IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 251 OF 2018

SHARIFU MOHAMED @ ATHUMANI ..... 1ST APPELLANT
MUSSA JUMA MANGU ..... 2ND APPELLANT
KARIMU ISSA KIHUNDWA ..... 3RD APPELLANT
SADICK MOHAMED JABIR @ MSUDANI @ MNUBI ..... 4TH APPELLANT
ALLY MUSSA @ MJESHI ..... 5TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Maghimbi, J.)

Dated the 23rd day of July, 2018
in
Criminal Sessions Case No. 12 of 2014

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JUDGMENT OF THE COURT

7th February, 2022 & 12th April, 2023

MWARIJA, J.A.:

The appellants, Sharifu Mohamed @ Athumani, Mussa Juma Mangu, Karim Issa Kihundwa, Sadiki Mohamed Jabir @ Msudani @ Mnubi and Ally Mussa @ Mjeshi (the first to fifth appellants respectively) and other two persons who are not parties to this appeal namely,

Shahibu Jumanne @ Mpungi @ Mredii @ Polisifaita and Jalila Zuberi @ Said who were the second and fourth accused persons respectively at the trial (the co-accused persons), were jointly and together charged in the High Court of Tanzania at Moshi with the offence of murder contrary to s. 196 of the Penal Code Cap. 16 of the Revised Laws. It was alleged that, on 7/8/2013 at Orkalili Mijohoroni, KIA area within the District of Hai in Kilimanjaro Region, they murdered one Erasto Msuya.

The appellants and their co-accused persons denied the charge and as a result, the prosecution called a total of twenty seven witnesses to testify. It also tendered twenty four documentary and real exhibits. At the close of the prosecution case, the trial court found that a *prima facie* case had not been established against the fourth accused person, Jalila Zuberi @ Said and therefore, acquitted him. As for the appellants and the second accused person, they were found to have a case to answer and were thus required to make their defence. Consequently, each one of them gave his evidence in defence. On his part, the first appellant called two witnesses to support his evidence; his younger brother, Issac David Mika and another person, Muslim Said Mbaga.

In her judgment, the learned trial Judge (Maghimbi, J), found that the tendered evidence, which in her opinion was mainly circumstantial,

had proved the case against the appellants. She was however, of the view that the evidence against the second accused person, the said Shahibu Jumanne @ Mpungi @ Mredii @ Polisifaita was hearsay and therefore, did not prove the case against him beyond reasonable doubt. He was thus acquitted. As for the appellants, they were convicted and sentenced to suffer death by hanging. They were aggrieved by the decision of the High Court hence this appeal.

The facts giving rise to the appeal may be briefly stated as follows: On 7/8/2013 in the morning, a boy known as Noel Thomas (PW2) was grazing cattle along Moshi-Arusha road in Orkalili Village within Siha District in Kilimanjaro Region. At the off-road, after Bomang'ombe – KIA road, he saw two persons sitting on a stationery motorcycle. Shortly thereafter, a motor vehicle arrived at the area. It stopped and after sounding a horn, the two persons waived at it. According to PW2, who was observing the incident from the distance of about 30 feet, while one of the two persons went to meet the motor vehicle's driver, the other person moved and stood behind the motor vehicle. After the driver, had disembarked, he was suddenly shot by the person who was behind the motor vehicle. The wounded person attempted to run towards the road

crying for help but fell down. Meanwhile, the two persons rushed back to the motorcycle and rode away.

The police received information about the incident and immediately a team of investigators led by SP Joash Elija Yohana (PW1) went to the scene. The team found a human body on the ground. It was profusely bleeding from multiple wounds on the chest suggesting that he was shot with bullets. That was confirmed later by Dr. Paul Christopher Chaote (PW4) who conducted a post mortem examination on the body identified to him to be that of Erasto Msuya (hereinafter "the deceased"). According to PW4's evidence, the cause of the deceased's death was stoppage of blood circulation due to bullet wounds. He tendered the postmortem examination report and the same was admitted in evidence as exhibit P1.

At the scene of crime, PW1 and his team proceeded to conduct inspection. Close to the deceased's body was a motor vehicle make, Range Rover, Reg. No. T. 800 CKF which was later found be the property of the deceased. Upon inspecting it, a pistol and two magazines, a small one having six bullets and a bigger one having twenty three bullets, were found. The body was also searched and two mobile phones; make, Samsung and Iphone were found. Upon further

inspection of the scene, a number of cartridge cases were also found. Thereafter, PW1 and his team handed over the crime scene and the above named items to the Regional Crimes Officer, Kilimanjaro (the RCO) who had gone to the scene with another team of investigators comprising of among other officers, Insp. Samwel Mwaimu (PW9), photographers and finger prints experts. PW1 took the deceased's body to Hai District Hospital where, as stated above was examined by PW4. As for the catridge cases, the same were sent to the Ballistics Expert for necessary examination.

Having been handed over the crime scene, PW9 drew a sketch map of the area (exhibit P3) and proceeded to collect further evidence. In the course of doing so, he received information that there was one motorcycle, make, Kingiion and a jacket which were abandoned at Embokoi Village. He went to the area and collected those items. The jacket was sent to the Chief Government Chemist for collection of a sample for DNA test. The sample was taken by Gloria Omari Machuve (PW26). The investigation revealed further that, the motorcycle, which was found abandoned at the said Village was sold on 3/8/2013 by Flotea Mmasi (PW21) for TZS. 1,650,000.00. On the same date, PW21

obtained from a neighbouring shop and sold to the same person, another motorcycle, make, Toyo at the cost of TZS. 1,700,000.00.

Earlier on, the RCO had formed three teams to investigate the incident; the operation, intelligence and cyber teams. The cybercrime experts managed to remove the password of one of the deceased's mobile phones No. 0763700000 which was found at the scene and handed over by PW9 to No. PF. 18738 Insp. William Obeid Mziu (PW16). PW16 started to work on the recent incoming calls appearing on that phone's call log. One of the recent call was from 0682 405323 registered in the name of Motii Mongululu. The police sought the assistance of the service provider of the subscriber of that number, the Airtel Telecommunications Company (Airtel) and found out that the number used to communicate with only four numbers which, upon further investigation, were found to have been registered by one Amisa, an Airtel agent at Arusha bus stand two days prior to the date of the incident.

They were registered in the names of Motii Riria, Motii Siria, Oldonyo Lolipiron and Motii Mongululu. It transpired from the evidence of Selestine Simon Mtobesya (PW20), the Airtel's Sim Cards Registration Supervisor, Northern Zone, Arusha and Scolastica Yona Kilaghana

(PW22) who was at the material time, the legal Officer of Airtel, that the numbers were temporarily registered pending formal registration. PW22 tendered a print out of the data for Sim Card No. 0682 405 323 from the Airtel's IT Department showing that the subscriber was Motii Mongululu.

When the agent who registered the four numbers (Amisa Kassim) was questioned, she mentioned one Masai or Adam as the person who registered them on behalf of the said four persons. She provided the police with the phone number of the said Adam. The number was tracked and found to be operating from Mererani. When he was arrested and questioned, the said person explained that, he registered the four numbers on the instructions of Musa Mangu (the second appellant). The mobile number of the second appellant was then tracked and the said appellant was later arrested on 11/8/2013 at KIA area. He gave the real names of the four persons and their formally registered mobile phone numbers.

Later on, the second appellant's cautioned statement was recorded by A/Insp. Herman Mutungi Ngurukisi (PW8). In his evidence, PW8 stated that the second appellant named the four persons who used the registered four mobile phone numbers registered in fake names to communicate amongst themselves alone. The named persons were;

Karim Mohamed, Sadick Mohamed Jabir, Jalila Zuberi (who was the fourth accused person at the trial), Ally Mussa and Shaibu Jumanne (who was the second accused at the trial). When their phone numbers were tracked through the assistance of their service provider, they were arrested at different places by PW9, No. F.3087 D/Sgt Atwai (PW10) and No. G.630 D/Cpl. Selemani (PW11). After their arrest, they were jointly charged together with the first appellant.

According to the evidence of PW9, the third and fourth appellants were arrested at Kaliua at the home of a traditional healer, one Khalid Sankamunge (PW5). As for the fifth appellant, the witness said, he was arrested at Kigoma after much efforts of tracking his mobile phone. It was difficult to track him because he used to change Sim Cards from time to time and due to his movement from one place to another, including Kwimba and Kigoma.

PW9, PW10 and PW11 who arrested the said appellants, testified that, when they were interrogated, they admitted the offence charged. In his evidence, PW9 added that, apart from confessing orally that he was involved in the commission of the offence, the third appellant disclosed information regarding the whereabouts of the firearm used to kill the deceased; that his brother, Said Mohamed Jabir had the

knowledge of the place at which the same was hidden. PW9 went on to state that, he immediately communicated that information to the RCO.

SP Vincent Lyimo (PW18), who was at the material time the OC/CID Siha District told the trial court that, on 11/9/2013, he was ordered by the RCO to trace Said Mohamed Jabir with a view to cause him to lead the police to where the said firearm was hidden. It was PW18's further evidence that, Said Mohamed Jabir led him and others to a bushy area and after a search, a firearm, a Semi-Automatic Machine Gun (SMG) was found. It was found at Matindigani in Baloti area. The witness went on to state that, during the exercise, he was with PW27 and other persons including one Joseph Hamisi Mushi (PW23) who was the first to see the sulphate bag in which the firearm was contained. According to PW18, firearm had serial No. 1952 KJ 10520. Like the cartridge cases found at the scene of crime, the recovered firearm was also sent to the Ballistics Expert for necessary examination. The firearm was tendered and admitted in evidence as exhibit P13.

In his evidence, the Ballistic Expert, Godfrey Luhanga (PW24) stated that, upon his examination, he found that the cartridge cases found at the scene of crime were fired from a gun similar to exhibit P13.

He tendered the ballistic expert's report and the same was admitted in evidence as exhibit P16.

On his part, PW10 added that, he was the one who recorded the cautioned statement of the fifth appellant (exhibit P8). As for the third appellant, PW9 testified that, he decided to take him before the Justice of the Peace to record his confession because, upon interrogation, he admitted that he committed the offence. The extrajudicial statement (exhibit P9) was recorded by Claude, Resident Magistrate and the Justice of the Peace (PW12). The evidence of PW9 was also to the effect that the second appellant led the police to the house of the first appellant who was consequently arrested. After his arrest, his cautioned statement was recorded by Insp. Damian Joachim Chilumba (PW27). The statement was admitted in evidence as exhibit P26.

PW9 went on to state that, he also recorded the statements of Amisa Kassim, Eveline William and Shaban Mohamed, the persons who registered the sim cards of the persons who disguised their names. Another statement which was recorded by PW11 was tendered as exhibit P20. In that statement, one Godson Mangeki, who was at the material time aged 16 years, stated among other things, that he was at the material time, staying in the house of the first appellant. According

to his statement, on 4/8/2013 he saw two new motorcycles being taken in that house. He described them as a red Toyo and balck Kishen. On 7/8/2013, when he returned home from school, he found that the motorcycles were no longer there. The three persons whose statements were admitted in evidence as exhibits P21, P22 and P23 respectively, did not testify in court because, according to the prosecution, they could not be traced to procure their appearance.

The prosecution relied also on the evidence of Raphael Karoli (PW3). On the date of the incident, the said witness had a function at his home in Embukoi Village, Hai District which was attended by other people. It was his evidence that, while at his home, he saw a motorcycle passing and on it were the rider and a passenger. At a short distance from his home, at the place where there was a gorge, the two persons disembarked from the motorcycle and immediately started to run away. It transpired that, those persons abandoned the motorcycle after its front tyre had become flat. Being suspicious, PW3 and the other people who were attending that function tried to pursue the two persons but one of them fired a bullet in the air and continued to run away. In the course of fleeing however, one of them dropped his jacket

which, as stated above was also taken to the Chief Government Chemist for extraction of a sample to be used to perform a DNA test.

As pointed out above the evidence of PW9, PW10 and PW11 is to the effect that, the third and fourth appellants were arrested at the home of a traditional healer (PW5). In his evidence, PW5 supported that evidence. He added that, the two appellants told him that they went there to seek protection from bad omen, prayer for prosperity in their businesses and to be shielded from arrest following their act of killing one billionaire at Arusha called Erasto Msuya. PW5 stated further that, on 13/9/2013 when police officers arrived at his home, the two appellants suspected them and thus attempted to run away.

Anasi Khalid Adam Sankamunge (PW6), the son of PW5, supported the evidence of his father that the third and fourth appellants who were there for among other things to seek protection from arrest attempted to flee when they noticed that certain police officers had arrived at PW 5's home. He added that, he was one of the persons who assisted the police to arrest the two appellants.

The prosecution relied also on the evidence of Elirehema Evarist Msuya (PW13), Karim Issa Mruma (PW14) and Robert Metishiel Mollel (PW15) who were at the material time, the employees of the deceased

at his hotel, SG Resort situated at Sakina area within the Municipality of Arusha. Their evidence was to the effect that, on 6/8/2013 while on duty at the deceased's hotel, they saw the deceased sitting at the swimming pool area having conversation with a certain person. It was their evidence further that, few days later, on 7/10/2013, they were required to go to police station for the purpose of identifying the person who visited and held conversation with the deceased at his hotel on 6/8/2013. Each one of them said that he identified the fifth appellant in the identification parade conducted on 7/10/2013 under the supervision of Insp. Benard Kapusi (PW17). According to this witness, who tendered identification parade registers (exhibits P10, P11 and P12), the three witnesses who were separately called to the parade which consisted of 10 persons, identified the fifth appellant.

In their defence, the appellants distanced themselves from the offence. All of them relied on the defence of *alibi.* The first appellant, who testified as DW1, contended that, on 7/8/2013 he was at Londoni gold mining area within Ikungi District in Singida Region where he stayed from 15/7/2013 until on 10/8/2013 when he left the area. He went on to testify that, he was arrested on 13/8/2013 at Arusha after having been called to the RCO's office. After his arrest, he was searched,

and forced to sign a document. His evidence was supported by Muslim Saidi Mbaga (DW8) and Issac David Mika (DW7). In his testimony, DW8 contended that, he was with the first appellant at Londoni, in Ikungi District within the whole period in which the latter was there between 15/7/2013 and 10/8/2013. On his part, DW7, the first appellant's younger brother, testified that he was present when their house was been searched and when the firearm and other items were found and taken by the police.

The second appellant, who testified as DW3, stated that, on 1/8/2013 he travelled to Singida by a bus known as *Mohamed Classic*. He said that, he went there to visit his parents at Mtingo village. According to his evidence, he stayed there until on 7/8/2013 when he returned to Arusha by a bus known as *Bestiline*. He tendered bus tickets which were admitted in evidence as exhibit D2. He testified further that, on 10/5/2013 in the afternoon, he was arrested but later on he was released. He was re-arrested later on the same day at about 23:00 hrs and forced to sign exhibit P2. He denied having known any of the other appellants before the date of his arrest.

The third appellant (DW4), testified to the following effect: Between 7/8/2013 and 10/8/2013, he was working in his farm situated

at West Kilimanjaro. At the end of August, 2013 he travelled to Tabora after having received information about discovery of gold deposits at Kaliua area. He arrived there on 28 or 29/8/2013 and thereafter, his host, one Ali, took him to the mining area. At Kaliua, he met one Jafari who was known to him and who also knew the fourth appellant. DW4 then requested the said Jafari to inform the fourth appellant about the discovery of gold. He went on to testify that, his host took him to a traditional healer for prayer (*dua*) so as to succeed in the mining activity. His host Ali, went away and DW4 remained at PW5's house because, due to a large number of clients, the *dua* would be performed to him after about four days. While still at PW5's house, the fourth appellant arrived having also been led there by the said Ali. The third appellant went on to state that, on 13/9/2013, he was arrested by PW9 and PW11. Save for the fourth appellant, he denied to have known the other appellants before the date of his arrest.

On his part, the fourth appellant, who testified as DW5, supported the evidence of DW4 that, he was the one who sent information to the former about discovery of gold deposits at Kaliua. He said that, as a result, he travelled to Kaliua and later on met DW4 at PW5's home where he was later arrested by PW9 and PW11. He also denied having

known any of the other appellants before his arrest. He further denied having given information to the police on the whereabouts of exhibit P13. He however, admitted that, Said Mohamed Jabir is his younger brother and that Shaban Mohamed is also his relative.

As for the 5th appellant, who testified as DW6, his evidence was to the effect that: On 6/8/2013, he was celebrating his marriage with Mwanaisha Hassan Juma after their wedding which took place at Msikitini Hamlet in Gechameda Village. The wedding was witnessed by among others, Hussein Rajabu, Muna Rajabu and Swalehe Saidi. He later on travelled to Kigoma after having been notified by his friend, one Habibu Chemu that he had secured employment for him in a company known as Nyakirang'anyi Construction. On 5/10/2013, while in Kigoma town after having walked out of the construction camp, he was arrested and taken to Kigoma Police Station where he was tortured and on 6/10/2014, he was taken to Arusha via Moshi. At Arusha he was lined up in the identification parade and PW13, PW14 and PW15 claimed to have identified him.

He challenged the procedure used to conduct that parade contending that, it did not consist of the people of similar age and physical appearance as required by the Police General Orders (the PGO).

It was his evidence further that, he was tortured and forced to sign exhibit P8. On whether he had known the other appellants before his arrest, he stated that, he only knew Shaibu Jumanne Said his brother in law, who was the second accused person at the trial.

As stated above, the learned trial Judge was satisfied that the case against the appellants had been proved beyond reasonable doubt. According to the judgment, the circumstances under which the deceased was killed were explained by PW2 who witnessed the incident at the distance of about 30 feet from the scene of crime. The witness described how the two persons arrived at the scene using a red motorcycle, their attire and how shortly thereafter, the deceased arrived at the scene in a motor vehicle and what happened shortly before he was shot dead.

As to the evidence which proved that the appellants were the persons who murdered the deceased, the trial court found that, the appellants were implicated by the first, second and fifth appellants' cautioned statements (exhibits P26, P2 and P8), the third appellant's extrajudicial statement (exhibit P9), oral confession of the third appellant as testified by PW9 as well as the evidence leading to the discovery of the firearm (exhibit P13) and the motorcycle (exhibit P25).

The learned trial Judge was of the view that, such evidence was corroborated by the statement of Godson Mangeki (exhibit P20) which was tendered by PW8 to prove the fact that, the motorcycles, red Kinglion, and black Toyo were seen at the first appellant's house. The learned Judge relied also on the cautioned statement of the second appellant which shows how the motorcycles were acquired by the first appellant through the person who identified himself to the seller as Motii Ndoale Mollel. According to the learned Judge, the evidence proved that the first appellant was actually the master planer and financier of the criminal act.

On the first appellant's defence of *alibi,* the trial court found that, the same did not raise any reasonable doubt because, even if he was at Singida on the material date, from his own admission, he could travel and arrive at the scene of crime on the same date and time of the incident. As for the second appellant, the trial court acted on the evidence of his cautioned statement. She observed that, although in his statement, the second appellant did not incriminate himself, the fact that he knew and participated, without disassociating himself, in the plan which later on culminated into the killing of the deceased, constituted sufficient evidence warranting his conviction.

With regard to the third and fourth appellants, the trial court found that, they were implicated by the evidence of the third appellant's extrajudicial statement (exhibit P9) in which, the said appellant gave the details of how the offence was committed, the weapon used and where the same was later on hidden. It acted further on the evidence of PW3 who averred that, he saw the third appellant at the place where the broken down motorcycle was abandoned and the evidence of PW5 to the effect that, the third appellant orally confessed to have committed the offence. The appellants' conviction was also based on the evidence of PW9 and PW10 to the effect that, the third appellant disclosed the whereabouts of exhibit P13 which, according to him, was used to kill the deceased; that he hid the same at Boloti Village in Hai District and went further to name Said Mohamed Jabir, the brother of the fourth appellant, as the person who knew the place where the firearm was hidden. The trial court found thus that, from that evidence, the third and fourth appellants' *alibi* did not raise any reasonable doubt against the prosecution evidence.

On the part of the fifth appellant, his conviction was based on the evidence of his cautioned statement (exhibit P9) which was recorded by PW10. The trial court found that, the statement, which was repudiated,

was corroborated by the evidence of PW13, PW14 and PW15 who testified that, they saw the said appellant at the deceased's hotel on 6/8/2013 and later on identified him at the identification parade. The learned trial Judge dismissed the fifth appellant's contention that the parade was not properly conducted. She was also of the view that, his defence of *alibi* did not tilt the evidence of the prosecution witnesses because he could have travelled from Magugu and arrive at the scene of crime on that same date and time of the incident.

As stated above, the appellants were aggrieved by the decision of the High Court and thus preferred this appeal. They had initially filed separate memoranda of appeal. However, on 11/9/2020, they filed a joint memorandum of appeal consisting of the following 31 grounds:

"1. *That, the Honourable trial Judge grossly erred in law and in fact in holding that the evidence adduced by the prosecution is to the satisfaction of the court that, it has established beyond reasonable doubt that the appellants were responsible for conspiracy to and execution of the death of the deceased....*
2. *That, the Honourable trial Judge grossly erred in law and in fact in convicting the appellants for the offence of murder on ground that, the evidence produced by the prosecution left no doubt that the appellants were perpetrators of the murder of the deceased.*

3. *That, the Honourable trial Judge grossly erred in law and in fact in holding that, on the day the murder was committed, the 1st and 2nd appellants went to the crime scene and gave the 3rd appellant the gun (exhibit P13).*
4. *That, the Honourable trial Judge grossly erred in law and in fact in holding that the evidence shows that the appellants were present at the crime scene and murdered the deceased.*
5. *That, the Honourable trial Judge grossly erred in law and in fact in holding that, the 5th appellant was seen and identified by PW13, PW14 and PW15 at the deceased's hotel in Arusha on the 6th August 2013, a day before the deceased was murdered.*
6. *That, the Honourable trial Judge grossly erred in law and in fact in holding that the evidence of alibi did not shake the prosecution evidence on the conspiracy and execution of the murder of the deceased.*
7. *That, after having observed and made a finding that, the cautioned statement (exhibit P26) was recorded before the 1st appellant was arrested and that he was forced to sign the already recorded statement, the Honourable trial Judge grossly erred in law and in fact in admitting and relying on the said exhibit P26 to convict the appellants.*
8. *That, the Honourable trial Judge grossly erred in law and in fact in holding that, the 1st appellant was the master planner and the financier of the whole plan to execute the murder of the deceased.*
9. *That, the Honourable trial Judge grossly erred in law and in fact in admitting and relying on repudiated confessions exhibit P2, exhibit P8, exhibit P9 and exhibit P26 in convicting the appellants.*

10. *That, the Honourable trial Judge grossly erred in law and in fact in holding that, exhibit P2, exhibit P8, exhibit P9 and exhibit P26 were confessions voluntarily made by the appellant.*
11. *That, the Honourable trial Judge grossly erred in law and in fact to hold that, there was no reason for the court to draw an adverse inference against the non-calling of RCO Kilimanjaro and Said Mohamed Jabir so far as the issue of discovery of the gun (exhibit P13) and motorcycle (exhibit P25) is concerned.*
12. *That, the Honourable trial Judge grossly erred in law and in fact to admit a letter exhibit P4 which was not part of the committal proceedings and upon failure to observe that it was deliberately and maiafide concocted in order to support the prosecution's case.*
13. *That, the Honourable trial Judge grossly erred in law and in fact to connect the appellants with the recovery of the gun (exhibit P13) after finding that it was not Said Mohamed Jabir who directed the PW18 and PW27 to where it was hidden.*
14. *That, the Honourable trial Judge grossly erred in law and in fact to shift the burden of proof from the prosecution to the appellants by commenting that the defence, who had access to the mostly argued Said Mohamed Jabir had an opportunity in such case to call those witnesses who would have testified in their favour to defeat the prosecution evidence.*
15. *That, the Honourable trial Judge grossly erred in law and in fact to hold that, discrepancies and inconsistencies on dates of information and finding of exhibit P13 as given by PW9 on one*

side and PW18 and PW19 on the other and also PW23 and PW27 were normal and not material discrepancies.

16. *That, the Honourable trial Judge grossly erred in law and in fact in deciding that the discrepancies on dates of recovering exhibits P13 and P25 on 11/09/2013 and 14/09/2013 were not material on grounds of time lapse and the fact that 22 cartridges were actually fired from exhibit P13.*
17. *That, the Honourable trial Judge grossly erred in law and in fact to connect the appellants with the motorcycle (exhibit P25).*
18. *That, the Honourable trial Judge grossly erred in law and in fact to dismiss the defence side's argument that if it were true that the 3rd and 4th appellants confessed before PW5 to have killed the deceased both of them ought to have been taken to justice of peace to reduce their confession in writing in extrajudicial statements but according to prosecution, the 3rd appellant only was alleged to have been taken to justice of the peace to record his extra judicial statement.*
19. *That, the Honourable trial Judge grossly erred in law to believe contradictory evidence of PW5 and PW6 levelled against the 3rd and 4th appellants.*
20. *That, the Honourable trial Judge grossly erred in law and inf act for failure to consider and/or ignoring the defence evidence including the defence of alibi.*
21. *That, the Honourable trial Judge grossly erred in law and in fact by relying on what is alleged to be the 2nd appellant's additional caution statement dated 13/08/2013 in convicting the appellants while the said statement was not admitted in evidence.*

22. *That, the High Court Judge grossly erred in law and in fact by not properly analyzing and resolving the contradictions and inconsistencies within the prosecution evidence regarding the appellants' participation in the murder of the deceased person.*
23. *That, the High Court Judge grossly erred in law and in fact by comparing the contents of exhibit 'P2' with that of exhibit 'P26', in determining competency of PW27 in recording exhibit "P26".*
24. *That, the High Court Judge grossly erred in law and in fact in finding that, in admitting and finding that, the statement of Godson Mangekl (exhibit "P20") corroborated the appellant's caution statements.*
25. *That, the High Court Judge grossly erred in law and in fact for not expunging from the record exhibit "P13" and exhibit "P25" after drawing adverse inference against prosecution for failure to call one Said Jabir who is alleged to have shown the place where the two exhibits were recovered.*
26. *That, the High Court Judge grossly erred in law and in fact in finding PW16 as the witness who unfolded communication which led to arrest of the accused persons while the said witness did not tender any report linking any of the appellant with communication leading to murder of the deceased person.*
27. *That, the High Court Judge grossly erred in law and in fact in finding PW22 who then was employee of National Housing Corporation competent to tender a report exhibit "P15") which was a document printed by IT department of Airtel Company Ltd.*

28. *That, the High Court Judge grossly erred in law and in fact in finding that the defence advocates committed abuse of Court process by raising issue of torture in their final written submission.*
29. *That, the High Court Judge grossly erred in law and in fact in connecting the 4th appellant with recovery of the fire arm (exhibit "P13").*
30. *That, the High Court Judge grossly erred in law and infact by finding that the Hal District Police handed over the exhibits and the scene of crime to the RCO, Kilimanjaro while there was no documentary evidence establishing the handover of exhibits and the scene of crime.*
31. *That the High Court Judge grossly erred in law and in fact in applying wrong principles of law in analyzing evidence and thus arriving to a wrong and unfair decision against the appellants."*

Later on, 15/11/2021, the first appellant filed additional memorandum of appeal containing three grounds (hereinafter "the additional grounds",). The three grounds, which are renumbered as 32, 33 and 34 state as follows:

"32. *That, the Honourable trial Judge grossly erred in law and in fact by unprocedurally receiving the testimony of PW2 at the trial within a trial, Faustine Jackson Mafwere who was not a competent witness to testify because neither was his statement read over nor was he listed at the committal proceedings as a prosecution witness or a reasonable notice*

in writing issued before he adduced his testimony as required by the law.

33. *That, the Honourable trial Judge grossly erred in law and in fact failing to consider the opinion given by the assessors.*
34. *That, the Honourable trail Judge erred in law and in fact in convicting the 1st appellant on misapprehended evidence that, during cross examination, he admitted that he was present at the scene of crime."*

In a whole therefore, the appeal is predicated on 34 grounds of appeal. During the hearing however, the 2nd, 12th and 33rd grounds of appeal were dropped.

From the nature of the grounds, that in essence, challenge the decision of the High Court for having based the appellants' conviction on insufficient and incredible evidence, the remaining 32 grounds of appeal can be clustered into 10 complaints, paraphrased as follows:

(a) *That, the trial court erred in law and in facts in basing the appellants' conviction on the repudiated/retracted confessions of the first, second and fifth appellants and extrajudicial statement of the third appellant which were wrongly admitted in evidence and unreliable for want of corroboration. (Grounds 7, 9, 10, 18, 21, 23, 24 and 31).*

(b) *That, the trial court erred in law and in fact in basing the appellants' conviction on the evidence of witnesses who were*

not credible and incompetent to testify. (Grounds: 3, 4, 26, 27 and 32).

(c) *That, the trial court erred in law and in fact in holding that the prosecution evidence had sufficiently proved the conspiracy which was masterminded and financed by the first appellant to perpetrate the murder of the deceased. (Grounds 1 and 8).*

(d) *That, the trial court erred in law and in fact in holding that the fifth appellant was identified by PW 13, PW 14 and PW 15. (Ground 5).*

(e) *That, the trial court erred in law and in fact in failing to find that the appellants evidence of alibi had raised reasonable doubt against the prosecution case. (Grounds 6 and 20).*

(f) *The trial court erred in law and in fact in failing,* ***first****, to draw adverse inference against the prosecution for failing to call the RCO, Kilimanjaro as a witness as regards discovery of exhibits P13 and P25,* ***secondly****, to expunge those two exhibits after having drawn adverse inference against the prosecution for failing to call Said Jabir who allegedly showed the place where the said exhibit were recovered and* ***thirdly,*** *for acting on the exhibits whose chain of custody was not established. (Grounds 11, 25 and 30).*

(g) *The trial court erred in law and in fact in basing the appellants' conviction on exhibits P13 and P25 while, neither Said Mohamed Jabir nor the fourth appellant were involved in leading to their discovery. (Grounds 13, 17 and 29).*

(h) *That the trial court erred in law and in fact in shifting the burden of proof to the appellants. (Ground 14).*

(i) *That the trial court erred in law and in fact in convicting the appellants on the basis of the evidence which was tainted with contradictions, inconsistencies and discrepancies. (Grounds 15, 16, 19 and 22).*

(j) *That the trial court erred in law in finding that the advocates for the defence acted in abuse of the court process by raising in there final written submissions, the issue of the appellants' torture. (Ground 28).*

At the hearing of the appeal, which took place in two sessions, between 22/11/2021 and 25/11/2021 in the first sessions and from 7/2/2022 to 11/2/2022 in the second sessions, the first appellant was represented by Mr. Richard Rweyongeza assisted by Messrs Mohamed Mkali, Gideon Opanda and Hudson Ndusyepo, learned advocates. As for the second and the third appellants, they were represented by Mr. Emmanuel Safari and Mr. Majura Magafu, learned advocates respectively while the fourth and fifth appellants were represented by Mr. John Lundu, learned advocate. On its part, the respondent Republic was represented by Ms. Verdiana Mlenza assisted by Mr. Kassim Nassir, both learned Senior State Attorneys.

Submitting in support of ground (c), Mr. Lundu argued that, the finding by the learned trial Judge that the first appellant was the master planner and the financier of the criminal act was erroneous because the finding was based on uncorroborated confessions of the third and fifth appellants (exhibit P9 and P8 respectively) which was also contradictory as regards the number of the persons who fired the bullets which killed the deceased.

On his part, Mr. Safari argued that the learned trial Judge erred in convicting the second appellant on the basis of the evidence proving conspiracy while the element of *mens rea* as regards the offence of murder was not proved against him.

Determination of this ground need not detain us much. Proof of conspiracy was not necessary for the determination of this case because the appellants were not charged with the offence of conspiracy to commit any offence. They were only charged with the offence of murder. The principle is that, once an offence has been committed, an accused person cannot be charged with conspiracy in respect of the same offence. – See for instance, the case of **John Paulo Shida v. Republic**, Criminal Appeal No. 335 of 2009 (unreported). That said, we do not find merit in this ground. It is superfluous.

Ground (j) was argued by Messrs Safari and Magafu. Mr. Safari faulted the learned trial Judge for observing in her judgment that, since the complaint about the torture of the first, second and fifth appellants at the time of recording their statements was dealt with in the trial within a trial, by submitting on that matter in the final written submissions, the learned advocates abused the process of the court. The learned counsel argued that the matter was argued in the final written submissions because the trial court deferred its reasons for overruling the objection so as to be incorporated in the judgment.

The learned counsel argued therefore, that, in the circumstances, it was proper to submit on the matter in the final written submissions. Mr. Magafu supported the argument made by Mr. Safari on that ground adding that, since the learned trial Judge reserved her reasons to a later date, there was no harm for the learned advocates to submit on the issue in their final written submissions.

Ms. Mlenza countered the arguments made in support of this ground. She submitted that, the learned trial Judge rightly held that the advocates for the appellants were not supposed to argue in their final written submissions, the complaint that the tendered cautioned statements were recorded after the said appellants had been tortured.

According to the learned Senior State Attorney, since that issue was dealt with in the trial within a trial whereby the objection against admission of the statements was overruled, by raising that issue in their final written submissions, the counsel for the appellants abused the process of the court.

It was not disputed that, after conducting the trial within a trial, the learned trial Judge reserved her reasons for overruling the objection raised against admission of the statements, promising to incorporate them in the judgment of the case. The trial court had made its decision to admit the statements after it had considered the submissions made by the learned counsel for the parties at the trial within a trial. What was pending were the reasons for that decision. In the circumstances, the arguments in the final written submissions could not assist the learned counsel for the appellants because the learned Judge was *functus officio* as far as determination of that objection was concerned. We thus find that the move taken by the learned counsel for the appellants was unprocedural but did not amount to abuse of the court process. According to **Black's Law Dictionary**, Ninth Ed., Brayan A. Garner; abuse of process is defined as:

"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process scope."

In this case, the learned counsel for the appellants filed final written submission after they had made oral submissions in a matter which had been decided upon. That is unprocedural but not abuse of the court process because they did not have the intention of obtaining any unlawful result. This ground thus succeeds only to that extent.

Grounds (a), (d), (e), (f), (g) and (h) are intertwined and for that reason, we find it appropriate to consider them jointly. On ground (a) of the paraphrased grounds of appeal, Mr. Rweyongeza began by contending that the appellants were charged in the case which was not properly investigated and therefore wrongly convicted. He submitted that what was done was the arrest first, of the appellants and later on proceeded to conduct investigation. He went on to argue that, the first appellant was wrongly convicted on the basis of his cautioned statement and that of the third and fifth appellants. Citing the case of **Mashimba Doto @ Lukubanija v. Republic,** Criminal Appeal No. 317 of 2013 (unreported), the learned counsel argued that, those statements should not have been acted upon unless they were corroborated.

He also faulted the learned trial Judge for acting on the statement of Godson Mangeki (exhibit P20) as corroborative evidence while that person did not testify in court. Mr. Rweyongeza went on to argue that, the cautioned statement of the first appellant should not have been acted upon for another reason, that the same was recorded on 12/8/2013 before the date of his arrest, which, according to the evidence of PW9, was on 13/8/2013.

He added that, although PW9 gave evidence to the effect that the first appellant was arrested on 13/8/2013, the said PW9 witness was not called to testify in the trial within a trial, instead, the prosecution called SP Mafwere whose evidence is invalid because he was not in the list of the witnesses who were intended to be called by the prosecution. Citing the case of **Abdallah Ramadhani v. DPP**, Criminal Appeal No. 219 of 2009 (unreported), the learned counsel submitted that, the evidence of PW9, lacks any probative value to corroborate the first appellant's cautioned statement or resolve the contradiction as regard the date of the first appellant's arrest and the date on which his cautioned statement was recorded. He added that, due to the contradiction, the cautioned statement should have been expunged.

The learned counsel argued further that, as for exhibit P20 which was tendered under s. 34B of the Evidence Act, the same was invalid because, **first,** no efforts were taken to procure the attendance of the maker of the statement and **secondly**, the defence objected to its admission and therefore, the trial court ought not to have admitted it. He cited the cases of **Elias Melami v. Republic**, Criminal Appeal No. 40 of 2014 and **Andrea Augustino Msigara v. Republic,** Criminal Appeal No. 365 of 2018 (both unreported) to support his argument that, for a statement to be admitted under s.34B of the Evidence Act, it must meet the conditions stated under that section, including the condition that reasonable steps must have been taken to procure the attendance of the maker of the statement in question.

As to the other statements, Mr. Rweyongeza argued that, exhibit P9 does not contain the truth because the third appellant is shown to have said that he shot the deceased jointly with the first appellant. Furthermore, in the third appellant's statement, it is shown that three persons went to the scene of crime and killed the deceased. Citing the cases of **Mashaka Pastory Paulo Mahegi @ Uhuru and Five Others v. Republic**, Criminal Appeal No. 49 of 2015 and **Andrea Augustino Msigara and Another v. Republic,** Criminal Appeal No.

365 of 2018 (both unreported), the learned counsel urged us to find that the cautioned statements were wrongly acted upon to convict the appellants.

On his part, Mr. Opanda supported the submissions made by Mr. Rweyongeza on that ground, stressing that the cautioned statements were not only inadmissible but also contradictory. Mr. Opanda added that the confession statements of the first, third and fifth appellants have different versions. He submitted that, as per the first appellant's statement, he was at Arusha at the material time but in his extrajudicial statement, the third appellant said that he was with him and fired the gun together. On the part of the fifth appellant's statement however, Mr. Opanda went to the argue, it is shown that it was the third appellant alone who shot the deceased.

On the finding by the learned trial Judge that the appellants' confessions were corroborated by the statement of Godson Mangeki (exhibit P20), Mr. Opanda challenged the credibility of that statement on the ground of the prosecution's failure to call one Adam Leyani, the uncle of Godson Mangeki named by him in the statement that, on 5/8/2013 he arrived at the house of the first appellant in the company of two persons who took there two motorcycles described in the statement

as red Toyo and black Kishen. The learned counsel relied on the case of **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (unreported) to support his argument that, in the circumstances, the statement lacked probative value to corroborate the tendered cautioned and extrajudicial statements.

Mr. Safari joined hands with Messers Rweyongeza and Opanda in faulting the trial court for having acted on the evidence of the first, second and fifth appellants' cautioned statements as well as the third appellant's extrajudicial statement to convict the appellants. With regard to the confession statement of the second appellant, Mr. Safari argued that, the same should not have been admitted because, apart from the fact that part of it was recorded out of time, the whole statement which had discrepancies, was not made voluntarily as contended in the trial within a trial. He cited the cases of **Mohamed Said Matula v. Republic** [1995] T.L.R 3 and **Marmo Slaa Hofu and Three Others v. Republic,** Criminal Appeal No. 246 of 2011 (unreported) in support of his submission. Citing a persuasive decision of the High Court in the case of **Rajabali v. Regina** [1953-1957] 2 T.L. (R) 101, he urged the Court to expunge the statement from the record.

In the alternative, citing the case of **DPP v. ACP Abdallah Zombe and Eight Others**, Criminal Appeal No. 358 of 2013 (unreported), the learned counsel argued that, the statement is not a confession because the appellant did not incriminate himself. He added that the cautioned statement is invalid because the same was tendered by a witness (PW2) who was not listed as an intended witness during the committal proceedings. He cited the case of **Joseph Joseph Komba @ Janta and Another v. Republic**, Criminal Appeal No. 121 of 2019 (unreported) to bolster his argument.

On his part, Mr. Magafu submitted also that, exhibit P2 is not a valid confession adding that the position applies to the extrajudicial statement of the third appellant (exhibit P9). According to the learned counsel, apart from having been recorded out of time, exhibit P9 was fabricated after the said appellant's cautioned statement was refused to be admitted in evidence. He went on to argue that, the extrajudicial statement does not contain the truth because it states that the third appellant fired the bullets jointly with the first appellant, the statement which is not correct because a bullet cannot be fired by two persons from one gun at the same time. Mr. Magafu argued further that the exhibit P2, P8 and P9 were wrongly acted upon because the evidence

contained in the said statements was not corroborated. He added that exhibit P9 was neither read out at the committal proceeds nor was PW12 who recorded it listed as one of the intended witnesses in terms of s.247 of the Criminal Procedure Act, Chapter 20 of the Revised Laws (CPA). With regard to the evidence of PW13, PW14 and PW15, Mr. Magafu argued that, their evidence was merely on the contention that they saw the fifth appellant at the deceased's hotel and therefore, that evidence cannot corroborate the statements relating to the commission of the offence.

On that same ground, Mr. Lundu argued **first**, that, since the cautioned statement of the fifth appellant contains the part which was not admitted in evidence, it should not have been relied upon. **Secondly**, he supported Mr. Magafu's argument that, the evidence of PW13, PW14 and PW15 is not valid corroborative evidence because their evidence does not implicate the appellants with the commission of the offence.

In his reply submissions, Mr. Nassir began by refuting the contention that the investigation in this case was poorly conducted and that the appellants were charged despite insufficiency of evidence. He submitted that, the police carried out investigation which led to the

arrest of the appellants who, upon being interrogated, the first, second, third and fifth appellants confessed that they committed the offence in collaboration with the other appellants.

With regard to ground (a), the learned Senior State Attorney submitted that, the confession statements of the first, second, third and fifth appellants are valid and thus the best evidence as per the decision of the Court in the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported). On the argument that the statement of the first appellant was recorded before he was arrested, Mr. Nassir submitted that the variance of the date on that aspect is a minor error which is curable. He cited the case of **Dickson Elia Nsamba and Another v. Republic**, Criminal Appeal No. 92 of 2007 and **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019 (both unreported) to support his argument. Relying on the provisions of s. 3 of the Evidence Act, Chapter 6 of the Revised Laws, the learned Senior State Attorney went on to submit that, the cautioned statement of the second appellant amounts to confession notwithstanding the fact that he exonerated himself from the offence.

As for the additional statement of the second appellant's confession which was not admitted in evidence, Mr. Nassir submitted

that, the refusal to admit that statement, which relates to the conduct of the identification parade did not render the admitted part of the statement invalid. The learned Senior State Attorney went on to submit that, the fact that the third appellant's extrajudicial statement (exhibit P9) was not read out at the committal proceedings stage is not fatal because it is not a requirement under s. 246 (2) of the CPA to do so. He went on to argue that, at the time of recording the extrajudicial statement, the Chief Justices directives were properly followed.

Mr. Nassir argued further that, although exhibits P2, P8, P9 and P26 were repudiated, the same were corroborated by the evidence of recovery of exhibit P13 and the testimony of PW2 who testified that he saw a red Toyo motorcycle at the scene of crime as well as that of PW3 who said that he saw a motorcycle of the same description at Embukoi Village with two persons on it. The learned Senior State Attorney said that, the evidence of PW3 was also to the effect that, one of those persons dropped his jacket in the course of running away after the motorcycle which was left at the area, had broken down. He added that, after the learned trial Judge had warned herself of the danger of acting on repudiated confessions, she was satisfied that the evidence was sufficient to found the appellants' conviction. He cited the case of

Dickson Elia Nsamba (supra) to support his argument that the finding of the learned trial Judge is faultless.

Adding to what was submitted by Mr. Nassir on this ground, Ms. Mlenza submitted that, the confessions of the said appellants were corroborated by the statement of Godson Mangeki which was admitted in evidence under s.34B of the Evidence Act. She opposed the argument that, once an objection is raised against admission of a statement of a person who was not called as witness, the court is barred from admitting that statement. It was her submission that, the statement may be admitted in the event the objection is overruled. She added that, in this case, the prosecution explained about the fruitless efforts made to trace the maker of the statement and thus the prosecution complied with the conditions stated under s.34B (2) (a) of the Evidence Act, making the statement admissible in evidence.

Messrs Rweyongeza, Safari and Magafu made rejoinder submissions. Mr. Rweyongeza argued first, that, the cautioned statement of the first appellant is unreliable for yet another reason, that the date on which the same was recorded is uncertain. This, he said, is because of contradictory testimonies of PW9 and PW27 on that aspect. He added that, the contradiction remained unresolved due to the

prosecution's failure to call the police officer who arrested the said appellant. The learned counsel added that, the second appellant who was the first to be arrested was, according to the prosecution, required to lead the police to where the first appellant could be found and that shows that the first appellant was not arrested on 12/8/2013. It was Mr. Rweyongeza's further argument that the learned trial Judge found that the second appellant's cautioned statement, which is exculpatory, was recorded before his arrest and later on signed it on 13/8/2013.

As to the third appellant's extrajudicial statement, the learned counsel argued that, the same is not reliable because of the expression "*mimi ndiye niliyefyatua risasi mimi na SHARIFU*". (It was I who fired the bullet I and SHARIFU). According to the learned counsel, it is practically not possible for two persons to fire a bullet from one gun at the same time. On the cautioned statement of the fifth appellant, Mr. Rweyongeza argued that, the same should not have been admitted because it does not contain the truth. According to his statement, he had three pieces of minerals which he wanted to sell to the deceased, in his statement, the first appellant mentions only one piece. As for the evidence that the third appellant orally confessed to PW5, Mr. Rweyongeza reiterated the argument that, such evidence was wrongly

acted upon because it lacked corroboration. To that argument, Mr. Safari added that, since the confession statements required corroboration, in principle, the same could not corroborate each other.

On his part, Mr. Magafu also supported the submission made by Mr. Rweyongeza that, the cautioned statement of the first appellant was invalid because the same was recorded before his arrest and for containing the contention to the effect that, the bullets were fired by two persons from one firearm at the same time. He added that, since both cautioned statements of the first and the fifth appellants were repudiated, they should not have been acted upon because of want of corroboration. As for the extrajudicial statement of the third appellant, the learned counsel argued that the same is also invalid because it was tendered by a person who was not listed as one of the witnesses who were intended to be called by the prosecution in terms of s.247 of the CPA. He added that, the statement contradicts the evidence of PW3 because, whereas the said witness testified that he saw one person disembarking from a motorcycle and proceeded to shoot the deceased, the statement contains different details on the number of the persons who shot the deceased. Mr. Safari went on to challenge the evidence of PW5 arguing that, the same required corroboration. He argued further

in his rejoinder submission that, the evidence of the sim cards (exhibits P19, P21 and P22) as well as exhibit P23 should not have been acted upon as corroborative evidence because the witness persons whose statements were tendered by PW8 had interest to serve. He argued also that, the evidence of exhibit P24 (certificate of seizure of exhibit P25) which was tendered by PW27 cannot corroborate the confession statements because the person from whom that exhibit was taken (Said Mohamed Jabir) was not called to testify.

As to ground (e), Mr. Opanda argued that the learned trial Judge erred in failing to properly analyze the first appellant's evidence, that between 15/7/2013 and 10/8/2013 he was at Ikungi. It was Mr. Opanda's submission that the evidence of the said appellant was supported by two witnesses; DW7 and DW8 but the trial court did not give reasons for disbelieving their evidence. The learned counsel stressed that, the first appellant's defence raised reasonable doubt against the allegation that he was at the scene of crime on the material date and therefore, relying on the case of **Maganga Nduguli v. Republic**, Criminal Appeal No. 144 of 2017 (unreported), the learned counsel submitted that, the appellant ought to have been acquitted.

This ground was also argued by Messrs Safari and Magafu. Mr. Safari submitted that, the issue of alibi ought to have been considered but that, was not the case. He went on to argue that, the finding by the trial court that the defence of *alibi* did not shake the prosecution's case is erroneous because, the reasoning of the learned trial Judge amounted to shifting the burden of proof to the appellants. The learned counsel argued further that, the trial court erred in holding that, the notice of *alibi* was insufficient while the prosecution did not raise any complaint to that effect.

Mr. Magafu added that the appellants' defence of alibi was not accorded the weight it deserved. It was his submission that, the trial court erred in holding that the appellants should have called witnesses to support their *alibi* while their evidence was not contradicted by the prosecution evidence.

In reply, Ms. Mlenza, argued that, the learned trial Judge considered the appellants' evidence on the defence of *alibi* generally as appearing on pages 2235 – 2237 of the record of appeal. As to the complaint that the trial court shifted the burden of proof to the appellants, she submitted that, the learned trial Judge was correct in observing that, the appellants ought to have called witnesses to support

their evidence because, the allegation that they were not at the scene of crime ought to be proved on the balance of probabilities. She cited the case of **Kubezya John v. Republic**, Criminal Appeal No. 488 of 2015 (unreported) to support her argument. She went on to submit that, the defence of *alibi* raised by the appellants was an afterthought and thus did not raise any reasonable doubt against the prosecution case.

Rejoining on this ground Mr. Opanda argued that, the finding of the learned trial Judge that the appellants' defence of *alibi* did not raise any reasonable doubt against the prosecution's case is not correct. He faulted the trial court's reliance on the possibility that the appellants could be at the scene of crime on the material date and time. It was his submission that, by relying on that possibility, the learned trial Judge acted on an extraneous matter. He cited the case of **Richard Otieno @ Gullo v. Republic**, Criminal Appeal No. 367 of 2015 (unreported) to cement his argument.

Rejoinder submissions were also made by Messrs Safari and Magafu. They stressed that the appellants' defence of *alibi* raised reasonable doubt against the prosecution case. Mr. Safari added that, the particulars of the *alibi* were sufficient and if the prosecution had found otherwise, it ought to have requested for more details.

With regard to grounds (f), (g) and (h), Mr. Magafu argued, first, on ground (f) that the evidence of the RCO and Said Mohamed Jabir was crucial as regards the recovery of exhibit P13 because, whereas PW8 said that on 11/9/2013, he was instructed by the RCO to trace Said Mohamed Jabir who allegedly knew where the exhibit was hidden, the said person went with the police to that place but did not get out of the motor vehicle. According to the learned counsel, the firearm was recovered before the appellants had been interrogated and therefore the evidence that the appellants' statements led to the recovery of exhibit P13 should not have been believed. He added that the evidence of PW8 contradicted that of PW9 and PW18 who said that the firearm was recovered on 14/8/2013.

Mr. Magafu argued further that, the contradiction could be resolved by calling the RCO and Said Mohamed Jabir to testify but since that was not done, the discrepancy should operate in favour of the appellants. The learned counsel added that, the evidence of exhibit P13 was also doubtful because in his evidence PW9 was not certain whether the firearm was a riffle or an SMG. The learned counsel conceded however, that, according to the evidence of the Ballistic Expert (PW16), the firearm was an SMG.

Mr. Magafu submitted also in support of this ground contending that the seizure certificate issued by Insp. Damian Joachim Chilumba, did not comply with the provisions of s.38 of the CPA because a receipt was not issued to the person from when the motorcycle (exhibit P25) was seized. He also supported the argument made by Mr. Safari that, the learned trial Judge shifted the burden of proof to the appellant by holding that the defence was at liberty to call the said Said Mohamed Jabir if they found that his evidence would be in their favour.

Mr. Magafu went on to argue that, apart from the absence of a handing over document as regards the cartridge cases found at the scene of crime and uncertainty of the person who collected them, the chain of custody of the tendered exhibits including P13, P25 and cartridge cases was not established. Citing the case of **Zainabu Nassoro @ Zena v. Republic**, Criminal Case No. 110 of 2007 and **Paulo Maduka and Others v. Republic**, Criminal Appeal No. 348 of 2015 (both unreported), the learned counsel submitted that the exhibits should not have been relied upon to found the appellants' conviction.

Submitting in support of ground (g), Mr. Magafu argued that, the learned trial Judge erred in implicating the appellants with the recovery of exhibit P13 while, according to the evidence, it was Said Mohamed

Jabir who led to its discovery and not any of the appellants. He also challenged the finding of the trial court which implicated the appellants with exhibit P25. He argued that, in the absence of the evidence of the RCO, it is doubtful that the motorcycle was found in the first appellant's house.

In reply, Ms. Mlenza opposed the argument that the omission to call the RCO as a witness weakened the prosecution evidence. It was her submission that, the evidence of PW18, PW19, PW23 and PW27 was sufficient to prove how and where exhibits P13 and P25 were found. Citing the case of **Ally Mohamed Mtupa v. Republic**, Criminal Appeal No. 2 of 2008 (unreported), the learned Senior State Attorney argued that, the number of witnesses is not material in proving a case. She submitted further that, the trial court rightly declined to draw adverse inference against the prosecution for failing to call as witness, Said Mohamed Jabir. According to her, since from the evidence of the Ballistics Expert (PW24), the cartridge cases which were sent to him for examination were found to have been fired from the type of the gun which the third appellant led to its discovery, that evidence as well as that of exhibits P23, P2 and P26 was sufficient to prove the case against the appellants.

On the chain of custody of the exhibits, she submitted that the same was not broken. In any case, she went on to argue, whereas the mobile phones had IMMEI numbers, exhibits P13 and P25 had unique serial numbers and since they are the items which could not be easily tempered with, they were properly acted upon by the trial court as valid evidence.

On ground (h), it was Mr. Magafu's argument that, the evidence that exhibit P13 was recovered as a result of the information relayed to the RCO is doubtful because the RCO was not called to testify. He argued thus that, the reasoning of the learned trial Judge that if it was the evidence of the RCO which would resolve that doubt, then the appellants should have called him such holding amounted to shifting the burden of proof on them.

Mr. Lundu supported the arguments made by Mr. Magafu on that ground. He submitted that, from the prosecution evidence, exhibit P13 was recovered on 11/9/2013 following the information which was alleged to have been given by the fourth appellant on 14/9/2013. In the circumstances, the learned counsel argued, that evidence is not creditworthy because it suggests that the exhibit was recovered before the fourth appellant was arrested.

Ms. Mlenza replied briefly to the arguments made in support of the above stated grounds of the appeal. She reiterated her arguments opposing the contentions by the counsel for the appellants. On ground (e), she contended that, the position taken by the learned trial Judge that the defence was at liberty to call the persons who would have been crucial witnesses but not called by the prosecution, did not amount to shifting the burden of proof to them. In support of her argument, the learned Senior State Attorney cited the case of **Yanga Omari Yanga v. Republic**, Criminal Appeal No. 132 of 2021 (unreported).

Maintaining his submission in-chief on these grounds, Mr. Rweyongeza argued that the trial court erred in convicting the appellants despite having drawn adverse inference against the prosecution case for having failed to call as a witness one Said Mohamed Jabir who led the police to the area where exhibit P13 was found and to the house of the first appellant where exhibit P25 was seized. The learned counsel stressed that, the chain of custody of exhibit P13 and P25 was not established. Messrs Opanda, Magafu and Safari supported Mr. Rweyongeza's arguments. Mr. Safari added that the chain of custody was also not observed as regards the mobile phones described in exhibit P4.

We have duly considered the arguments made in support of and in opposition of the above stated grounds of appeal. In these grounds, the High Court is being faulted for basing the appellants' conviction on the confessions of the first, second, third and fifth appellants while, according to them, the same are not valid confessions. They are also faulting the trial court for linking them with the recovery of exhibits P13, P25 as well as other documentary and real exhibits including a mobile phone alleged to be the property of the deceased and cartridge cases found at the scene of crime. They contended that the evidence to that effect is tainted with inconsistences and contradictions and thus not worth being acted upon.

To start with, we are with respect, in disagreement with the submission that investigation in this case started with the arrest and recording of the appellants cautioned and extrajudicial statements which were later used to gather evidence. It is plain from the facts of the case as stated at the beginning of this judgment that investigation began at the scene of crime where, among other things, the deceased's two mobile phones were found. It was from one of the mobile phones that the Police Cyber Crime experts, through the assistance of the Airtel Telecommunications Company traced and arrested the appellants. It

was also through police investigation that some of the exhibits including motorcycle which was allegedly used in the commission of the offence (exhibit P2) was found.

Having said so, we move to consider the issue regarding the validity or otherwise of the second appellant's cautioned statement. It is not disputed that the said appellant exculpated himself from the offence. He narrated on how he participated in the arrangements which he said, transpired to him later that it was in the process of committing the murder of the deceased. Making reference to s.3 of the Evidence Act, it was the argument by the learned counsel for the appellants that, from the contents of the statement whereby the maker exculpates himself from the offence, the same does not amount to a confession. We agree with that submission. Under s.3 of the Evidence Act, a statement made by an accused person is taken to be a confession only where the person admits to have committed the offence charged.

A statement in which a person exculpates himself from the offence is not a confession. In the book **Law of Evidence** by Sudipto Sakar & V.R Manohar, Vol.1, Lexis Nexis at page 602, the learned authors state as follows:

> *"No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession* ***must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence."***

In the light of the above stated position, we are unable to agree with Mr. Nassir that the second appellant's statement amounts to a confession. It cannot therefore, be used in that regard, against him or the other appellants.

With regard to the first appellant's cautioned statement, we agree that the same was recorded on 12/8/2013 while the appellant was arrested on 13/8/2013. The learned trial Judge agreed with the anomaly although she did not explicitly hold that the statement is invalid, she did not act on it to convict the appellants. In our considered view, the irregularity is fatal because time is of essence in recording a statement of a person taken under restraint on allegation of having committed an offence. – See s.50 (1) (a) of the CPA which provides for a period of four hours from the time of placing a person under restraint, to record his statement. With uncertainty of the date of arrest therefore,

the statement of the first appellant cannot be said to have been recorded in accordance with the law. We do not therefore, agree with Mr. Nassir that the error is curable. The statement is thus hereby expunged from the record.

Coming to the third appellant's extrajudicial statement, we also agree that the same is invalid. First, it is a correct position that although the statement was listed, it was not read out at the committal proceedings contrary to the requirements of s.246 (2) of the CPA. Secondly, the witness who tendered it was not listed as one of the witnesses who would be called by the prosecution as required by s.247 of the CPA. The end result of the two anomalies is to render the document to be of no evidential value. - See the cases of **Masamba Musiba @ Musiba Masai Masamba**, Criminal Appeal No. 138 of 2019 and **Simon Shauri Awaki @ Dawi v. Republic**, Criminal Appeal No. 62 of 2020 (both unreported). In all these cases, the documents which were admitted in evidence while the same were not listed and/or read out during the committal proceedings were expunged from the record. We are constrained to do so also in this case. Thus the extrajudicial statement of the third appellant is expunged from the record.

On the fifth appellant's cautioned statement, we do not, with respect agree with Mr. Lundu that the same is invalid because it contains the part which was not admitted in evidence. Since that part is an additional statement recorded on a separate date, even though it was intended to be a continuation of the original statement, that does not affect the soundness of the main statement.

That having been said and done, we now turn to consider the grounds upon which the confession of the fifth appellant is being challenged. Before we embark on that duty, we wish to observe **first,** that the statement implicates all the appellants with the offence. For ease of reference, we hereby reproduce the relevant parts of it.

> "*Siku iliyofuatia nikiwa na Sadick s/o Jabiri, Jalila s/o Shaibu Jumanne na Sharifu mwenyewe na ndiyo Sharifu alituambia tukiwa wote kuwa kuna mpango wa kumuua Erasto.... Mimi jukumu langu lilikuwa ni kuhakikisha kwamba ERASTO anatoka ofisini kwake na kumfikisha eneo la tukio, KARIMU yeye jukumu lake ni kuwa na bunduki na ndiye atakayempiga risasi ERASTO, SADIKI na SHAIBU wao walipewa jukumu la uiinzi mita chache toka eneo la tukio ili kuona kama kuna Polisi au watu watakaoweza kuzuia tukio wamtaarifu KARIMU, MUSA yeye kazi yake*

ni dereva wa kutoa Arusha wahusika na kuwapeleka eneo la tukio na pia baada ya tukio kuwatoa wahusika eneo la tuklo na kuwarudisha Arusha, JALILA yeye jukumu lake ni kuwepo katika gari ya SHARIFU na ndiye atakayebeba silaha kutoka kwenye gari na Kwenda kumkabidhi KARIMU pale kwenye eneo la tukio...SHARIFU alinipa madini pisi tatu na kuniambia kwamba nimtumie ujumbe wa simu kwamba ninariziki nataka nimuuzie na niiijitambulisha kwake kwamba naitwa MOTII, baada ya kumtumia ujumbe wa simu yeye alinipigia na kuniambia niende ofisini kwake S.G. RESORT nitamkuta, baada ya kufika hotelini kwake nilimkuta na kumuonyesha madini pisi tatu na nikamuuzia jiwe moja kwa thamani ya shilingi milioni tatu na kumwambia haya mengine siyo ya kwangu tuko na ndugu yangu na tunayo mengine hivyo kesho tukutane maeneo ya Bomang'ombe tufanye biashara, ... Mimi nilimtumia ujumbe kwa njia ya simu kwamba tayari sisi tumeshafika KIA tunakusubiri tunakunywa chai, alinipigia nasi tukaendelea kumsubiri mpaka alipokuja ndio nikampeleka kwenye tukio.... Yeye KARIMU alikuwa mbele ya gari na ndiyo baada ya ERASTO kuteremka na Kwenda kumsalimia KARIMU, ERASTO alirudi na

kumfungulia KARIMU mlango ili wafanye biashara ndanl ya gari ndipo ERASTO allpogeuka na kumuona KARIMU akiwa anatoa bunduki kumuelekezea ndipo ERASTO alipoanza kukimbia kuzunguka gari kuelekea barabarani KARIMU aliwahi kumpiga rlsasi na kuanguka lakini aliendelea..."

Secondly, that the same was admitted in evidence after a trial within a trial because the said appellant repudiated the statement. The learned trial Judge had the opportunity of determining the credibility of the witnesses and finally found that the statement was made voluntarily.

As stated above, the confession was repudiated and as correctly argued by the learned counsel for the appellants, it could not be acted upon unless it was corroborated by independent evidence. The position was underscored in the case of **Pascal Kitigwa v. Republic** [1994] T.L.R 65 in which the Court states *inter alia* that:

"Evidence from a co-accused as in this case is accomplice's evidence and a court may convict on accomplice's evidence without corroboration if it is convinced that the evidence is true, and provided it warns itself of the danger of convicting on uncorroborated accomplice's evidence."

It went on to hold however, that:

> *"Although the law does not say that conviction on uncorroborated accomplice's evidence is illegal, it is still unsafe, as a matter of practice, to uphold a conviction based on uncorroborated evidence of a co-accused."*

In the instant appeal, the learned trial Judge found that, there was sufficient corroborative evidence and thus used the confession as one of the pieces of evidence which, according to her, had proved the case beyond reasonable doubt. That finding is the subject of challenge in these grounds of appeal as expounded in the arguments made by the counsel for the appellants. The trial court found that the statement of Godson Mageki (exhibit P20) was one of the pieces of evidence which corroborated the cautioned statement. As shown above, Mr. Rweyongeza challenged that finding. We find, with respect, that the two reasons stated by Mr. Rweyongeza are not tenable. According to the record, PW11 who tendered the statement told the trial court that he could not procure the attendance of the maker of the statement, who was a student at the time when he recorded the statement, because his whereabouts were unknown. It is on record that the witness (PW11), was recalled after the prosecution had failed to trace the maker of the

statement. The record shows further, at page 1126, that on 23/4/2018 when the prosecution sought to tender the statement, all the advocates for the appellants were in attendance and Mr. Lundu expressed that the defence did not have any objection.

We are also unable to agree with Mr. Opanda that, exhibit P20 could not be acted upon unless one Adam Leyani named in the statement was called to testify. The author of exhibit P20 testified on what he saw at the first appellant's house. That evidence is credible without the testimony of the person who took the motorcycles at the first appellant's house.

With regard to exhibit P13, PW24 confirmed that, the same was an SMG. From the evidence of PW9, it was the fourth appellant who led to the discovery of that exhibit which, upon examination of the cartridge cases found at the scene of crime, PW24 concluded that they were fired from the type of that firearm (SMG). The issue on the inconsistency of the evidence of PW1 and PW9 as regards the number of the cartridge cases found at the scene of crime is, in our view, a minor one. In his evidence at page 248 of the record, PW9 said that when they inspected the scene of crime, they found 22 cartridge cases. He stated as follows:

"We started Inspection of the scene where we were able to find 22 bullet covers."

On his part, PW24 stated as follows at page 1014 of the record of appeal:

"He (PW9) came with the firearm SMG Serial No. 1954 KJ 10520 which had a caliber of 7.62 millimeter. He ***also had 22 bullet covers for bullets used in SMG or SAR*** *with a caliber of 7.62 mm. His purpose of bringing the bullet covers and SMG was that we examine the two items and say whether those bullets were fired from that firearm."*

[Emphasis added]

It is clear from the evidence therefore, that the number of cartridge cases found at the scene is the same as that which was sent to the Ballistics Expert. On the omission to call as witnesses the RCO and Mohamed Said Jabir, we do not find that their evidence was crucial such that an adverse inference could be drawn against the prosecution. Under s.143 of the evidence act, no particular number of witnesses is required to prove a case. For this reason, failure by any party to call a person as a witness will not be a ground for discrediting the tendered evidence. The omission may only be relevant if the person who was not

called as a witness would have, if he had testified, given evidence which is adverse to the person who called him or her.

It is only under the situation where a person is not called because of concealing a fact which would be disclosed if he is called to testify, that an adverse inference may be drawn. That is not the position in this case. The complaint in this case is that the evidence is not credible because the RCO and Mohamed Said Jabir were not called as witnesses. Further to that, where an accused person feels that certain person who was not called as witness by the prosecution would have been a crucial witness such that, if he was called would weaken the prosecution case, then the defence is, as observed by the trial court, not precluded from calling him. In our considered view that, would not amount to shifting the burden of proof on the defence as argued by the learned counsel for the appellants. The learned trial Judge did not therefore, err in making that observation.

As to the argument that, exhibit P13 was recovered before the appellants were interrogated, that does not also affect the witnesses' evidence because, its recovery was a result of the information given by the third appellant after he had been arrested at Kaliua. On the failure to issue a receipt to the person from when exhibit P25 was taken, we

are of the opinion that the omission did not prejudice the appellants. In any case, exhibit P25 is not the only evidence which was used to corroborate the cautioned statements. The learned trial Judge found that PW18, PW19, PW23 and PW27 had given credible evidence as regards the recovery of exhibit P13 and P25 and on our part, we could not find any sound reason to fault her. With that evidence, it is our opinion that the learned trial Judge was correct in her finding that, the appellants' defence of *alibi* did not raise any reasonable doubt against the prosecution case. As for the contradiction in their evidence, we find the same to be minor and in effectual. – See for instance, the cases of **Dorovico Simeo v. Republic**, Criminal Appeal No. 256 of 2008 (unreported).

On the complaints about the chain of custody of the exhibits, we agree with Ms. Mlenza that, since the real exhibits in question are items which do not change hands easily and have their unique numbers of identification, even if the chain of custody would not have been established, still their evidential value would not necessarily be affected. – See the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported). In that case, the Court observed that:

"It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature .... Where the potential evidence is not in danger of being destroyed or polluted and/or in any way tempered with the court can safely receive such evidence despite the fact that the chain of custody was broken."

In this case, the exhibits in question (P13 and P25) are in the nature of the items that cannot be easily tempered with or exchanged. We therefore, do not find merit in the complaint relating to the chain of custody.

Apart from the corroboration evidence shown above, there was evidence of oral confession of the third appellant before PW5 which also corroborates the extrajudicial statement of the said appellant. The confession is also corroborated by their conduct of attempting to flee as soon as they noticed that PW9, PW10 and PW11 were police officers. The evidence of conduct is sufficient to render corroboration. - See the case of **Pascal Kitigwa** (supra). In that case, the Court held that:

"Corroborative evidence may be circumstantial and may well come from the words or conduct of

accused and, in this case, the appellant independently corroborated the evidence of the co-accused."

In sum, we are satisfied that, even without other evidence, our finding so far on the raised points, answers in the affirmative, the issue whether or not the fifth appellant's confession (exhibit P8) was properly corroborated. It is our finding also that the statement contains the truth. We thus find that the learned trial Judge had properly so found. Grounds (a), (d), (e), (f) and (h) are thus dismissed.

On ground (b), Mr. Opanda challenged the evidence of PW2 arguing that the same is unreliable because he could not have a proper view of the incident given the distance between the place where he stood and the scene of crime. As for the circumstantial evidence, the learned counsel argued that, the same is insufficient because the possibility of a mistaken identity was not eliminated. On the principle that, circumstantial evidence must be sufficient to eliminate the possibility of a mistaken identity, Mr. Opanda cited the case of **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 (unreported).

It was Mr. Opanda's further argument that the description of the two persons who were seen at Embukoi Village was not sufficient because those persons were said to have "maumbo madogo madogo" (small bodies). As for the two motorcycles said to have been seen at the first appellant's house, he contended that, apart from the failure to mention their registration numbers, the same were described in exhibit P20 as red Toyo and black Kishen while the witnesses described them as Toyo and Kinglion. Relying on the case of **Azizi Abdala v. Republic** [1991] T.L.R 71, the learned counsel submitted that, in the circumstances, the evidence of identification of one of the motorcycles is unreliable.

On his part, Mr. Lundu added that, the evidence of PW6 is unreliable because that witness could not even know the number of his children. Mr. Lundu went on to fault the learned trial Judge for having believed the evidence of PW9, PW10 and PW11 to the effect that, in the process of being arrested at PW5's house, the third and fourth appellants attempted to flee so as to avoid being arrested. According to the learned counsel, in the absence of the evidence of any of the villagers other than PW6 who allegedly assisted to arrest the said appellants, that allegation was not proved.

In this ground, the learned counsel for the appellants have also challenged the competence of PW22 to tender the print out of the communications made amongst mobile phone numbers registered temporarily in fake names and between one of them who disguised himself as Motii Mongululu and the deceased (exhibit P15).

In response, Mr. Nassir submitted that, the evidence proved that the appellants were at the scene of crime at the material time of the incident, the third appellant having been described to have put on a khaki jacket. The learned Senior State Attorney argued further that, the evidence of PW16 relating to the communications made between the fake mobile phone numbers including the one registered in the name of Motii Mongululu, who communicated with the deceased, was not challenged and therefore, that evidence remained intact. Mr. Nassir cited the case of **Emmanuel Lyabonga** (supra) to support his argument.

He went on to counter the submission that PW16 was not competent to tender exhibit P15 on account that, the said witness was at the material time of giving evidence, an employee of the National Housing Corporation, not Airtel Telecommunication Company. He argued that the witness was competent because at the time when she

signed and stamped the print out, which was sent to the RCO, was an employee of the Airtel Telecommunication Company. Citing the case of the **DPP v. Mizrai Pirbakhshi @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (unreported), the learned Senior State Attorney argued that the witness was competent to tender the print out in court.

In further reply to the submissions made by the appellants' counsel in support of this ground, Ms. Mlenza argued that, the crebility of PW6 should not be judged on the mere fact of his failure to know the number of his children. She insisted that, the said witness is entitled to be believed notwithstanding his failure of memory. Ms. Mlenza went on to argue that, the learned trial Judge did not misapprehend the evidence when she held that, in his statement, the first appellant admitted that he was at the scene of crime. This is more so, she said, because in his defence, the said appellant did not dispute that contention.

In rejoinder, Mr. Rweyongeza reiterated the submission that the appellants were convicted while the prosecution did not adduce sufficient evidence, adding that, whereas there is uncertainty as regards the type of one of the two motorcycles which the author of exhibit P20 said he saw at the first appellant's house; that it was Kishen rather than Kinglion, the evidence as regards the date on which exhibit P13 was

recovered and whether that firearm was an SMG or a riffle is also doubtful. The learned counsel argued also that, the evidence of PW16, leading to the arrest of the appellants, is unreliable because neither did the said witness mention the names of the suspects nor was any report of the finger prints examination tendered by him.

Submission in rejoinder was also made by Mr. Safari who argued that, PW6 was not reliable because from his evidence, he was short of memory and thus his evidence should not have been acted upon, adding that, the prosecution did not prove that the mobile phones described in exhibit P4 belonged to the deceased because the evidence of its registration in his name was not tendered.

Mr. Magafu also rejoined by challenging the credibility of PW16 on account of his failure to tender a printout showing that the appellants communicated with the deceased. On his part, in his rejoinder submission, Mr. Lundu supported the submission made by Mr. Rweyongeza on that ground; regarding PW6's inability to remember his personal particulars and the place where he recorded his statement.

Mr. Lundu joined hands by arguing that the evidence of PW6 is unreliable because he lied when he said that, the third and fourth appellants confessed on the second day of their arrival at PW5's house

that they committed the offence of murder and that a report was thereafter made to the Village Chairman. According to Mr. Lundu, if that evidence is the truth, the appellants would not have stayed in the village for about one and a half weeks without any action having been taken against them. The Village Executive Officer would not also, have proceeded to make inquiry about their conduct so that their application for allocation of land, which they had made before the village authority could be considered. On the evidence that the said appellants attempted to flee at the time of their arrest, the learned counsel insisted that such evidence is not creditworthy because the prosecution did not call as a witness, any of the villagers who allegedly assisted to arrest them.

Starting with the deceased's mobile phone, ownership of it was not at issue at the trial and therefore, we find that it was inappropriate to raise it at this stage. On reliability of the evidence of PW2, it is not in dispute that he observed the incident at the distance of 30 feet. The incident took place in a broad daylight and in our considered view, the distance was sufficient to enable him to see what was happening because the arrival of a motorcycle and later a motor vehicle, the movement of the relevant persons and the act of shooting, took place in

the open. From the way on which the murder was committed, we are satisfied that PW2 was a credible witness.

On the evidence of PW3, it is our considered view that, the same was relevant to the fact that, two persons were seen on a motorcycle which, after it had broke down, they decided to run away and when an attempt was made to pursue them, one of them fired a bullet in the air. In the circumstances, it could not be possible for the witness or any other person to give detailed description of those persons. As for the motorcycle, the same was taken by the police from that area. Regarding the description of one of the motorcycles, which the maker of exhibit P20 said he saw at the first appellant's house; that it was a black Kishen while according to the other witnesses, it was a black Kinglion, we find that, the difference of description of the motorcycle's make does not render the evidence in that statement incredible because he was describing the same black motorcycle.

With regard to the competence of PW22, we agree with Mr. Nassir that the witness was competent to tender the exhibit (P15). She was the person who prepared the document and therefore, was the one to tender it. The fact that at the time of giving evidence, she was working

with another employer did not make her incompetent to tender the document which she prepared before her transfer.

On the credibility of PW9, PW10 and PW11 regarding their evidence that the third and fourth appellants attempted to flee upon seeing and suspecting them to be police officers, we do not, with respect, agree with the submissions of the learned counsel for the appellants that the learned trial Judge erred in finding the said witnesses credible. The fact that none of the villagers who assisted to arrest the third and fourth appellants was called to testify, does not make the witnesses' evidence unbelievable. It is trite principle as held in the case of **Goodluck Kyando v. Republic** [2006] T.L.R 363 that, a witness is entitled to be believed unless there are compelling reasons for disbelieving him or her. apart from the reason that his evidence was not supported, as shown above, the reason which we have found to be unsound, there were no other reasons given by the counsel for the appellants for the Court to disbelieve the said witnesses. We thus find that the finding of learned trial Judge cannot be faulted.

On the evidence of PW16, the same does not become incredible merely because he did not mention the names of the suspects. His evidence centred on the outcome of the investigation on the mobile

phone communications amongst the mobile phone numbers registered in fake names. As to who were the real persons, that was investigated by other persons.

On the part of PW6 however, we agree with the learned counsel for the appellants that he was indeed an unreliable witness. From his evidence, it appears that he either had shortness of memory or he might have not been serious in his testimony. It is strange that he could not remember not only some simple personal particulars like his age or the number of his children but also the place where his statement was recorded.

In concluding this ground, we find that, in the light of the above stated reasons, save for our finding that PW6 was not a credible witness, ground (b) of the appeal is also dismissed.

On ground (d), after we have found that exhibit P8 is a valid confession and thus sufficient evidence to be acted upon by the trial court, we do not find any pressing need to consider that ground of appeal concerning identification of the said appellant by PW13, PW14 and PW15.

Ground (i) was argued by Messrs Safari, Lundu and Magafu. Mr. Safari argued that, contrary to what was found by the learned trial

Judge, the discrepancies and inconsistences on the dates of information about the whereabout of exhibits P13 and P25 given to PW9 on one hand and to the other witnesses (PW18, PW19, PW3 and PW7) on the other hand, is material. As such, he argued, the exhibits should be expunged from the record. He argued further that, the evidence as regards the second appellant's participation in the commission of the offence is contradictory and therefore, unreliable. He contended that, the prosecutions evidence is contradictory as regards the date on which exhibit P25 was bought and taken to the first appellant's house and the date on which exhibit P13 was recovered. It was argued further that, there is contradiction on the serial number of exhibit P13. Mr. Lundu supported the arguments made by Mr. Safari adding that, the date of recovery of exhibit P13 is contradictory as per the evidence of PW8 and PW23.

As for Mr. Magafu, his argument was on the evidence of PW5 and PW6, that it is contradictory. Since we have discarded the evidence of PW6, we think this argument does no longer hold water.

Responding to the argument, made on that ground, Ms. Mlenza contended that, the contradictions on the evidence of PW18, PW19 and that of PW23 and PW3 as regards the date on which exhibit P13 was

recovered was due to lapse of time because the witnesses gave evidence after three years from the date of the incident. Otherwise, she argued that, the said exhibit was recovered on 14/9/2013 as stated by PW11 and PW10. On the cited case of **Emmanuel Lyabonga** (supra), the learned Senior State Attorney submitted that the case is distinguishable because in the present case, the contradictions and inconsistencies are minor and did not therefore, weaken the prosecution evidence.

Submitting further on this ground, Ms. Mlenza argued that, the serial number of exhibit P13, is as per the evidence of PW8, only that the letter "R" was omitted and thus a mere omission rather than contradiction. As for contention that the statement of Godson Mangeki (exhibit P20) contradicts the evidence of the other witnesses as regards the types of the motorcycles he saw at the first appellant's house; that they were black Kishen and red Toyo instead of black Kinglion and red Toyo, Ms. Mlenza responded that, the contradiction is also minor because the maker of the statement could not differentiate between Kishen and Kinglion motorcycles. She went on to argue that, the gist of the statement is that the maker of exhibit P20 saw two motorcycles having red and black colours at the first appellant's house.

Mr. Lundu stood by the arguments in-chief made by the counsel for the appellants on these grounds. He insisted in his rejoinder submission that, the evidence of PW9 seriously contradicted that of PW1 as regards the person who collected the exhibits from the scene of crime. He emphasized that, the prosecution evidence is also contradictory as regards the date on which the third and fourth appellants were arrested.

We have duly considered the rival arguments of the learned counsel for the appellants and the learned Senior State Attorney on this ground. On the contradictions and discrepancies as regards information which led to the recovery of exhibit P13 and the difference of date of its recovery and other dates of incidences argued by the learned counsel for the appellant, including the purchase and taking of exhibit P25 to the first appellant's house, we agree with the learned trial Judge that the same are minor as they do not go to the root of the matter. The variance of evidence as to who collected the cartridge cases from the scene of crime for example, does not negate the fact that the items were found at the scene of crime and later taken to the Ballistics Expert for examination. Furthermore, the discrepancy such as the serial number of exhibit P13 is so minor because as submitted by Ms. Mlenza,

only the letter 'R' was omitted to be shown. According to the learned authors of Sarkar, **The Law of Evidence**, 16th edition, 2007:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized.* ***While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do.***"

We have found above that the statement of the second appellant is not a confession. We have also discarded the third appellant's extrajudicial statement. In his statement, the fifth appellant states that, the second appellant's role was that of a driver. There is no other cogent evidence showing that he was involved or knew that the activities which he was performing on the instruction of his employer, the first appellant, were in the execution of the plan to kill the deceased.

In the circumstances we find that the available evidence on the record is insufficient to sustain the second appellant's conviction. For these reasons, we hereby allow his appeal. Consequently, his conviction is quashed and the sentence is set aside. He should be released from prison forthwith unless he is otherwise held. For the first, third, fourth and fifth appellants, after our finding that their grounds of appeal are devoid of merit, their appeal fails. It is hereby dismissed.

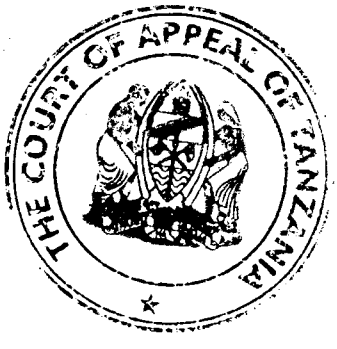
DATED at **DAR ES SALAAM** this 8th day of April, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 12th day of April, 2023 in the presence of the appellants linked via video from Ukonga Prison, Mr. Mohamed Mkali and Mr. Gideon Opanda, learned counsels for the 1st appellant and hold brief for Mr. Hudson Ndesyepo and Richard Rweyongesa also learned counsels for the 1st appellant and Mr. Majura Magafu for the 3rd appellant. Mr. Nazario Michael Buxay holding brief for Mr. Emmanuel Safari, learned counsel for the 2nd appellant and Mr. John Lundu, learned counsel for the 4th & 5th appellants and Ms. Nura Manja, learned State Attorney appeared for the respondent/Republic; is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL