IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 263 OF 2021

HUSSEIN MALULU @ ELIAS HUSSEIN .....1ST APPELLANT
BERNARD JOHN SABU @ BEN .....2ND APPELLANT
ALPHONCE PASCHAL @ KIULA .....3RD APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Shinyanga)

(Kagomba, J.)

dated 24th day of March, 2023

in

Criminal Session No. 48 of 2021

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JUDGMENT OF THE COURT

5th &13th December, 2023

ISMAIL, J.A.:

The appellants herein are part of the quartet of the accused persons who were arraigned in the High Court of Tanzania that sat at Bariadi in Shinyanga Registry. The other accused person was Mungo Kisandu who was acquitted by the trial court. They were charged with murder, contrary to the provisions of sections 196 and 197 of the Penal Code. The allegation is that, on 20th day of May 2021, at Kidulya Street, Isanga Ward within Bariadi District

in Simiyu Region, the appellants together with Mungo Kisandu, murdered Saningo Ndwani @ Peter.

On that fateful night, at around 03:00 hours, the 1st, 3rd and Mungo Kisandu jumped a perimeter fence of the compound of John Bahame Sabu, the 2nd appellant's father (PW1). The intention was to steal PW1's bags of sunflower seeds. PW1's wife who was awake at the time, noticed some irregular movements which alerted her. She woke up PW1 who peeped through the window and saw two people moving towards a store in which cereals are kept. Armed with his gun, he walked out to confront the suspected assailants. He shot in the air to scare them and, in the process, one of the two assailants went on a run. However, PW1 got the better of the 3rd appellant, forcing him to surrender. Following an alarm, neighbours gathered at the scene of the crime.

As PW1 and neighbours were still gathered reflecting on what had happened, it rang in his mind that his watchman, Saningo Ndwani @ Peter was nowhere to be seen. As he went around the compound, he found his body lying down, lifeless. He called the police who visited the scene of the crime and left with the deceased's body along with the 3rd appellant the latter of whom was conveyed to Bariadi Police Station for interrogation and further investigation. The 3rd appellant confessed that he went to the scene of the crime to steal sunflower seeds and that he was accompanied by Mungo Sandu

who fled. A police swoop succeeded in apprehending him at Mwamusasi area, within Bariadi District. The duo provided a lead that helped in the arrest of Hussein Malulu, the 1st appellant. The 1st appellant was, subsequent to his arrest, taken to the scene of the crime where it was said that he had dropped his mobile phone (Exhibit P2) which was allegedly recovered with the assistance of Cosmas Salum (PW3). This exhibit was kept in an envelope and placed in PW4's custody. Confessions made by 1st and 3rd appellants led to apprehension of the 2nd appellant who was said to be the architect of the aborted theft. His phone was also seized (Exhibit P6A) and handed over to PW7 for investigation. What came out is that the appellants were allegedly communicating and that the theft incident that brought about the deceased's demise was planned and executed by them.

Completion of investigation saw the appellants, and their other accomplice arraigned in court on a charge whose involvement they stoutly denied. The 1st and the 2nd appellants were 1st and 2nd accused persons, respectively, while the 3rd appellant was the 4th accused in the trial proceedings. Mungo Kisandu who has since been acquitted featured as 3rd accused. After a trial that involved 8 prosecution witnesses against four for the defence, the High Court held that, with the exception of Mungo Kisandu who featured as the third accused person, the rest had a culpable role in the deceased's murder. What settled the contest is the 1st and 3rd appellant's

cautioned statements and existence of what the trial court considered to be circumstantial evidence against the appellants. They were consequently sentenced to suffer death by hanging.

It is this finding that has displeased the appellants, hence their decision to institute the instant appeal. In the joint memorandum of appeal, the appellants raised nine grounds of appeal. These grounds were, at the hearing of the appeal, whittled down to **three** grounds. The retained grounds are paraphrased as follows: **One**, that the trial court erred in law and fact in convicting and sentencing the appellants while the prosecution's case had not been proved beyond reasonable doubt; **two**, that the trial court grossly erred in law and in fact by admitting Exhibits P2 and P3 contrary to the provisions of section 38 (1) and (2) of the Criminal Procedure Act (the CPA), and section 31 (1), (2), (3) and (4) of the Proceeds of Crime Act (the PCA).

These grounds of appeal were supplemented by one more ground raised orally by counsel for the 1st appellant that the appellants' cautioned statements were admitted contrary to the law.

It is noteworthy, as well, that consistent with rule 72 (1) of the Tanzania Court of Appeal Rules ("the Rules"), three more grounds of appeal were filed exclusively for the 2nd appellant. These grounds were; **one**, that the trial Judge erred in law in holding that the appellant made an oral confession to PW8; **two**, that the trial Judge erred in law for relying on

uncorroborated, retracted confession of the co-accused in convicting the appellant; and, **three,** the trial Judge erred in law in convicting the appellant while the case against him was not proved beyond reasonable doubt.

When the matter came up for hearing before us, Messrs Audax Theonest Constantine, Deya Paul Outa and Augustine Michael, all learned advocates, represented the 1st, 2nd and 3rd appellants, respectively, while Ms. Ajuaye Bilishanga Zegeli, Principal State Attorney, Suzan Masule and Ms. Violeth Mushumbusi, both learned State Attorneys, appeared for the respondent Republic.

When given the opportunity to address the Court, Mr. Constantine's starting point was the additional ground of appeal. He argued that during the conduct of trials within a trial some defence advocates were not availed an opportunity to ask questions to prosecution witnesses. He singled out a trial within a trial of the 1st appellant that appears at pages 86 through to 94. Learned counsel contended that at page 87, only Mr. Zawadi Lazaro, learned advocate, was allowed to cross examine the witness while others were not given that opportunity. The record does not indicate, either, that such chance was availed to them but they chose to spurn it. The same trend was observed by Mr. Constantine at page 92 of the record where only Mr. Shabani Mwigole, Senior State Attorney, was accorded that chance. The same was said to be the case with respect to proceedings recorded at page 113.

With respect to the 3rd appellant whose proceedings appear at pages 152 through to 159, the submission by learned counsel is that only Mr. Geni Dudu, learned counsel, was allowed to cross-examine. Mr. Constantine argued that the law acknowledges that trial within a trial is a distinct matter from the main trial, and that the procedure applicable is similar to what applies in normal trial proceedings. It includes observance of the right to be heard. On this, the learned advocate implored us to stick to our position accentuated in **Janeroza Petro v. Republic**, Criminal Appeal No. 269 of 2016 (unreported), in which it was observed that the procedure of carrying out a trial within a trial is the same as the main trial. On the consequence of the alleged failure, Mr. Constantine urged us to hold that Exhibit P4 for the 1st appellant; P7 for the 3rd appellant; and P5 for the 3rd accused were irregularly admitted and that they should be expunged from the record.

Submitting on grounds 1 and 2 of the memorandum of appeal, the learned advocate's argument is that the evidence which was relied upon by the trial court to pass a conviction was circumstantial and it hinged on the cautioned statements. He argued that the circumstantial evidence relied on by the prosecution related to Exhibits P2 and P3. If the Court was to accede to his argument and expunge the cautioned statements what remains is Exhibits P2 and P3 whose admission did not conform to section 38 of the CPA, thanks to the challenges on the propriety search of the scene of the crime, the

eventual seizure, and the chain of custody of the seized items. Mr. Constantine revisited the judgment and highlighted the doubts expressed by the learned trial judge on the adequacy of the evidence adduced in court. In the learned advocate's view, such doubts ought to have been resolved in the appellants' favour.

He concluded by submitting that, since the cautioned statements and mobile phones are the only evidence on which the conviction hinged and, in view of the fact that ownership of the phones was not established, we should hold that the case against the 1st appellant was not made out and that the appeal should be allowed.

Mr. Outa who featured for the 2nd appellant, was confined to the supplementary ground of appeal and he argued them in sequence. With regard to ground one, his entry point was the trial Judge's finding that the oral confession corroborated the cautioned statement. He invited the Court to cast an eye at page 162, of the record of appeal, line 12 at which PW8 is quoted as saying that that there was no oral confession to the murder. He drew the conclusion that the trial court's finding was not supported by any evidence.

Regarding ground two, the learned counsel's take was that the trial court relied on an uncorroborated retracted confession. This is because what is said to be an oral confession that corroborated the testimony was not

there. The implication, therefore, he argued, is that confession of the 1st appellant was used to convict the 2nd appellant. This, in Mr. Outa's view, was highly irregular. He fortified his position by citing the case of **Morris Agunda & 2 Others v. Republic** [2003] T.L.R. 449, particularly in holding No. (iii); and holding (iii) in the case of **Adolf Macrin v. Republic** [2013] T.L.R. 17. He took the view that if Exhibits P4 and P7 are chalked off then there is no other evidence that implicates the 2nd appellant.

Submitting on ground three, Mr. Outa contended that the testimony relied on in the conviction of the 2nd appellant is that of PW7 who conducted an investigation in relation to the phone communication. He invited the Court to have a glance at pages 60 and 61 at which the tendering of the Exhibit P3 was objected because section 38 had not been conformed to. The learned advocate was perturbed by the learned trial Judge's decision to find the appellants guilty amidst his acknowledgment that investigation of the case was bungled. He argued that the trial Judge's remarks were enough to lead to a conclusion that the case against the 2nd appellant was not proved. Mr. Outa further contended that PW7's evidence was not supported by any other evidence as he admitted, as discerned from the record (pp. 142, 143, 146 and 167), that he did not know the owners of the seized phones.

It was Mr. Outa's conclusion that, in criminal trials, where a Judge feels that some evidence was not tendered, the conclusion he should make is that the case was not proved.

When Mr. Michael's turn came, he only expressed his support to the submission made by counsel for the 1st appellant. He, too, prayed that the appeal by the 3rd appellant be allowed.

Rebuttal submission by the respondent was made by Ms. Zegeli whose submission began by supporting the conviction and sentence imposed on the appellants. Regarding the complaint on the alleged irregularities in the conduct of the trials within a trial, she joined hands with her counterpart that trial within a trial is a separate process. She was quick to point out, however, that counsel for the 1st appellant has not stated how the alleged omission prejudiced the appellants. She distinguished the case of **Janeroza Petro** (supra), cited by Mr. Constantine, arguing that the same addressed the issue of swearing of witnesses, a different cry from what is at stake in the instant matter.

While making reference to the record and drawing our attention to several parts which showed that the counsel in attendance were accorded the right to ask questions but declined, Ms. Zegeli firmly contended that, if the counsel for the appellants saw the documents and knew how devastating they

were to the defence case and let them admitted unscathed, they should not be allowed to complain now.

With respect to proof of the case beyond reasonable doubt, Ms. Zegeli did not have qualms on the fact that in cases where circumstantial evidence is relied upon, the evidence must irresistibly be leading to no other conclusion but that of guilt of the appellant, she argued that, in this case, death of the deceased occurred when the appellants were about to commit theft which was followed by the arrest of the 3rd appellant. Ms. Zegeli argued that there is ample evidence to prove that the victim died at the time of commission of the theft incident, and that the incident occurred at 3.00 am (as per PW1 at page 25 of the record). The learned Principal State Attorney further contended that the testimony of PW1 at page 28 of the record of appeal, was to the effect that he found the deceased hit on the head, bleeding and dead. This testimony, she argued, was corroborated by PW4 who said that he saw the dead body of a Maasai hit on the head and bleeding.

Ms. Zegeli relied, as well, on the 3rd appellant's confession that they went to steal and that they killed the deceased to rid of the barrier. She was firmly of the contention that the cautioned statement of the 3rd appellant also mentioned 1st and 2nd appellants. The learned Principal State Attorney urged us to take note of the 1st appellant's confession that he dropped his mobile

phone at the scene of the crime and the fact that he mentioned the 2nd appellant in his confession.

Addressing us on the seizure, Ms. Zegele conceded that recovery of the mobile phones was done without any search order or certificate of seizure, and that it was possible to obtain both documents. She quickly submitted, however, that given the unique circumstances of this case, involving a complicated murder case, nothing untoward would be inferred from the omission. She argued that phones have unique IMEI numbers and cannot easily change hands. Ms. Zegeli was magnanimous enough to concede that the seized mobile phones were given to a custodian who did not testify in court. She conceded to the fact that PW7 admitted that it was important prove ownership of the seized mobile phones, but it was not done. She urged the Court to consider that what was tendered is what was seized, imploring us to consider efforts employed by PW8 to get the witnesses to testify in court.

Finally on the cautioned statements, the view by Ms. Zegeli was that retracted confessions can still be relied upon if the court warns itself and that the statements contain nothing but the truth. On the absence of corroborating testimony, the argument by Ms. Zegeli was that it is within the Court's powers to re-analyse the evidence that corroborates the cautioned statements. She urged us to find the witnesses as credible and dismiss the appeal.

Submitting in rejoinder, Mr. Constantine maintained his prayer that Exhibits P4 and P8 should be expunged. He strongly opposed to the contention that there was an oral confession made to PW5 as what was narrated to him was in the course of recording the statements. On the mobile phones, Mr. Constatine argued that there is no evidence of ownership, and that the 1st appellant was not there when the mobile phone which was alleged to be his, was recovered. He took an exception to PW8's failure to procure attendance of the witnesses.

On his part, Mr. Outa urged the Court to consider that there was no oral confession by any of the appellants; that PW3 did not sign the seizure certificate contrary to what PW4 testified on. He wound up by submitting that remarks by the Judge discredited the witnesses. He reiterated his prayer for allowing the appeal.

Mr. Michael chose, yet again, to align himself with the submissions made by his colleagues.

We have dispassionately gone through the record of appeal and the authorities cited in the course of counsel's submissions, together with their oral representations. We are now ready to address matters in respect of which the rival counsel are at loggerheads. In doing that, we propose to begin with the ground two of the memorandum of appeal which has taken an exception to the admission of Exhibits P2 and P3. The contention by Mr.

Constantine was that the provisions of section 38 of the CPA were flouted as no search order or warrant was issued prior to search and ultimate seizure of the said exhibits. Ms. Zegeli has conceded that no certificate of seizure was issued yet the same was important. She readily argued that circumstances in this case were so peculiar that procurement of such a document would not be possible. She was economical with details of the peculiarity of the circumstances of this case and how the same would dispense with this statutory requirement.

As unanimously held by both sets of counsel, search into a suspect's premises or any other premises from which evidence is ultimately sourced is regulated by law. The relevant legal regime applicable in this country is the CPA and Police General Orders (PGO). These two pieces of legislation work hand in glove, complimenting each other in guiding on the procedural aspects relating to search, seizure and even custody of the seized items. To bring clarity, we find it apt to reproduce the substance of section 38 of the CPA, which is relevant on the subject, as follows:

> *"(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-*
>
> *(a) anything with respect to which an offence has been committed;*

(b)anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c)anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, ***he may search or issue a written authority to any police officer under him*** *to search the building, vessel, carriage, box, receptacle or place as the case may be.*

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".

[Emphasis is added]

Worth of a note is the fact that the just quoted provision operates alongside PGO No. 226 paragraphs 1 (a), (b) and (c) and 2 (a), the latter of which provides as hereunder:

> *"1- The entry and search of premises shall only be affected, either: -*
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> *(a) on the authority of a warrant of search; or*
>
> *(b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant;*
>
> *(c)* ***under no circumstances private premises may police enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.***
>
> *2. (a) Whenever an O/C (Officer Incharge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigation officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has committed, or anything which is necessary to the conduct of an investigation into any offence,* ***he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act,***

Cap. 20 R.E. 2002. The person named in the warrant will conduct the search".

[Emphasis is ours]

The import distilled from the foregoing provisions is that a search and seizure that drifts from the imperative requirement enshrined in the law lack legitimacy and are illegal. They deviate from the legal reality, as it currently obtains, that is intended to ensure that investigative agencies do not flex their muscles irregularly and abuse their mandate and infringe people's privacy. Thus, in **Doreen John Mlemba v. Republic**, Criminal Appeal No. 359 of 2019 (unreported), we observed as follows:

> *"In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in peoples' private premises in fulfilling their undisclosed ill motives- see* ***Badiru Musa Hanogi v. R****, Criminal Appeal No. 118 of 2020 (unreported)".*

See also: **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019; and **Ayubu Mfaume Kiboko & Another v. Republic**, Criminal Appeal No. 694 of 2020 (both unreported).

On the consequence of the respondent's non-compliance with the law on search and seizure, our holding in the recent case of **Ndila Lugata v. Republic**, Criminal Case No. 207 of 2021 (unreported) provides the answer. We held as hereunder:

> *"The totality of all this is that the search conducted by PW4 and his companions leading to recovery of Exhibit P4 whose possession has been credited to the appellant was illegal. Needless to say, therefore, that the product of such illegal indulgence, that is Exhibit P4, is nothing less than an illegally obtained evidence which cannot be allowed to see the light of the day. It is a piece of evidence whose admission did not conform to the imperative requirements of section 169 (1) and (2) of the CPA, and as underscored by this Court in* ***Nyerere Nyague v. Republic****, Criminal Appeal No. 67 of 2010 (unreported)".*

Such is the fate that must befall Exhibits P2 and P3, both of which were illegally seized in a warrantless search. The exhibits were illegally obtained evidence that must be chalked off. Accordingly, we expunge this evidence as we allow ground one of the appeal.

We now turn our attention to ground one of the 2nd appellant's supplementary memorandum of appeal. The 2nd appellant's disquiet in this ground is that the learned trial Judge slipped into an error of law when he held that the 2nd appellant made an oral confession. Mr. Outa's argument which won the support of the learned Principal State Attorney in that indeed such a finding was the learned Judge's own creation.

For our part, this is the easiest of all the grounds as the record speaks volumes in support of what Mr. Outa has contended. Our unfleeting review of the record takes us to page 162 of the record of appeal, where part of the testimony of PW8 is found. In lines 18 and 19, PW8 testified as follows:

> *"At 09:00 hours I recorded the statement of 2nd accused person Benard John Sabu. He didn't confess to have participated in the murder".*

Clearly, this testimony is starkly at variance with the finding that the learned trial Judge made at page 278 of the record of appeal when he held the view that the 2nd appellant made a confession to PW8. It is our finding that this conclusion is not supported by any material on record. Consequently, we find merit in this ground and we allow it.

Ground two of the supplementary memorandum of appeal is critical of the trial Judge's decision to rely on the confessional statements to hold the 2nd appellant to account. The contention by Mr. Outa was that, being the

testimony of co-accused persons, such testimony ought to have been corroborated. Ms. Zegele took the view that a retracted or repudiated confessional statement can still be used to found a valid conviction if the court warns itself against the dangers of the statement containing untruthful facts. On corroboration, the learned Principal State Attorney threw the ball at this Court to re-analyze the testimony that corroborates the testimony of co-accused.

As stated earlier on, what creates a link between the 2nd appellant and his other co-accused, now the appellants, are Exhibits P4 and P7. These are confessions allegedly made by them and have an inculpating effect on the 2nd appellant. They are the basis on which a finding of guilty against the 2nd appellant was made. In law, an accused person may be found guilty and convicted of an offence based on an implication in the co-accused's confession. This is catered for under section 33 (1) of the Evidence Act. It is a legal position that is judicially acknowledged across jurisdictions one of which is India. In Criminal Appeal Nos. 238-239 of 2001, the Supreme Court of India (Justice M. B. Shah and R. P. Sethi), came up with conditions under which a confession by an accused person may be admitted and used as evidence against a co-accused. These conditions are as follows:

"(i) More persons than one are being tried jointly;

(ii) The joint trial of the persons is for the same offence;

(iii) A confession was made by one of such persons (who are being tried jointly for the same offence; and

(iv) Such a confession affects the maker as well as such persons (who are being tried jointly for the same offence); and

(v) Such a confession, if proved in court, the court may take into consideration such confession against the maker thereof as well as against such persons (who are being jointly tried for the same offence)".

While the leeway under section 33 (1) of the Evidence Act is a free ride if conditions for its invocation are fulfilled, we should be mindful of the limitation imposed in sub-section (2) which states as follows:

"Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused."

What we gather from the quoted provision is that the testimony of a co-accused, arising out of his confession to committing an offence must be given force through corroboration. This means that conviction of a co-accused without there being corroborating evidence fails the test of a properly grounded conviction.

As we alluded to earlier on, conviction based on the testimony of a co-accused, as a general rule, must be cautiously applied. Thus, in **Pascal Kitigwa v. Republic** [1994] T.L.R. 65, we underscored the fact that it is not illegal to convict an accused person based on an uncorroborated testimony of the co-accused. However, such conviction must be preceded by a warning, by the convicting court, of the dangers of relying on such testimony. The Court further observed as follows:

> *"However, as correctly observed by the trial magistrate and the learned judge, even though the law is such that a conviction based on uncorroborated evidence of an accomplice is not ıllegal, still as a matter of practice, the then Court of Appeal for Eastern Africa and this Court have persistently held that it is unsafe to uphold a conviction based on uncorroborated evidence of a co-accused. In this case, the trial magistrate as well as the learned judge on first appeal apart from warning themselves of the danger of convicting on uncorroborated evidence of the second accused (DW2), went further to look for other evidence implicating the appellant. It is common ground that corroborative evidence may well be circumstantial or may be forthcoming from the conduct or words of the accused".*

Significantly, such corroboration need not be in the form of direct evidence. It may be in the form of circumstantial evidence or based on the accused's conduct or words, and that the weight of the corroborating evidence is a matter of discretion by the convicting court (See: **State v. Nalini,** Criminal Appeal No. 325 of 1998).

Our scrupulous review of the record, particularly the impugned judgment, did not find anything, in the form of circumstantial evidence, worth its name and quality stated above, which would corroborate the 1st and 3rd appellants factual account as gathered from the confessional statements. Not even the conduct or words of the 2nd appellant were capable of giving an interpretation that would bring him to any culpable or blemished responsibility. The record does not bring that picture. We entertain no doubt, therefore, that the impugned decision did not, in any slightest form, convey any impression to us that the learned trial Judge warned himself against the dangers of grounding the 2nd appellant's conviction solely on the confessions of the co-accused. We are of the considered view that, had the learned trial Judge exercised a caution the 2nd appellant would not have been found blameworthy. In sum, we find merit in this ground of appeal and we allow it.

Lastly, there is a question as to whether the case against the appellants was proved beyond reasonable doubt. This issue has been brought up by the appellants through ground one of the memorandum of appeal and ground

three of the supplementary ground of appeal. Both Messrs Constantine and Outa have implored the Court to hold that a case was not made out against the appellants to warrant their conviction. The learned trial Judge's remarks in his judgment, found at page 278 of the record has been singled out as part of the basis for their contention. The other is the manner in which Exhibits P2 and P3 found their way to the court. Ms. Zegeli finds nothing unsettling about the quality of testimony adduced by the prosecution and the conclusion drawn by the learned trial Judge with regard to the appellants' conviction.

We wish to preface our analysis on this issue by stating that proof beyond reasonable doubt, as required in criminal cases, entails satisfaction by the court that the prosecution has proved the case in a manner provided in section 3 (2) (a) of the Evidence Act, which stipulates as follows:

> *"(2) A fact is said to be proved when-*
>
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists".*

Satisfaction that a case has been proved beyond reasonable doubts cannot be held to exist where doubts linger in the head of a trial Magistrate or a Judge on the blameworthiness of an accused person he is set out to convict. If there is persistence of doubts or unsureness about the guilt of the accused

person, the obvious conclusion is that the case has not been proved at the required standard and the accused person should benefit from the doubts.

In the instant matter, as acknowledged by the learned trial Judge, the prosecution's case was predicated on the 1st and 3rd respondents' own account, extracted from their confessional statements, and circumstantial evidence drawn from the circumstances that surrounded the occurrence of the incident and subsequent events, including short message communication that was allegedly exchanged amongst the appellants through their mobile phones. The confessional statements and the message exchange, as revealed by PW7, are what roped in the 2nd appellant and held him to account. Given the decisive role that the circumstantial evidence played in the findings that the learned trial judge made, we propose to spend a bit more time on the aspect.

It is settled law that, generally, conviction of an accused person of the offence with which he is charged, may be predicated on circumstantial evidence. The caveat placed to this general position is what serves as a condition precedent. This is to the effect that such evidence must be capable of irresistibly leading to no other conclusion than that it is the accused - and no one else - who committed the crime. Stated otherwise, the inculpatory facts, as adduced by the prosecution, must be incapable of no other interpretation than that the person in the dock, the accused, is guilty of the

offence charged. This cherished position, enunciated close to two centuries ago, has been widely acknowledged and consistently applied across jurisdictions, our very own not excepted.

In the Ugandan case of **R v. Sadrudin Merali,** Uganda High of Court Cr. A. No 220 of 1963 (unreported), Sir Udo Udoma, C.J., observed as follows:

> *"... It is no derogation to say that it was so for it has been said that circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics". Expressing identical sentiments over a century before in 1850 Henry D. Theory the American transcendentalist best known for his ant-materialist philosophy had this to say:* ***"some circumstantial evidence is very strong, as when you find a trout in the milk"****. The dicta are as true in this third millennium as they were in the second millennium and command the allegiance and respect of us all."*
> [Emphasis is ours]

The subscription in the cited case was adopted by this Court in **Seif Seleman v. Republic**, Criminal Appeal No. 130 of 2005, (unreported), in which we observed:

"Where evidence against an accused person is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be clearly connected with the facts from which the inference is to be inferred. In other words, the inference must irresistibly lead to the guilt of an accused person."

Crucially, the finding in **Seif Seleman** (supra) was given a much broader view by the Court in **Sadiki Ally Mkindi v. The D. P. P.**, Criminal Appeal No. 207 of 2009 (unreported), wherein a passage in Sarkar on Evidence, 15th Edn., was quoted with approval. We feel constrained to quote the said decision as we do hereunder:

*"We would therefore set out the general rules regarding circumstantial evidence in criminal cases as elucidated in **SARKAR ON EVIDENCE**, Fifteenth Edition, Reprint 2004 at pages 66 to 68. These are:*

1. That in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt.

2. That all the incriminating facts and circumstances must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other hypothesis than that of his guilt, otherwise the accused must be given the benefit of doubt.

3. That the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred therefor.

4. Where circumstances are susceptible of two equally possible inferences the inference favoring the accused rather than the prosecution should be accepted.

5. There must be a chain of evidence so far complete as not to leave reasonable ground for a conclusion therefrom consistent with the innocence of the accused, and the chain must be such human probability the act must have been done by the accused.

6. Where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

7. *Circumstances of strong suspicion without more conclusive evidence are not sufficient to justify conviction, even though the party offers no explanation of them.*

8. *If combined effect of all the proved facts taken together is conclusive in establishing guilt of the accused, conviction would be justified even though any one or more of those facts by itself is not decisive".*

See also: **Safari Anthony & Mtelemko & Another v. Republic,** Criminal Appeal No. 404 of 2021; **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006; and **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (all unreported).

The nagging question that arises from the legal foundation set above is whether circumstantial evidence, in the mould stated in the cited cases, existed and formed the basis for the decision that the trial court made. We have revisited the prosecution's evidence yet again. What is considered to be circumstantial evidence in this case is, by and large, an aggregation of the text messages which were retrieved from Exhibits P2 and P3. These were allegedly recovered from the 1st and 2nd appellants, respectively. Besides the challenges of admissibility of these exhibits which we have addressed earlier on, our conviction is that, on account of admission by PW7 that he did not

know and would not say with any semblance of precision that these messages were sent by the 1st and 2nd appellants, such testimony was incapable of supporting the exclusive hypothesis that the 1st and 2nd appellants were guilty of what they were charged with. In our considered view, no adverse inference can be drawn against them. In short, there exists no circumstances upon which involvement of the said appellants in the murder clinches the issue of their guilt.

Matters are hardly made any easier where doubts on the adequacy, if not sufficiency, of the testimony refused to fade in the Judge's memory. In the instant case, the trial Judge expressed serious reservations on the manner in which the case was investigated. In his view, the case was laden with shortfalls and flaws which were exposed by the defence. The learned Judge's remarks are found at pages 27 and 28 of the record of appeal. His dismay is expressed in the following words:

> *"Before winding up, there are shortfalls and flaws observed by the learned defence advocates in the prosecution case. Lack of certificate of seizure and lack of proof of owners of the mobile numbers investigated by PW7 were among such shortfalls. I also observed the same. It is surprising that while PW4 stated that he prepared the seizure certificate none was tendered in court. It is also surprising how PW8 could be conformable (sic) with closure of*

prosecution case without bringing the mother of Hussein Malulu Ms. Veronica Masunga and Hussein's wife Ms. Happy Mussa to testify on the phones found in Hussein's possession. The behaviour of PW8 as the main investigator of the case is simply shocking. It has left more questions than answers on how the investigation and prosecution were handled in the final stage of the trial".

Nothing could be more revealing. It is the clearest of dissatisfactions by the learned Judge of the qualitative value of the evidence adduced by the prosecution. What he meant is that the testimony adduced in support of the case by the prosecution left a lot to be desired and lagged way below the required threshold in criminal cases. This expression of discontentment could not be given if the case for the prosecution was watertight and well weaved to sufficiently prove the case against the accused persons. The doubts harboured by the learned Judge were reasonable and they were a thinly veiled admission that what the trial court was treated to was a mere aggregation of separate facts all of which are inconclusive in that they are as consistent with innocence as with guilt. As was held in **Chhabildas D. Sumaiya v. Regina** (1953) 20 EACA 14, such facts would hardly have any probative value. From the foregoing, the inescapable inference that we can draw is that the conviction of the 1st and 2nd appellants, against whom the deficient testimony was considered, was not based on the weight of the

prosecution case but on the weakness (if any) of their defence. In other words, suspicion is what took reign when the court found that the appellants were guilty. In law, suspicion alone, however strong, cannot be the basis for conviction (See: **Shabani Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002 (unreported)).

We are constrained to hold that, having formed the opinion that gaps existed in the testimony that the prosecution relied on to push the case against the 1st and 2nd appellants, the logical conclusion is that the learned trial Judge ought to have drawn is that the prosecution had not discharged the burden of proof. The resultant consequence would be to acquit them. In our considered view, ground one of the memorandum of appeal as captured in ground 3 of the supplementary grounds is meritorious as against the 1st and 2nd appellant. We allow it.

Having resolved matters touching on the 1st and 2nd respondents, our focus turns to the 3rd appellant. His position differs from that of his colleagues, primarily but most crucially, because he, unlike his colleagues, was arrested at the scene of the crime as he tried to elude PW1. The testimony adduced by PW1 and PW8, together with his cautioned statement (Exhibit P4) constitutes the testimony that the learned trial Judge used to find him guilty and convict him. In his defence, the 3rd appellant confessed that he was found in PW1's compound and that he was on a mission to steal bags of

sunflower but the mission was thwarted when PW1 put him under restraint. By this he meant that he was not involved in the killing that he is linked with. This version of the story has been given a wide berth by the learned trial Judge who held in his judgment that appears at page 280 of the record as follows:

> *"The 4th accused person relied on the argument that his cautioned statement was not recorded by PW8 A/Insp. Benson but by one Neema. This defence is immaterial in view of the fact that he is found guilty on his own confession to this court, and the fact that he went to the scene of crime to commit an unlawful act which led to the death of the deceased".*

The reasoning by the learned trial Judge is, in our view, vindicated by what is found in the 3rd appellant's own confessional account, though retractred, recorded through his cautioned statement. The statement (Exhibit P7) occupies pages 249 to 253 of the record of this appeal. The relevant part of the statement is found at pages 252 and 253. He stated as follows:

> *".... basi ndipo wote tuliondoka tukiwa tunaongozwa na HUSSEIN s/o MALULU hadi nyumbani kwa JOHN s/o SABU @ JB huko Kidulya na wakati huo HUSSEIN MALULU allkuwa anachati na BENARD s/o JOHN SABU akimweiekeza mahali pa kupitia kuingia ndani, ndipo*

HUSSEIN s/o MALULU alituongoza hadi kwenye uzio wa nyumba, sehemu ambapo ukuta ni mfupi tukaruka na kuingia ndani na wakati huo HUSSEIN s/o MALULU alıkuwa ameshika mpini wa jembe mkononi basi baada ya wote kuingia ndani, BENARD s/o JOHN SABU alikuja mahali tulipokuwa akiwa amevaa boxer "nguo ya ndani" yenye rangi ya njano na tisheti ya CCM rangi ya kijanI na kutuambia kuwa tuwe makini na mlinzi tukiwa tunatoa alizeti kwenye godown maana mlinzi huyo ambaye ni mmasai ana silaha ya upinde pamoja na panga na pia akamwambia HUSSEIN s/o MALULU kuwa mlinzi akizingua malizana nae na baada ya kusema hivyo na kutuonyesha mahali magunia ya alizeti yalipokuwa alirudi ndani ya nyumba yao na kulala na sisi tulianza jitıhada za kuanza kusomba magunia ya alizeti kutoa nje ya geti na ndipo mlinzi alishtuka na hapo hapo HUSSEIN s/o MALULU alimuwahi na kumpiga na mpini kichwani akawa ameanguka chini pale pale alıkokuwa amelala na ndipo tulifanya haraka na kubeba gunia moja la alizeti na kulirusha nje ya ukuta "uzio" .... Wakati tunajiandaa kubeba gunia lingine la alizeti na wakati tunajiandaa kubeba gunia lingine la alizeti ghafla nılisikia mlio wa bunduki kupigwa ndipo nilianguka chini na wenzangu wote wakafanikiwa kuruka ukuta na kutoka nje na mimi nikawa nimekamatwa na JOHN s/o SABU @ JB na baada ya muda mfupi majirani wakawa wamefika na kuanza kunıhoji ambapo

niliwaeleza kila kitu kilichotokea na wälipoenda kumuona mlinzi alipokuwa amelala walıkuta amefariki dunia na ndipo walichukuwa mwili wa mlinzi na kuupeleka hospitali Somanda na mimi wakanipeleka kituo cha polisi Bariadi".

We are aware that the 3rd appellant's confessional statement, just like that of the 1st appellant, was admitted after a serious opposition on account of what the 3rd appellant contended that it was involuntarily procured. This contention did not find any purchase from the learned trial Judge who gave it thumbs up after a trial within a trial. By having it admitted, the learned trial Judge was convinced that the threshold set out for admission of a confessional statement was met, and we must add, that it contained an admission of all ingredients of the offence as provided under section 3 (1) (d) of the Evidence Act.

But even where the confession is not voluntarily made, as the 3rd appellant appeared to suggest during trial and subsequent thereto, the trite position is that such confession would still be relied upon if it carried a true account of facts. This incisive position has been restated by the Court in numerous decisions. In **Hemed Abdallah v. Republic** [1995] T.L.R. 173, it was held:

"A conviction can be based on a retracted cautioned statement provided the trial judge is convinced that

the said statement is true." (See also the case of ***Michael Luhiye v. R*** [1994] TLR 181)".

Instructively, the position in **Hemed Abdallah v. Republic** (supra) was a leaf borrowed from the case of **Tuwamoi v. Uganda** [1967] E.A. 84. In the latter, the defunct East African Court of Appeal reasoned as follows:

> *"What this passage says is that in order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary that is the end of the matter and it cannot be admitted. If it is adjudged voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused,* ***the court may found a conviction thereon if it is fully satisfied that the confession is true****".*
>
> [Emphasis added]

Gauging if the confessional statement is true requires putting the facts to some form of test through a set of questions. These questions would ascertain if the confessional statement amounts to an admission of one's culpability. Thus, in the case of **Juma Magori @ Patrick & 4 Others v. Republic**, Criminal Appeal No. 328 of 2014 (unreported), the Court made a

conclusion by drawing inspiration from the decision of the Supreme Court of Nigeria in **Ikechukwu Okoh v. The State** (2014) LPER-22589 (SC) which quoted with approval, the UK decision in **R v. Sykes** (1913) 1 Cr. App. Report 233. In the latter, key principles necessary for determining probity and weight to be accorded to confessional statements were enunciated. It was held:

> *"The questions the court must be able to answer it can rely on a confessional statement to convict an accused person were set out in the case of **R v. Sykes** (1913) 1 Cr. App. Report 233 are as follows: (a) Is there anything outside it to show that it is true? (b) Is it corroborated? (c) Are the factors stated in it true as can be tested? (d) Was the accused the man who had the opportunity of committing the offence? Is the confession possible? (f) Is it consistent with other facts which have been ascertained and proved? (at 22)...."*

(See also: **Umalo Mussa v. Republic**, Criminal Appeal No. 150 of 2005 (unreported)).

Our settled position is that Exhibit P7 shed enough light on how the deceased demised happened and the role that each of the assailants played in terminating his life. The details shared reveal the culpable role played by the confessor, that is the 3rd appellant, in the murder incident. These details were

tightly kept by him and that the same would not be in the public domain if he had not shared them.

In our view, the 3rd appellant's confession met the criteria set in the case **Emmanuel Lohay and Udagene Yalooha v. Republic**, Criminal Appeal No. 278 of 2010 (unreported), in which it was emphasized that a confessional statement must:

> *".... shed some light on how the deceased concerned met his death, role played by each of the accused persons, such details as to assume the courts concerned that* ***the maker of the statement must have played some culpable role in the death of the deceased."***
>
> [Emphasis is supplied].

It is in view of the foregoing that we are constrained to hold that the learned trial Judge was right in his conclusion that the 3rd appellant was guilty of the charged offence. It follows that his efforts to extricate himself from the wrong doing are, to say the least, a 'hit and hope affair' that we cannot entertain.

In the upshot, this appeal partly succeeds and is allowed only in favour of the 1st and 2nd appellants, while in respect of the 3rd appellant it fails and it is hereby dismissed. Accordingly, the conviction and sentence against the 1st and 2nd appellant are hereby quashed and set aside and we order that they

both be set free immediately, unless held for other lawful reasons. As against the 3rd appellant, the appeal is dismissed and the conviction and sentence imposed upon him by the trial court are upheld.

DATED at **SHINYANGA** this 12th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of Mr. Audax Constantine learned counsel for the 1st appellant also holding brief for Mr. Deya Outa, Mr. Augustine Michael for the 2nd and 3rd appellants and Mr. Louis Boniface Mbwambo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL