IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MKUYE, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 404 OF 2021

SAFARI ANTHONY @ MTELEMKO..... 1ST APPELLANT

SAFARI KIJA @ ELIKANA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Khamis, J.)

dated the 2nd day of July, 2021

in

Criminal Sessions Case No. 3 of 2020

.....

JUDGMENT OF THE COURT

26th September, & 23rd October, 2023

GALEBA, J.A.:

In Criminal Sessions Case No. 3 of 2020, before the High Court of Tanzania at Tabora, Safari Anthony Mtelemko and Safari Kija Elikana, the first and second appellants respectively, were charged under the provisions of section 196 of the Penal Code, for the murder of Maduhu Dwisha (the deceased), a three-wheeler rickshaw driver and a resident of Igunga township in Tabora Region. After their full trial, the appellants were convicted for the offence and were both sentenced to death.

The facts of the case giving rise to this appeal are that; the deceased left home for work in the morning of 2nd March, 2017. However, he did not come back that evening as was his regular routine. Till the next morning of 3rd March, 2017, the whereabouts of both the deceased and his rickshaw were still a mystery. At around 11:00 hours, Mwadawa Jumanne Ally (PW10), the deceased's wife, went to Igunga Police Station to report the deceased's unexplained disappearance.

At the station, PW10 reported the incident to Paschal Hosea Kiula, (PW1), a District Head of Criminal Investigation (OC-CID). PW10 also left PW1 with his husband's telephone line number 0763 550 977 and the details of the missing brand-new rickshaw No. MC 554 BPC make TVS, blue in colour. The other information was that the deceased had always carried with him a black wallet written *"lacosta,"* with a symbol of an allegator. Pursuant to the report, PW1 organised a search team to search for a possible trace of the deceased, dead or alive and his rickshaw. PW1 led the team along Igunga - Nzega road, and the search started around noon on the same day, 3rd March, 2017.

As the search was on, towards Nzega direction, No. 5766 WP Neema, (PW2) working within the Traffic Department at the station,

was on her regular duties along Igunga - Sikonge - Singida Road. While at work, young primary school pupils passing by approached her and informed her that they had seen some blood scattered around a culvert at a place called Hanihani, along the road that PW2 was monitoring traffic. The children took her to that point, and upon getting there, PW2 saw a human body with an injury on the forehead. She immediately called PW1 who, with his search team and other rickshaw drivers, went to the scene where the body was found. The rickshaw drivers identified the dead body as being that of the deceased. The police then took the dead body to Igunga District Hospital for Postmortem procedures.

At Igunga District Hospital, Dr. Sange Hussein Saadallah (PW3), carried out a postmortem examination, and concluded medically that, the deceased's cause of death was shaking of the brain and suffocation. This witness tendered the Report on Post Mortem Examination, exhibit P4.

In the course of the investigation, PW1 approached Vodacom and obtained a detailed print out, exhibit P3, showing that whoever had the deceased's telephone line on 2nd March, 2017 was in Igunga and Nzega but on 3rd March, 2017 the telephone line was in use in Kahama, another busy trade centre in Shinyanga Region. Upon

noting this information, PW1 convened a meeting of ASP Edward Gabriel Dinawi, (PW4), No. F 5571 DC Moses, (PW11) and No. F 5505 D/Cpl Wenceslaus (PW12) all of Igunga police station, and instructed them to travel to Kahama to search and locate a person operating the deceased's telephone line.

With the above details, on 16th March, 2017 PW4, PW11 and PW12 travelled, and reported to OC-CID Kahama, who introduced the Igunga team to one of his staff who was a cyber security expert, No. G 3269 DC Sebastian, (PW5). The latter was given exhibit P3, the print out from Vodacom. The team agreed to start the actual tracing of the person operating the deceased's telephone, the next day. The next morning on 17th March, 2017, the team reconvened at Kahama police station. Upon studying exhibit P3, PW5 noted that the deceased's telephone had been in constant communication with telephone number 0762 461 284. PW5 did not call this new number directly, but he contacted cyber security department in Dar es salaam in order to get the telephone numbers that frequently communicated with that number. Shortly, they gave him three numbers including 0762 870 772, which was the only active at the time.

He called this number and a lady picked up the call. PW5 tricked the person at the other end of the line, that he had her parcel

from Arusha and that he was at Kahama Bus Station. They stayed in contact and at around 13.00 hours, the lady came for the "parcel" and they met as agreed whereupon she introduced herself as Glory. She was requested to accompany the police officers to Kahama police station. At the police PW5 used Glory's telephone number to call 0762 461 284, and it displayed the name "SAFARI". Glory confirmed to know Safari as a rickshaw driver that she used in her regular trips. She confirmed also that getting him was very easy for she would call him, which she dutifully did. She told Safari that he should come to the peasant's market as she had bought household items for domestic use that she wanted to carry home. At around 17:00 hours, Safari's rickshaw arrived at the peasant's market where he was arrested and was taken to Kahama police station.

At the police, according to PW5, the suspect introduced himself as SAFARI KIJA ELIKANA and confirmed to know the deceased's telephone number, but that the number was served by his colleague called SAFARI ANTHONY MTELEMKO. According to PW5, Safari Kija Elikana said Safari Anthony Mtelemko was a close friend and a fellow rickshaw driver at Kahama, such that getting him was also pretty easy. They told Safari Kija Elikana to call Safari Anthony Mtelemko on the deceased's telephone number line and tell him that he was at the

police station on a minor traffic offence which needed a fine of TZS. 30,000.00, which he needed from Safari Anthony Mtelemko. The latter, who was at the car wash cleaning his rickshaw, promised to give the assistance as soon as he would finish washing his three-wheeler.

A while later, Safari Anthony Mtelemko arrived at the police and after he was identified to the police by Safari Kija Elikana, he was easily apprehended. According to PW5, Safari Anthony Mtelemko disclosed to the team of investigation that he was involved in three criminal incidents at Igunga, and in each incident, they stole a rickshaw and killed its driver. This suspect stated that the most recently stolen rickshaw was in his possession and it was at the time, being cleaned at a car wash at Usagali Filling Station. The team then proceeded to the car wash and found a blue TVS rickshaw MC 554 BPC make TVS. PW5 drove the rickshaw to Kahama police station after seizure of the same. Safari Anthony Mtelemko confessed to PW5 and other members of the team, that they got the rickshaw from Igunga Darajani where they killed its owner and stole it. He also told them that he took the telephone from the pocket of the rider they killed. This suspect confessed to be a co-murderer of other two rickshaw drivers at Igunga with Safari Kija Elikana.

Thereafter, the search team went to Nyasubi area in Kahama where, both Safari Anthony Mtelemko and Safari Kija Elikana lived as tenants of Asha Mohamoud Farah (PW8). The team included PW4, PW5, PW8 (the land lady), Mkombozi Pascal Kajoro, (PW9) a neighbour, PW11, PW12 and other police officers from Kahama.

Upon entering Safari Anthony Mtelemko's bedroom with him leading the way, after removing the mattress, underneath his bed, there were found the following items: (1) three tyres of a rickshaw; (2) hubs; (3) a nylon bag that contained several rickshaw spare parts and a black wallet, written *'lacosta'* exhibit P8, containing passport size photos of the deceased, exhibit P10, together with his voter's registration card, exhibit P9; (4) a black Rambo bag which had a red manila rope inside; (5) several metal spanners for fixing and loosening nuts and bolts in rickshaws and; (6) three seats of rickshaws. The telephone of the deceased, exhibit P11, was delivered to PW4 by Safari Anthony Mtelemko from his pocket. All these items were seized and a search warrant was prepared, exhibit P5, and signed by Leonard Mayala, PW8, PW9 and Safari Anthony Mtelemko himself.

All the above exhibits together with the rickshaw, exhibit P13, were taken to Igunga by PW1 assisted by PW11. Then PW1 called

PW10, and the latter identified the properties recovered from Safari Anthony Mtelemko's house, as the deceased's.

PW4 and other CID officers remained in Kahama with Safari Anthony Mtelemko for further investigation, particularly to trace and arrest other suspects. PW4 upon questioning Safari Anthony Mtelemko as to their associates, the latter mentioned Emmanuel John and Yassin Abdu, to be their co-criminals. He offered to assist with the arrest of Emmanuel John who was eventually arrested, but later died. According to the police, Emmanuel John jumped off a moving police vehicle enroute to Nzega from Igunga where he was leading them to arrest Yassin Abdu. However, according to the appellants, Emmanuel John was killed by the police at Igunga Police Station following excessive torture inflicted on him by the said officers. As Emmanuel John died before the arrest of Yasin Abdu, the latter was never traced or arrested. It therefore means that, this appeal does not concern the duo, although their names will surface as we proceed, particularly regarding their alleged participation in planning and executing murders at Igunga, including the deceased's.

As to the methodology that the murders at Igunga including that of the deceased were executed, Safari Kija Elikana in minute details explained to PW4 and PW5 that Emmanuel John and Yassin

Abdu, while in advance at Igunga, would identify a driver who drives a new rickshaw and get used to him either by befriending him or by presenting themselves as reliable customers. Thereafter, they would call Safari Kija Elikana and Safari Anthony Mtelemko to Igunga for carrying out the illicit plan. The latter would then start a journey from Kahama to Igunga, particularly in the afternoon of the date of the pre-determined murder and robbery. Upon arrival of Safari Kija Elikana and Safari Anthony Mteiemko at Igunga bus station, Emmanuel John or Yassin Abdu would call the identified driver to go and pick their "guests" from a bus stand and transfer them to where Emmanuel John and Yassin Abdu would be waiting, usually along the main road two to three Kilometres outside Igunga town centre. This transfer of the "guests", according to the plan of the four bad guys, would be the very last activity of the driver in his lifetime, because his death at this time, would be looming large in the vicinity, very imminent and close to his very nose. The scheme was always that, once the driver reached in around a stone's throw distance from the point where Emmanuel and Yasin would be waiting, Safari Kija Elikana and Safari Anthony Mtelemko, who are at that time the driver's only 'passengers' in the rickshaw, would suddenly and without notice, jump on him and grab the driver by the neck,

ruthlessly strangle him by using a plastic rope around the neck, which act would not only suffocate their victim, but also would block blood flow from his heart to the brain. At that critical moment, when the unprepared and defenceless victim is face to face with death, fighting for his last breath on one hand, and his aggressors consolidating efforts to subdue him into succumbing to death, on the other, then Emmanuel and Yasin would rush quickly to join the duo, in order to reinforce the murder team so that they may do away with the poor driver's life, within the least possible time. Post that ugly moment, the poor driver would have gone, gone, and gone for ever!

Thereafter, the four murderers would carry the rickshaw driver's body, put it in the rickshaw, fast drive past Igunga town; maintain Nzega direction, and would throw the body at the bushes around Igogo Village and proceed with the rickshaw to Kahama. Safari Kija Elikana told PW4 and PW5, that previously they used to take spare parts from the stolen rickshaws and board lorries travelling at night, but the third time they drove the rickshaw straight to Kahama.

Those are the facts upon which the prosecution based their case at the trial.

As for the defence, the appellants' defences consisted of denials that they did not commit the alleged offence. They both testified in common that, they were arrested on diverse dates. The first appellant was arrested on 18th March, 2017 on the way from Nhongolo center to Kahama urban center whereas the second appellant was arrested on 17th March, 2017 at CDT street in Kahama District. They contended that upon their arrest they were taken to Kahama police station. On 18th March, 2017 while in the investigation room and being strangers to each other, they were both joined with one, Emmanuel John, a fellow suspect (deceased) in order to admit that they knew one another and participated in the killings, a fact which they denied. They contended that, upon such denial, they were each subjected to torture.

Later in the day, that is on 18th March, 2017 at around 16:00 hours, the appellants were taken to Igunga police station and on arrival, they were seriously tortured. Despite the alleged torture, the appellants still maintained that they never knew each other and did not participate in the murder. They further contended that it was such torture which led to the death of their fellow suspect. That means they denied the charge such that the prosecution had to prove it against them.

The prosecution called a total of 14 witnesses and tendered 22 exhibits. Of the 14 witnesses, 8 were police officers of various ranks and experiences including a cyber security expert. The appellants, who were represented by learned advocates, other than their own evidence, did not call any other witnesses. At the end of the trial, the High Court found them guilty of the offence of murder and convicted them accordingly. Although the typed record does not reflect that any sentence was imposed, the handwritten original record of the trial court indicates that, imposed on the two appellants, was a sentence of death by hanging. This appeal is challenging that judgment of the High Court.

Initially, the first appellant had lodged 13 grounds of appeal and the second had lodged 14 grounds. However, at the hearing Mr. Kamaliza Kamoga Kayaga assisted by Mr. Kelvin Kamaliza Kayaga, both learned advocates informed us that, they would argue two supplementary grounds of appeal and the first ground of appeal in both original memoranda of the appellants. His explanation in that respect, was that his arguments supporting the first ground in the two original memoranda would take care of all points raised in all the 27 grounds of both appellants. Thus, the appeal was based on the following three grounds of appeal:-

"1. That the trial court erred in law and facts when it conducted the proceedings without assessors participating fully in the proceedings leading to unfair conduct of the proceedings hence a denial of the appellants' fair hearing.

2. Exhibits P19, P20, P21 and P22 were improperly admitted during the trial because they were obtained after torture and against the interests of justice.

3. That the case for the prosecution was not proved against the appellants beyond reasonable doubt."

Mr. Kelvin Kayaga argued only the first ground of appeal. His complaint was based on two points: **First**, that the assessors who sat with the learned trial Judge were not addressed on their roles in the trial, and; **second**, that vital points of law that were involved in the trial were not addressed to them, which means that summing up to assessors was improper.

Elaborating on the first limb of his complaint, Mr. Kelvin Kayaga submitted that from page 84 of the record of appeal where assessors were selected, to page 86 of the same record where recording of the evidence started, nowhere in between, did the court advise assessors

of their expected duties and responsibilities in the trial at hand. Because of the omission to tell them their roles, no assessor asked any question to any witness up to the 10th witness, when they started asking questions, the learned advocate argued.

On improper summing up, the learned advocate contended that at page 521 of the record, the first appellant raised a defence of *alibi* when he stated that at the time when the offence was being committed in Igunga he was in Kahama. Therefore, the learned trial Judge erred by not addressing this aspect of the first appellant's defence to the assessors. He also added that the conviction of the appellants was based on the doctrine of recent possession of the recovered items, which aspect the learned trial Judge had no option but to address it in the summing up notes, because it was a vital point of law. In the circumstances, he concluded, the appellants were unfairly tried and unlawfully convicted, and referred us to the case of **Gerald Athanas Kivwango v. R,** Criminal Appeal No. 103 of 2019 (unreported).

Based on these two contentions, he moved the Court to nullify the proceedings and the judgment, quash the conviction and set aside the death sentence. As there was no credible evidence to hold

the appellants guilty if a retrial is ordered, then the appellants be set free from prison, he argued.

In reply, Mr. Ukongoji submitted that, although it is true that the trial Judge did not address assessors in terms of their roles, all the same the assessors fully participated in the trial. He submitted that the fact that the assessors did not ask questions did not mean that they did not participate. It would have been an error if they were not given a chance to ask questions, according to the learned Senior State Attorney. He stated that in the present case, as the assessors participated fully, the question to ask is whether there was any prejudice to the appellants. To substantiate his point, he referred us to this Court's decision in **Amani Rabi Kalinga v. R**, Criminal Appeal No. 474 of 2019 (unreported).

On the second point of failure to address assessors on the defence of *alibi*, the learned Senior State Attorney submitted that the defence of *alibi*, in the first place, was not considered in the judgment. As such, the trial Judge did not use it to convict the appellants. He added that, in any event, as the *alibi* had no advance notice to the respondent, the same offended section 194 (4) of the CPA. His point, was that the *alibi* was an afterthought and the trial court was not duty bound to address the point to the assessors. With

respect, we did not hear the learned Senior State Attorney addressing us in rebuttal on the issue of the doctrine of *recent possession*.

In determining the above first ground of appeal, we will start with the first limb of Mr. Kelvin Kayaga's contention that the assessors were not advised of their roles prior to commencement of trial. It is true that the trial court did not address assessors as to their duties and responsibilities immediately before commencement of the trial. We also agree with him that according to this Court's decision in the case of **Gerald Athanas Kivwango** (supra), if the assessors are not addressed as to their roles, then the trial is deemed to have been conducted without the aid of assessors, which would be offensive of sections 265 and 298 (1) of the CPA. To that extent, we generally agree.

However, we wish to clarify that, in the case of **Gerald Athanas Kivwango** (supra), this Court did not hold that where the assessors fully participate in a trial by performing their roles and responsibilities as required, the omission to address them on such roles (which they would have performed) would still be consequentially fatal and violative of any rule of law or of practice. It is also the law of this country that, the entire subject of involvement

of assessors in trials before the High Court, and summing up to the assessors, falls within the category of procedural law. This Court has deliberately chosen to embrace and pursue a purpose driven approach as opposed to a technical driven course, in dealing with procedural irregularities. It is fair in our view, that we take a minute or two to explain what the purpose driven approach or the justice driven approach entails.

To put the discussion in perspective, we will start with the premise we set in **Kobelo Mwaha v. R**, [2010] T.L.R. 196 at 210 where we came out clear and affirmed that:-

> *"**Trial with the aid of assessors is procedural law.** Section 265 of the Criminal Procedure Act [Cap 20 R.E. 2002] stipulates that all trials in the High Court should be held with the aid of assessors. **To gauge the effect of non-compliance or mis-compliance with any rule of procedure, the test is always whether the breach of that rule has in any way prejudiced the accused and thus led to a miscarriage of justice.**"* [Emphasis added]

Let us be clear also here that, the decision in **Kobelo Mwaha** (supra) was not the first, in which we held so. We have always had

the same position even before that case, in **Ally Juma Mawepa v. R**, [1993] T.L.R. 231; **Michael Luhiye v. R**, [1994] T.L.R. 181 and; **Richard Mebolokini v. R,** [2000] T.L.R. 90. In **Michael Luhiye** (supra) for instance, the appellant appealed against conviction in a murder case. He argued that the trial was a nullity as it was conducted without the aid of assessors; because the assessors were not given opportunity to examine the witnesses individually, instead they examined them together and the witnesses answered them together. This is what this Court observed in answer to that complaint on appeal:-

> *"**For a trial in a criminal case to be a nullity it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned failure of justice;** in this case the Triai Judge gave a summing-up of the evidence to the assessors, and took into account as to the guilt or otherwise of the appellant and therefore it cannot be declared a nullity."*

We had the same spirit voiced in **Flano Alphonce Masalu @ Singu and Four Others v. R,** Criminal Appeal No. 366 of 2018 (unreported), where we stated:-

> *"However, in our earlier decision in* ***Jumanne Shabani Mrondo v. Republic,*** *Criminal Appeal No. 282 of 2010 (unreported) where we confronted an identical irregularity;* ***we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice."***
> [Emphasis added]

Many other decisions have followed the same spirit. Such decisions include **Ernest Jackson Mwandikaupesi v. R,** Criminal Appeal No. 408 of 2019; **Salehe Rajabu Salehe v. R**, Criminal Appeal No. 318 of 2017 (both unreported) and; recently **Amani Rabi Kalinga** (supra). Thus, this is the present position, and for the time being, an ongoing position of the law, which we think fits a progressive and positively changing society like ours. It reflects what we referred to as the justice driven approach; the approach permitting the court to pause, and interrogate the parties and itself in order to find out whether justice was done, irrespective of the procedural infraction.

In this case, throughout the proceedings, assessors were afforded a right to ask questions to all witnesses and after that, a summing up as shown in the record of appeal from pages 540 to 577

was read and explained to the assessors. Then, from page 577 to 580, the three assessors, namely, Renatus Mlyutu, Edina Isaya and Elisha Bundala, all gave their opinion on the case. They all returned the verdict of guilty in respect of both appellants.

Thus, we cannot rationally hold that not advising assessors of their roles prevented them from performing their duties in the trial. We also find no prejudice to any of the appellants in the circumstances. In this case, we hold with certainty and confidence, that the infraction was inconsequential and therefore, one of the procedural omissions curable under section 388 of the CPA. Thus, we dismiss the first limb of Mr. Kelvin Kayaga's contention that the trial is a nullity because assessors were not advised of their roles.

Mr. Kelvin Kayaga's other complaint was in respect of vital points of law. We wish to state at the outset, that there are countless authorities of this Court to the effect that where vital points of law are not explained to the assessors, sections 265 and 298 (1) of the CPA are deemed to have been violated, and the trial has to be declared a nullity. The basis for so holding has consistently been that, in law, every criminal trial in the High Court has to be with the aid of assessors who must be addressed on the vital points of law involved in the trial, and that if no such address is made, then the

trial is a trial without aid of assessors. Two of such decisions include; **Charles Lyatii Sadala v. R**, [2012] T.L.R. 135 and; **Augustino Nandi v. DPP**, [2020] 1 T.L.R. 119. So, there is no question about what has been the decision on failure to address important issues of law to assessors.

Nonetheless, after thoroughly studying the entire record of this appeal, particularly the evidence of both sides to the matter, and having considered the submissions of parties on the grounds raised, we made a decisive decision to retrace our own footsteps and find out why is it that we have almost on all occasions been holding that sections 265 and 298 (1) and (2) make it mandatory that in criminal proceedings the assessors' opinion is indispensable to the decision of the High Court to the extent that the proceedings and even the judgment itself may be nullified if the aspect of the assessors' participation is not handled with care and sensitivity. To make ourselves clear, we will start with the provisions of sections 265 and 298 (1) and (2) of the CPA which were, at the time of the trial of this case, providing that:-

> *"265. All trials before the High Court shall* ***be with the aid of assessors*** *the number of whom shall be two or more as the court thinks fit.*

298.-(1) Where the case on both sides is closed, ***the Judge may sum up the evidence for the prosecution and the defence and shali then require each of the assessors to state his opinion*** *orally as to the case generally and as to any specific question of fact addressed to him by the Judge, and record the opinion.*

(2) The ***Judge shall then give judgment, but in doing so, shall not be bound to conform to the opinions of the assessors.****"*

[Emphasis added]

From our attentive and slow reading of section 265 of the CPA, the role and participation of assessors in a criminal trial, is marginal and secondary. Their role is not central or primary, like the trial Judge's. The role of assessors' is *'to aid'* the trial Judge, and not to control or impose a degree of control on him. By its nature an assistance, becomes necessary only when there is an insufficiency or a need. Section 298 (2) of the CPA confirms that indeed, the opinion of assessors, good or bad, may be disregarded by the trial Judge, and that cannot affect the quality of the High Court Judge's judgment. The intention of the legislature, by enacting sections 265

and 298 (2) of the CPA, was therefore to keep the opinion of assessors as meek and as advisory as possible such that no opinion of assessor or its absence would have any detrimental effect to the absolute powers of the Judge to render his decision.

In our view, that is why the law authoritatively states that the Judge is not bound to conform to any opinion of any assessor. Thus, the law recognizes, validity of a judgment which does not incorporate the opinions of assessors. If we are right in our reasoning, then with, or without opinion from assessors, a Judgment of the High Court cannot, just for that reason, be invalidated or vitiated. To hold the other way round, would be subjecting validity of the High Court judgment to the opinion of assessors. That, in our considered view, would be to subject the judgment of the High Cout to the opinion of assessors who are just there to assist the court. It would also be in a way, a departure and disobedience of article 107A (1) of the Constitution of the United Republic of Tanzania and sections 177, 178 and 298 (2) of the CPA whose cumulative effect is to vest absolute and full mandate of decision making in the court. It was not the intention of the legislature that views of lay persons would legally be authoritative to the point of being used to overturn a decision of a High Court Judge.

We will explain ourselves a bit more by way of examples of decided cases, which we have always relied upon in the subject of assessors and summing up to them. The earliest decisions that we have been able to trace, are three. Addressed in these cases, is the effect to the judgment of the High Court after failure of the Judge of that court, either to address assessors on any points, or a complete failure to sum up the case to the assessors. The objective is to find out whether omission to do either of the two, vitiates a trial.

The first case is **Miligwa Mwinje and Shonga Malugu v. R**, (1953) 20 E.A.C.A. 255. The judgment in this appeal resulted from Consolidated Criminal Appeals No. 267 and 268 of 1952. The matter before the Court was not directly on the issue of addressing vital points to assessors, but a complete failure to address or to sum up the case to assessors. We think it bears a lot of relevance to the issue we are covering. This is so because failure to sum up to assessors or failure to address the whole case to assessors goes hand in glove to the failure to address them on vital points. The case was decided by our predecessor, the Court of Appeal for Eastern Africa, Sir Barclay Nihill (President), Sir Newnham Worley (Vice President) and Rudd (from Kenya), on 13th February, 1953. In that case, the appellants were charged with the murder of one Muguji,

and were convicted by the High Court of Tanganyika (Sinclair J.). However, in the course of the judgment of the High Court, the trial Judge observed that he did not get any assistance from assessors during the trial, because the assessors did not understand the evidence. In the context of that omission, on appeal the ground which was raised as ground number one was this:-

> *"1. That the trial was a nullity in that the trial Judge recorded that he had derived no assistance from the assessors and that they obviously had no participation or understanding of the evidence."*

Of significant to note in this case is that, not only that the assessors did not understand any vital points of law, the assessors were not even able to grasp the facts of the case. This is what the Court of Appeal decided in answering the above ground raised at page 256 of the report:-

> ***"There is no substance in the first ground of appeal.*** *Section 283 (1) of the Criminal Procedure Code of Tanganyika requires the Judge to sum up the evidence to the assessors and require each assessor to state his opinion orally and the Judge is to record such opinion.* ***But sub-section (2) expressly provides that the Judge shall***

give Judgment and in doing so shall not be bound to conform to the opinions of the assessors*. The corresponding section (section 304) of the then Criminal Procedure Code of Kenya was considered by this Court in* ***Hablb Kara Vesta and Others v. Rex****, (1934) 1 E.A.C.A 191 and this Court then said: -*

*"****(The section) confers an absolute power on the Judge to give effect to his own views****. The most he is directed to do, is to require each assessor to state his opinion which logically means he must consider that opinion. ...* ***The assessors are not, as the jury, judges of fact so as to bind the Judge****. It is the latter who must decide the case on the facts as well as the law but he will of course have regard to their opinion, even though it is not binding on him.* ***We have dealt thus with what seems to us quite obvious because we think it as well to indicate that no argument in future directed to persuading us to diminish or in any way to qualify that absolute power of a Judge to give effect to his own views, should receive any attention from this Court****."*

What was said there is still good law to-day, in Tanganyika as well as in Kenya. It has been reaffirmed in Criminal Appeals Nos. 232 to 252 of 1950 (Kenya) as well as in Criminal Appeal No. 174 of 1951 (Uganda) and has been constantly acted upon in this Court in other cases.

The function of the assessors is to assist the Court, as far as in them lies, on questions of fact and sometimes on questions of native custom and habits. *It is, unfortunately, by no means rare, in the East African Territories for one or more of the assessors to state, when asked for his opinion, that he has no opinion to offer and "leave it to the Judge". That is probably inevitable where assessors are drawn from such a wide variety of people in varying stages of civilization. In such a case the Court is deprived of the assistance it might have expected,* ***but that provides no ground whatever for any argument that the trial thereby becomes a nullity."***

[Emphasis added]

We trust that the quoted part of the decision on that ground, demonstrates beyond clarity, the absolute mandate and powers of a

trial Judge, over the deliberate subordination and marginalization of the assessors' input in the decision of the High Court. In our view, the above decision is authority for the view that, whether the assessors give opinion or not, the judgment of the High Court cannot be vitiated, and our reason, is not only based on the above decision, but also on the existence and import of section 298 (2) of the CPA at the trial of this case.

The other celebrated decision is **Washington Odindo v. R,** (1954) 21 E.A.C.A 392. The judgment in this appeal was handed down on 16th December 1954. The appeal had emanated from a criminal matter that had been tried by the High Court of Tanganyika at Mwanza. In that matter, Washington Odindo had been charged for committing three offences; **one**, breaking into a building and committing a felony therein; **two,** assault with intent to prevent lawful apprehension and, **three**, assault with intent to maim, disfigure or disable or to do some grievous bodily harm. He was sentenced by the High Court to 12 years imprisonment with hard labour and the maximum of 24 strokes. However, in the course of the trial, the learned trial Judge, Harbord J, did not at all sum up the evidence or even direct assessors on any points of law. The Court observed:-

"We have one further observation to make, and that is that, it would appear from the record that the learned trial Judge did not sum up the evidence to the assessors or ***direct them on the iaw****, at least he has not recorded that he did so. He has recorded a series of specific questions which he put to them and the answers received. We agree with Mr. Fifoot that it would seem from the wording of section 283 (1) of the Tanganyika Criminal Procedure Code that* ***there is no statutory obligation on a trial Judge to sum up the evidence, but it is a very sound practice which is almost invariably followed by Judges in these territories to do so except in the very simplest cases****. Furthermore, such practice approximates to the practice in England in a trial by jury. There is, of course, no objection to a Judge putting specific questions to the assessors after the addresses have been concluded,* ***but when he does so, we should have thought that they should at least be reminded of the salient points in the evidence before being required to answer them****."*

After the above observation, the following was the holding on that aspect:-

> *"1) There is no statutory obligation in Tanganyika on the trial Judge to sum up the evidence to the assessors, but it is a sound practice to do so* ***except in the very simplest cases.***
>
> *(2) there is no objection to the trial Judge putting specific questions to the assessors after the conclusion of the addresses, but, before so doing, he ought, at least,* ***to remind them of the salient points in the evidence before requiring them to answer them.***
>
> *(3) Where the opinion of the assessors is recorded in the form of specific answers to questions, they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused person.*
>
> *Appeal dismissed, except that the sentence is reduced."*
>
> [Emphasis added]

In **Washington Odindo's** case (supra), the appeal was dismissed although there was neither summing up, nor was there

any addressing of vital points of law to assessors. What was observed was that, it is sound practise to sum up a case to assessors. There is however an exception, where summing up is not mandatory. This is particularly so, where in the opinion of the trial Judge, the case is a simple one. To us, a simple case includes a straight forward case in which the Judge is deemed not to have required assistance from any lay person. We wish to note too, that nowhere in that decision was it held that a trial may be vitiated by an omission to address vital points of law to the assessors. Further, that decision did not hold that where summing up is not done, the entire Judgment of the Judge is invalid or that the trial is vitiated. In actual fact, not only that the ground of appeal which was challenging the High Court for not summing up was dismissed, but also the appeal itself was not spared.

According to the second holding in that decision, addressing assessors to salient points in the evidence is necessary only where a trial Judge wants to ask assessors specific questions. The law that was being interpreted in this case at that time, was section 283 (1) of the Criminal Procedure Code which read:-

> *"283. -(1) Where the case on both sides is closed, the Judge may sum up the evidence*

for the prosecution and the defence and shall then require each of the assessors to state his opinion orally and shall record such opinion."

The provision is almost *pari materia* with section 298 (1) of the CPA at the time of the trial of the appellants in this appeal which, to reproduce it once again, reads:-

> *298.-(1) Where the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally* ***and as to any specific question of fact addressed to him by the Judge,*** *and record the opinion.*
> [Emphasis added]

The bold text is the part that was missing in our law as it was at the time of **Washington Odindo** (supra) in 1954. In our view, the case of **Washington Odindo** (supra) is a strong and compelling authority that even without addressing anything to assessors, a trial cannot be vitiated, leave alone addressing assessors on vital points which is only necessary where a trial Judge wants to ask assessors any specific questions.

We will now move to the third decision on the same subject, which followed the above two decisions of the same Court. It is the case of **Andrea Kulinga and Another v. R**, [1958] 1 EA 684. In that case at the High Court, Harbord J. convicted the appellants for conspiracy to murder and soliciting the use of witchcraft under the Witchcraft Ordinance Cap. 18 of the Laws of Tanganyika. However, before doing so, the learned trial Judge did not sum up the case to assessors. On appeal, relying on the two earlier decisions above, the Court held that, where summing up is not done, the effect is only to diminish the quality of the opinion. The quality diminished is that of the opinion, which the Judge is not compellable to adopt and not the quality of the trial or the judgment of the court. Again, like in the two preceding decisions, the appeal was dismissed. So, unless a trial Judge wants to put specific questions to assessors, he is under no obligation to address assessors on any salient points - See holding number (2) in **Washington Odindo** (supra) and the bold text in section 298 (1) of the CPA above.

Be as it may, we have to resolve Mr. Kelvin Kayaga's complaint in the second limb of his first ground, to definitely state the effect of failure to address assessors on vital points of law. As indicated earlier on, the requirement to have assessors' participation in a trial is a

procedural matter as per **Kobelo Mwaha's** case (supra). As such, for a procedural lapse or omission to vitiate a proceeding, it must be demonstrated that the lapse occasioned a miscarriage of justice, on the person alleging the irregularity. Otherwise, the omission is deemed to be inconsequential and thus, curable under section 388 of the CPA as per **Ernest Jackson Mwandikaupesi** (supra); and **Amani Rabi Kalinga** (supra).

The burden to prove that a procedural irregularity occasioned an injustice lies on the person so alleging. In this case, other than Mr. Kelvin Kayaga's linear statement on several occasions, that the *alibi* was not explained to assessors and that therefore the appellants were unfairly tried, the learned advocated did not explain to us, how the failure by the Judge to address assessors on the *alibi* led to the unfair trial of the appellants, since the address was to be made to assessors and the appellants were duly represented by learned advocates. In our view, having explained how the assistance of assessors under section 265 of the CPA does not matter to the judgment of the Court under section 298 (2) of the CPA, we do not see how the unfair trial could have ensued, particularly where it was not demonstrated how the omission amounted to an unfair trial complained of.

Thus, we are satisfied that the trial Judge's omission to address assessors on vital points of law, was unnecessary because the Judge did not ask assessors any questions, as was held in **Washington Odindo** (supra) and as provided under section 298 (1) of the CPA. Besides, the omission is curable under section 388 of the CPA, for issues of assessors are procedural matters. Accordingly, the second limb of the first ground of appeal, like the first, has no merit. For those reasons the first ground of appeal fails, and we dismiss it.

In respect of the second ground of appeal, Mr. Kamaliza Kayaga's argument was that exhibits P19 and P20 which were, respectively, the cautioned statements of the second appellant and of the first appellant, were procured after torturing the appellants. As for their extra judicial statements, exhibits P21 and P22, the same were extracted after imposing real threats of torture and pain in case the appellants would not confess. He added that exhibit P22, was admitted without the learned trial Judge giving a reasoned ruling for admitting it. For those reasons, the learned advocate, beseeched us to expunge the exhibits and also hold that the evidence of PW11 and PW12, be adjudged to have no evidential value or weight. On the last point, he submitted that the evidence of the two witnesses should be deemed to lack credibility because of the torture they inflicted on the

appellants. In that respect, the learned advocate cited to us the case of **Hamis Chuma Hando Mhoja v. R**, Criminal Appeal No. 36 of 2018 (unreported).

In reply, Mr. Ukongoji stated that before the witnesses were to record the statements, they were given their rights whether they wanted to be accompanied with lawyers or relatives, and they chose to be alone. He submitted that in the circumstances, the exhibits complained of, were all recorded voluntarily.

Mr. Kamaliza Kayaga's forceful and spirited complaints are not difficult to resolve and we will do that in the context of the evidence of the appellants during trial within trial that was administered by the trial court. For instance, the second appellant testified at page 331 of the record of appeal as follows:-

> *"Subsequently Moses returned to the room holding a spoke of a bicycle together with some papers. He opened the said papers and produced two gloves that he wore on his hands. He then asked me 'utasaini au tukumalize?' Meaning, are you going to sign or we finish you? I did not respond. Because I did not respond Moses said that I was stubborn "kiburi". As I lay down, Edward, Wenceslaus and the other policemen held my*

legs and head and pressed me against the ground. Moses lowered my 'boxer'. He took my penis and started to enter the spoke in the urethra (hole of my penis). I cried for the pains that entered my body. I could not even defend myself for the severe pains that struck me. He used 'kuzungusha ile spoku na hivyo kunisababishia maumivu makali sana'. I have scars caused by beatings on my legs and hands. I also have scars caused by friction of handcuffs on my hands. I am ready to show those scars to the court. I requested them to take me to hospital but Moses refused."

That, according to the second appellant, was the situation he was into, at the time he was signing the cautioned statement. According to the first appellant, the situation was no better. At pages 400 to 402, the first appellant recounts the amount of pain he endured, and we will quote the chilling parts of the story. He stated:-

"Moses produced a spoke from a wardrobe and handcuffed me. I was laid to face up 'chali'. Wenceslaus held my legs together with another policeman. Edward placed the table on my chest while Moses took a spoke and entered it in the hole of my penis. I cried with pains and the table blocked me to see how much the spoke entered my penis...I heard

someone say íseti. That was followed by a 'bunduki ikisetiwa' (a gun being cocked). I know sounds of a cocked gun as I used to see it in movies. A voice then said, I ask you for the last time, do you accept or not. I said I did not know anything. Because of fear for being shot, I told them to write down anything and I would sign it. ...Despite promising to sign, I did not sign any statement, I was not taken to hospital."

Exhibits P21 and P22 confirm the story of the appellants in the above accounts. **First,** PW13 and PW14 both recorded in the exhibits that the suspects who went to them had fresh injuries on their bodies. **Second,** although the stories were that much shocking, the second appellant was not cross examined on any aspect of the torture. The first appellant was asked, but he explained even better how he was tortured. Mr. Ukongoji's reply was too light and deviant in terms. It did not, and could not explain the acts of torture.

The law of this country is that a confession procured involuntarily cannot be admitted in evidence. In **Richard Lubilo and Another v. R**, [2003] T.L.R. 149, we stated as follows: -

"..the law of this country is that in order for a confession to be admitted in evidence it must be voluntary. The law places the onus on the

prosecution to prove affirmatively the voluntariness of any confession sought to be put in evidence. That is the rule of procedure which emerges from the totality of sections 27 and 28 of the Evidence Act as well as decided cases over the years."

[Emphasis added]

In this case, we are satisfied that the exhibits complained of, were involuntarily procured. Thus, we discard exhibits P19 and P20 and declare them to be of no evidential value against the appellants' respective cases.

Mr. Kamaliza Kayaga prayed that we also expunge the evidence of PW11 and PW12, because, their remaining oral stories cannot have credibility if their acts of torture were as detailed by the appellants. As for this point, we did not hear Mr. Ukongoji putting up any contrary view.

Nonetheless, we would have considered Mr. Kamaliza Kayaga's prayer, but unfortunately there was no ground of appeal specifically seeking to expunge the recorded evidence of any witness. That means the complaint raised during the hearing by learned counsel, is not part of the record of appeal. Thus, we are unable to consider the complaint. We therefore, leave it at that.

The learned advocate for the appellants had one more prayer. It was about discarding exhibits P21 and P22, because according to him the exhibits were illegally procured. Whereas exhibit P21 was procured after the first appellant was threatened, exhibit P22 was admitted without any ruling on the evidence that was given during the trial within trial. Mr. Ukongoji, stated that the confessions were freely given by the appellants and the witnesses who recorded them had no interest to serve.

We will start with exhibit P21, the extra judicial statement of the first appellant. This statement was recorded by Richard Baraka Kiri, a Resident Magistrate at Igunga Primary Court. When he was about to tender it, the same met a stiff objection from the first appellant's side at pages 430 and 431 of the record of appeal based on two reasons, although they are listed as four: **First,** when escorting the first appellant to the Primary Court in the vehicle, three police officers Makabe, Wenceslaus and Moses, threatened him that he would be killed if he would not sign the statement that he was going to sign at the Primary Court and; **two,** that the statement was recorded in the presence of a police officer one Wenceslaus, who was talking to PW13 in English, the language that he did not understand.

Sections 27 (2) and 28 of the Evidence Act and section 59 of the Magistrates' Courts Act, put a burden of proof on the prosecution to demonstrate that a confession was procured voluntarily, see this Court's decision in **Richard Lubilo and Another** (supra). Therefore, when the objection was raised, the prosecution through PW13 refuted the allegations of the first appellant. The witness stated that the first appellant was alone in his chambers at the time he was recording the suspect's statement. However, naturally the witness would not have capacity to dismiss the first point, that of threatening the suspect on the way when he was being taken to court.

At page 447 the first appellant stated: -

> *"Two policemen, Moses and Wenceslaus carried guns. While in the vehicle, the policemen threatened me that if I did not confess to the justice of the peace, they would finish me....When I entered the Magistrate's chamber, the policemen stopped to threaten me. Inside the office of the justice of the peace, I was accompanied by policemen. The other remained outside."*

In this case, during a trial within a trial, the prosecution did not call any witness to prove that the first appellant was not

threatened enroute to the Primary Court. In other words, the objection to admission of exhibit P21 was supposed to be sustained because it was not appropriately answered. In the circumstances, the extra judicial statement of the first appellant, exhibit P21 is hereby discarded and declared to be of no evidential value.

Exhibit P22 is at page 624 of the record of appeal, and was recorded by Juhudi Steve Mdonya, PW14, a Resident Magistrate at Igunga Primary Court. When he sought to tender it at the trial, the move was resisted by the defence side. Two points were put forward: **One**, that the second appellant was threatened by the police if he would refuse to sign the document he will be given by the Magistrate; and **two**, that throughout the time the suspect was with PW14 in the latter's chambers, two police officers kept reminding him of 'the promise' to kill him. All this entailed a trial within a trial in which the prosecution was a party to prove the second appellant wrong. Of course, PW14 stated that he was alone with the suspect at the time of the interview. However, instead of giving a ruling on the evidence tendered in the trial within trial in respect of exhibit P22, at page 497, the learned trial Judge, stated: -

"COURT RULING

Having heard the testimony of TWT PW4 Juhudi Steven Mdonya and TWT DW4 Safari Elikana Kija on admissibility of exhibit TWT DE 4, I am of the view that the statement is admissible. The reason for this ruling will be given at a future date to be communicated to the parties. It is so ordered.

Sgd

JUDGE

15/06/2021

ORDER

Ruling delivered in open court in the presence of both accused and their advocates, Mr. Saleh Makunga and Ms. Kaumuiiza Magreth David, Ms. Jane Mandago, Senior State Attorney for the Republic is present R/A explained"

Sgd

JUDGE

15/06/2021."

Mr. Kamaliza Kayaga's complaint, is that although the learned trial Judge did not give reasons for his decision to admit exhibit P22, he nonetheless admitted it at page 500 of the record of appeal. In other words, although the trial within trial was conducted, exhibit P22 was admitted without the trial Judge having given reasons for the admission of the exhibit. Thus, we agree with learned counsel

that exhibit P22 was admitted without giving reasons why the objections of the second appellants' side were refused. Accordingly, admission in evidence and reliance on exhibit P22 were both irregular. We therefore discard, exhibit P22 and declare it to be evidentially worthless. Consequently, we allow the second ground of appeal.

Mr. Kamaliza Kayaga, implored us that after discarding exhibits P19, P20, P21 and P22 as we have just done, then the remaining evidence cannot be taken to have proved the case beyond reasonable doubt against the appellants in the context of ground three, to which we now focus our full attention.

The third ground of appeal was that the prosecution failed to prove the case beyond reasonable doubt. To resolve this ground of appeal, we will consider the material evidence of the prosecution minus the exhibits we have discarded above. We will do so because according to this Court, discarding a portion of the evidence in a case does not, on all occasions, render the remaining evidence too weak to found a conviction. We so held in **Anania Clavery Batera v. R** [2020] 2 T.L.R. 112.

In this appeal and at the trial, the fact that the deceased died of an unnatural death was not at issue. So, we will discuss the evidence relevant for linking the appellants with the death of the deceased and assess whether such evidence, was sufficient to hold them guilty as the High Court did.

Notably, there is not a single witness that saw any of the appellants killing or participating in the murder of the deceased. That, in law, means the case was decided on circumstantial evidence. In this jurisdiction, it is a settled position that where a conviction is to be solely based on circumstantial evidence, such evidence must be watertight, unerringly and conclusively pointing to no one else except the accused person as the offender. The quality and reliability of the evidence upon which to found a conviction is extremely high. Facts relevant in a conviction based on such evidence must not only be exceedingly compelling, but also the facts must be adding up with mathematical precision entertaining no chances of error, leading to only and only one conceivable conclusion; the guilt of the accused person. To summarize the above, in **Bahati Makeja v. R,** Criminal Appeal No. 118 of 2006 (unreported), this Court stated:-

> *"All in all, a survey of decided cases on the issue in this country and outside jurisdictions,*

establishes that such evidence must satisfy these tests:-

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established beyond reasonable doubt;

(2) those circumstances should be of a definite or conclusive tendency unerringly pointing towards the guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and

(4) the circumstancial evidence in order to sustain a conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and should be inconsistent with his innocence."

Those are the principles, that we will maintain as our True North in terms of focus as far as circumstantial evidence is concerned. However, looking at the nature of the prosecution evidence, this Court will necessarily have to consider oral confessions by the appellants, as we proceed. That aspect of the

law has also its own principles. On that, we will revisit the law applicable, thereafter we will move to a few decisions of this Court in that area before we catch up with the oral confessions we intend to cover.

Section 3 (1) (a), (b) and (c) of the Evidence Act provides to the effect that oral confessions are recognizable, and in actual fact a suspect may be convicted based solely on such evidence - See, the case of **DPP v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82. On the same aspect, this Court in **Posolo Wilson Mwalyengo v. R,** Criminal Appeal No. 613 of 2015 (unreported), stated that:-

> *"It is settled law that an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect."*

See also **Bujigwa John @ John Kijiko v. R,** Criminal Appeal No. 427 of 2018; **Yusuph Ndaturu Yegera @ Mbunge Hitler v. R**, Criminal Appeal No. 195 of 2017; and **Rashid Roman Nyerere v. R**, Criminal Appeal No. 105 of 2014 (all unreported).

We propose to start with a confession which was made by the second appellant to PW4 and PW5 in Kahama where he detailed how

he and other fellows were carrying out the murders at Igunga. His confession which we summarized at the beginning of this judgement; we feel compelled to get it *verbatim* from the witness as contained from page 129 to page 132 of the record of appeal. PW4 states:-

> *"We questioned him on his name. He said that he was SAFARI KIJA ELIKANA. We continued with interrogation as usual. We told him on allegations of murder of Bajaji drivers killed in Igunga. He denied ... However, as the questioning continued, he confessed that he was involved in all the three incidents of the Bajaji drivers killed In Igunga. The incidents he confessed were in respect of the late Alex Okungu, Songa Juma and Maduhu Dwisha. ... In all those incidents Safari Elikana took part. The suspect Safari Elikana gave names of his associates in crime. Those mentioned were Safari Anthony Mtelemko, John Emmanuel and Yasin Abdu.*
>
> *Safari Elikana also told us the means and strategies used to fulfil their criminal rackets. He explained that two of them went ahead to Igunga. These were John Emmanuel and Yassin Abdu. They were to identify a Bajaji driver who drove a new Bajaji and get used to him as a friend or customers. Thereafter John*

Emmanuel and Yassin Abdu would call Safari Elikana and Safari Anthony Mtelemko and inform them that they were prepared and had identified a Bajaji for the exercise....at that time Safari Elikana and Safari Anthony Mtelemko would start a journey in the afternoon of the date of incident to Igunga District. That upon arrival in Igunga, Yassin Abdu and John Emmanuel would inform the identified Bajaji driver to pick their visitors from the bus station and take them to where they were located. When Safari Kija and Safari Mtelemko arrive in Igunga, the Bajaji driver would pick them from the bus station and take them to a place outside the town. Usually is about 2-3 Kms away along Singida road after Lake Oil Petrol Station. When the Bajaji driver arrives at the place where John Emmanuel and Yassin Abdu are located and can see them, then their visitors in the Bajaji (Safari Elikana) and (Safari Mtelemko) would tighten the Bajaji driver and strangle him using a plastic rope around the neck. At that point in time, John Emmanuel and Yassin Abdu would come to assist the two Safari to kill the Bajaji driver. After killing the Bajaji driver, the four killers would carry the body in the Bajaji while one of them would drive the

Bajaji and reverse to take the road from Igunga to Nzega. They would then throw the body in Igogo Village bush and proceed with their journey to Kahama. Previously they took the spare parts and left the scrapper in the bush. After taking the spare parts, they keep them in parcels and board the lorries heading to Kahama that drive during night time. However, for the last incident of Maduhu Dwisha, they killed, did not taken spare parts. Instead, they drove the Bajaji straight to Kahama District."

We think such a confession is material and credible although it mixes the murder we are interested in, with other two previous killings, which is not a problem.

According to the evidence on the record, after the second appellant was arrested, he called the first appellant on the deceased's telephone number, which led to the latter's arrest. Upon his arrest, the first appellant had conversation with PW4 on the whole issue in Kahama. The relevant parts of the confessions are all over across the evidence of PW4, but for now we will take what was confessed between pages 135 to 137 of the record of appeal, where the witness stated:-

"I introduced myself to him that I was a policeman from CID Igunga....I also told him that his colleague, Safari Kija had disclosed the reality of the incidents. Safari Anthony Mtelemko digested what I had told him, and then he also confessed to have been involved in the three murder incidents. He also disclosed names of his associates who were the same as mentioned by Safari Kija Elikana. He mentioned them as himself (Safari Mtelemko), John Emmanuel and Safari Kija Elikana. He also conceded the technique applied in fulfilling their criminal rackets in the same way as Safari Kija told us. ....Safari Anthony Mtelemko showed us the handset of Maduhu Dwisha stolen from the deceased. He produced it from his pocket. He admitted that he had the Bajaji of Maduhu Dwisha."

The first appellant later led the police officers to where the rickshaw was at the car wash and it was seized. It will be recalled that Safari Anthony Mtelemko, is the person whose residence was searched and many items including the deceased's wallet containing the deceased's voter's registration card and even passport size photos were recovered. This evidence is at page 141 of the record of appeal and we listed all items recovered from Safari Anthony

Mtelemko's bedroom earlier on. These and more confessions, are also detailed by PW5, the cyber security officer who accompanied the search team at Safari Anthony Mtelemko's residence. PW5 testified how he witnessed the whole interview of Safari Anthony Mtelemko and PW4 and how he participated in the search at Safari Anthony Mtelemko's house in Kahama. PW8, Asha Mohamed Farah, Safari Anthony Mtelemko's land lady witnessed the search and saw the wallet written *lacosta* with a voter's registration card of the deceased. The neighbour, PW9 also was at the search and witnessed all these items belonging to the deceased.

The confessions in this case were made by the first appellant to reliable witnesses. We have no doubt in our mind that the evidence constituted the truth and reflected what actually happened and show that the appellant made the confession as a free agent. We acknowledge too, that the evidence in this case was wholly circumstantial, but we are satisfied that, the evidence passed the test set by this Court in **Bahati Makeja** (supra).

Throughout the defence of Safari Anthony Mtelemko, the witness, does not disclose or say anything on how the items of the deceased found their way underneath his bed in Kahama and how did the deceased's telephone find its way in his pocket. This fact

points to him as a man who caused or participated in the murder of the deceased, even if there would have been no oral confessions.

There is one final aspect we need to wind up with. It concerns the residence of the appellants. According to the first appellant, his place of aboard before he was arrested was at his paternal uncle's house one Maganga Mtelemko at Nhongolo Street In Kahama. That fact sought to contradict the evidence of PW4, PW5, PW8 and PW9, which was that the first appellant was a resident of Nyasubi area in Kahama, where the deceased's properties were found. However, when exhibit P5, a seizure certificate listing the above items, was being tendered at page 155 of the record of appeal, the same was not objected at all. Although it was not objected, it says that the items listed in it were recovered at Nyasubi area in a room rented by the first appellant. That document was also signed by the first appellant. The only question for cross examination at page 169 of the record of appeal, attracted an affirmation of PW4 that the items were indeed, found in the first appellant's bedroom.

Of course, we are aware of the position of the law that no criminal suspect or accused person in this jurisdiction is expected to prove his innocence, nonetheless, in the case of **John Madata v. R,** Criminal Appeal No. 453 of 2017 (unreported), quoting from our

earlier decision in **Mohamed Katindi and Another v. R** [1986] T.L.R. 134, it was stated that:-

> *"(iii) it is the obligation of a defence counsel, both in duty to his client and as an Officer of the court, to indicate in cross-examination the theme of his client's defence so as to give the prosecution an opportunity to deal with that theme."*

In the above context two points arise, which needed some action on the part of the first appellant's learned advocate at the trial: **One**, it was expected, that there would be sufficient cross examination on the items that were recovered from the first appellant's place, but there was none of the quality expected in the circumstances. Where points which ought to be cross examined are not cross examined upon, particularly where a party who omits to cross examine is represented by a learned advocate, there is a presumption that the party omitting to cross examine accepts the authenticity of the evidence not cross examined upon. See **Martin Misara v. R,** Criminal Appeal No. 428 of 2016 (unreported) where we held that: -

> *"It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies acceptance of*

the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter."

Two, we also think that the first appellant's paternal uncle, one Maganga Mtelemko of Nhongolo Street in Kahama referred to at page 514 of the record of appeal, who was, allegedly, hosting the first appellant, would be called to testify in order to affirm the position that indeed the first appellant was living with him at Nghongolo Street and not Nyasubi area as alleged by the prosecution. That would have cast doubt on the prosecution evidence, that probably the first appellant was not renting PW8's house at Nyasubi area. However, such witness was not called. We make this remark being fully aware of the position in criminal law that, a suspect should never be convicted because of his weak defence, but rather the strength of the prosecution case. Nonetheless, that principle of law, must at all times be balanced with another principle in the law of evidence, that each party has a duty to call his material witnesses.

Consequently, we are settled in our mind that, the evidence that remains on record after discarding exhibits P19, P20, P21 and P22, proves beyond reasonable doubt that the appellants killed the deceased or they participated in the murder. Thus, as Mr. Kamaliza

Kayaga's submissions on the third ground of appeal was also for all grounds of appeal, the entire appeal has no merit.

Finally, and for the above reasons the decision of the High Court is upheld and this appeal is dismissed.

DATED at **DAR ES SALAAM,** this 20th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

Judgment delivered this 23rd day of October, 2023 in the presence of Mr. Kelvin Kayaga, learned Counsel for the Appellants and Ms. Upendo Florian, learned State Attorney for the Respondent/Republic, both parties appeared vide video conference facilities linked from the High Court of Tanzania at Tabora Registry, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL