Appeal No. 309 of 2015 (both unreported)].

The second onslaught fell on the invocation of the doctrine of last person to be seen with the deceased to convict the appellant, a complaint comprised in ground four (4) of the initial memorandum of appeal. Ms. Francis and Ms. Thomas agreed that, if anything, the appellant was only legally required to explain away the doubt of his involvement in killing the deceased from the time they were at PW7's house only and not before that time because PW7 confirmed through his son one Doy that the appellant and the deceased visited his house in that fateful night. The two learned counsel concurred that, in the absence of any other evidence to the contrary, the appellant's explanation should be taken to be true that from PW7's house, they parted ways safely. Doy was the only person to tell otherwise but did not testify at the detriment of the prosecution case. In the circumstances they opined that the 'the doctrine of last person to

be seen with the deceased' was improperly invoked to convict the appellant.

We have no valid reasons not to go along with the two counsel's view. The issue nocking at the door begging for an answer is whether or not, in the circumstances of this case, the doctrine of 'the last person to be seen with the deceased could be applied by the trial court to convict the appellant. The import of that principle was lucidly explained by the Court in **Mathayo Mwalimu and Another vs Republic,** Criminal Appeal No. 147 of 2008 (unreported), to mean that: -

> "... *where a person is alleged to have been the last to be seen with the deceased, in the absence of plausible explanation to explain away the circumstances leading to the death he/she will be presumed to be the killer."*

In the instant case, the appellant admitted being with the deceased last at PW7's house where the deceased bought tobacco and the evidence is clear that the deceased was dealing with buying tobacco. That, too, was the mission behind the appellant and the deceased leaving together as the trial court was told by the deceased's wife (PW3) when the two left. The appellant's account of the circumstances that obtained stands to be highly probable because there is no evidence to contradict his

explanation as Doy, a crucial witness, was not called to testify entitling us to hold an adverse inference against the prosecution case that if he was to be called to testify he could contradict the assertions by the prosecution witnesses (See **Aziz Abdalla vs Republic** [1991] T.L.R 71 and **Peter Mabara vs Republic,** Criminal Appeal No. 242 of 2016 (unreported). It is our view that had the learned trial judge properly considered the evidence and the import of the principle of last person to be seen with, she would have accepted the appellant's explanation as being reasonable and probable. It should be borne in mind that, like any other witnesses, the appellant was entitled to credence as it is well settled that every witness is entitled to credence unless there are reasons for not according it. (See the case of **Goodluck Kyando vs R** [2006] T.L.R 363 and **Allan Duller vs Republic**, Criminal Appeal No.367 of 2019 (unreported). Unfortunately, in this case, there was no evidence which discredited him. Had the evidence considered on these lines, conviction would therefore not arise.

The remaining implicating evidence as complained in grounds one (1) of the initial memorandum and the new grounds relates to the appellant's cautioned statement (exhibit P2). Its reliance in convicting the appellant was not free from attack by Ms. Francis and Ms. Thomas who were agreeable that it suffered from two infractions that it was not

tendered by a witness and, the most serious one, being that it was not read out after it was admitted as exhibit so as to allow opportunity for the appellant know its contents for the purpose of properly aligning his defence hence subject to be expunged as was stated by the Court in the case of **Omary Hussein @ Lundanga and Another vs Republic**, Criminal Appeal No. 547 of 2017 (unreported). It is trite law that a confession may found a conviction provided that it is made voluntarily by the accused admitting without any qualification all the ingredients of the charged offence and its recording complied with the law (sections 50 and 51 of the CPA). It being own incriminating statement, it may ground a conviction as the Court stated in the case of **Mohamed Haruna Mtupeni and Another vs Republic,** Criminal Appeal No. 259 of 2007 (unreported) cited in **Frank Kinambo vs The Director of Public Prosecutions**, Criminal Appeal No. 47 of 2019 (unreported), that:

> *"The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt."*

It is uncontroverted fact that exhibit P2 was not read out after it was admitted at page 96 of the record of appeal hence, on the authority cited above, it has to suffer the unescapable wrath of being expunged, as we hereby do.

We last engaged the learned counsel to address us on the appellant's conduct after the incident which the learned trial judge held to have advanced the prosecution case in proving his guilt. According to PW1, PW4 and PW6, the appellant disappeared from the village after the incident which conduct raised suspicion of his involvement. Luckily, and in our view rightly, this view did not find merit in the minds of the two learned counsel. They reasoned that, after parting ways at PW7's house, nothing prevented the appellant from proceeding with his errands as he would not know that the deceased would die hence his travel and death of the deceased was a mere coincidence.

In cases where the appellant's conduct is in question, the presiding judge should not take it lightly and hold that it is inconsistent with innocence. It should first, be noted that conduct has only a corroborative value when there is another cogent and sufficient evidence linking the appellant with the commission of an offence charged and, second, that it is relevant only when the question of malice aforethought is at issue. The Court reiterated that position in **Jacob Asegelile Kakune vs Republic,** Criminal Appeal No. 178 of 2017 citing the case of **Abdallah Rashid @ Kamkoka vs Republic**, Criminal Appeal No. 206 of 2016 (both unreported) where another case of **Enock Kipela vs Republic,** Criminal Appeal No. 150 of 1994 (unreported) was cited, that the suspect's conduct

before or after the killing may be one of the indicators of malice aforethought. Conduct, alone, cannot therefore be the basis of a conviction.

The appellant, in the instant case, did not deny being away from the village on the day the deceased body was recovered stating that he was on safari. As amply discussed above, there is neither evidence directly or circumstantially placing the appellant at the crime scene nor linking him with the offence making the appellant's conduct inconsequential. In all, such a behaviour may raise suspicion but, in law, suspicion, as was rightly submitted by both learned counsel, however strong cannot be a foundation of conviction. (See **MT. 60330 PTE Nassoro Mohamed Ally vs Republic**, Criminal Appeal No. 73 of 2002 (unreported). But, in the instant appeal, the appellant's explanation on his whereabouts invites no doubt and as rightly put by the learned counsel, nothing prevented him from travelling on that particular day. We would also add that, it would be absurd and ridiculous if the law is always to presume that one who absents himself or travels and behind him a crime is committed, is a prime and potential suspect. Even common sense would not support that.

We think, quite sufficiently, the grounds we have positively determined, dispose of the appeal.

In all, we allow the appeal, quash his conviction and set aside the sentence imposed on him. He is to be released forthwith from prison if not detained on another lawful cause.

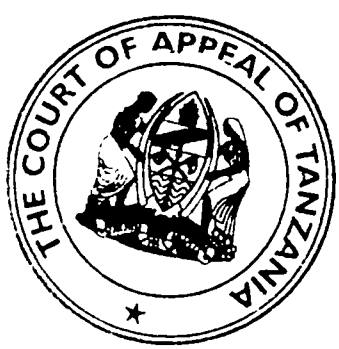
DATED at **TABORA** this 4th day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 5th day of October, 2023 in the presence of the Appellant in person and Mr. Nurdin Mmari, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL