IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 120 OF 2022

DANIEL THOMAS @ YUSUPH @ NGENI .....1ST APPELLANT

EMMANUEL THOMAS .....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kagomba, J.)

dated 14th day of March, 2022

in

Criminal Sessions Case No. 42 of 2018

.....

JUDGMENT OF THE COURT

14th & 23rd February, 2024

ISMAIL, J.A.:

The appellants are siblings who were convicted of murder which was allegedly committed at about 06:30 hours on 13th October, 2013, at Igwamadete Village, Iseke Ward, Nkonko Division within Manyoni District in Singida Region. The victim of the murder was Alord Joshua who was alleged to succumb to gunshots inflicted on his chest.

The brief facts of the case, as gathered from the prosecution's case reveal that on the fateful day, the deceased, together with his friend, one Daud Azaria Jonathan (PW1) were on the way to Mpapa Village. Midway through their journey, they were invaded by assailants who were armed with a muzzle gun, known in Kiswahili as "gobore". The assailants, who came to be identified later as the appellants and their elusive colleague, a certain Mr. Mosi Mnaija, demanded that they be given money. The deceased parted with TZS. 8,000.00. The paltry nature of the sum given by the deceased enraged the assailants. It is then, that one of the assailants who is said to be the 2nd appellant fired a shot that killed the deceased instantly. PW1 alleged that he was able to identify the 1st appellant whom he described as a person who was familiar to him despite the fact that he covered his face with a plastic bag.

The incident was reported to Sanza Police Station. The deceased's body was collected by the police and taken to hospital where an autopsy was carried out by Dr. Peter Nyugu (PW6). The postmortem examination report, which was admitted in court as exhibit P1, indicated that the deceased's death was due to severe hemorrhage due to gunshot on the left side of the chest. The trial proceedings saw the prosecution marshal the attendance of 8 witnesses who tendered four exhibits. The exhibits were: Postmortem

examination report (exhibit P1), Sketch map of the scene of the crime (exhibit P2), 2nd appellant's cautioned statement (exhibit P3), and the 2nd appellant's extra-judicial statement (exhibit P4).

A police swoop managed to put under restraint the 1st appellant who had fled to Morogoro. On interrogation by E 9204 D/Cpl. Wilson (PW5), he confessed to the involvement in the death of the deceased, revealing further that he did that in collaboration with his brother, the 2nd appellant and Mosi Mnaija. It was further alleged that prior to his arrest, the 1st appellant confessed to Sule Matiana (PW2) that he and his brother, the 2nd appellant had killed a person at the hill.

The 2nd appellant who had since fled was arrested on 21st May, 2015. On interrogation, he too allegedly confessed that he committed the offence with which the appellants were charged. As a result, he allegedly recorded two confessional statements, namely; cautioned statement which was recorded by E 2826 Sgt. Kamala (PW7) and Extra-judicial statement, recorded by Athumani Singana (PW8). These statements were admitted in evidence as exhibits P3 and P4, respectively. Subsequently, the appellants were arraigned in court where they pleaded not guilty to the charge.

The appellants protested their innocence and fielded their defence. In the case of the 1st appellant, his testimony was to the effect that, on 13th

October, 2013, he was at his home in Igwamadete Village, and that he was informed of the murder incident. He said he participated the funeral of Mzee Stanley's relative before he left to watch a football game. On the 14th October, he left for Morogoro to look after his pregnant wife and he stayed around until 17th October, 2013, when he was arrested. On 19th October, 2013, he was conveyed to Manyoni Police Station, where he was interrogated in connection with the murder incident whose involvement he denied. He was arraigned in Manyoni District Court on 21st October, 2013.

The 2nd appellant was also in denial, alleging that on the fateful day he was attending a funeral at Mr. Stanley's residence and that, as he was at the graveyard, news filtered to him that a person had been killed at Igwamadete hill. On the following day, he and his colleague, Ntanda, went for hunting in the bush and that their expedition lasted for a week. A week after their return, he left for Simbanguru and later for Chikola Village where he stayed for one and a half years. He stated that he was arrested on 17th May, 2015, subsequent to which, he was arraigned in the District Court of Singida where he was charged with murder.

Conclusion of the trial proceedings saw the trial Judge hold the appellants culpable of the charged offence. He was convinced that the combination of visual identification and appellants' confessions did enough

to prove the case for the prosecution. They were thus convicted and sentenced to suffer death by hanging.

The trial court's decision was not to the appellants' liking, hence their decision to institute the instant appeal. In two memoranda of appeal filed on 10th November, 2022 and 7th February, 2024, a total of 20 grounds of appeal were raised by the appellants, which because of the manner in which they were argued by both learned counsel, we do not feel the need to reproduce them. These grounds of appeal were supplemented by two other grounds which were raised in the course of the appeal hearing. Details of the supplementary grounds shall be found in the course of this decision.

Hearing of the appeal saw Mr. Leonard Haule, learned counsel representing the appellants, while the respondent was represented by Ms. Happiness Makungu, assisted by Mses. Neema Taji and Rose Ishabakaki, all learned State Attorneys.

Before he addressed us on the substance of the matter, Mr. Haule prayed to drop grounds 4 and 8 of appeal. Regarding the rest of the grounds of appeal, the learned counsel's game plan was to argue them under the umbrella that the prosecution case was not proved beyond reasonable doubt.

Mr. Haule's onslaught began with the committal proceedings to which he took a serious exception. These proceedings are found at pages 19 to 24 of the record of appeal and his contention is that during such proceedings the substance of the evidence by the prosecution was not read out. Making particular reference to page 22, the learned counsel submitted that what the Magistrate did was merely to show the evidence and not reading it. He considered this to be an anomalous conduct akin to what the Court censured in the case of **Fabian Edmund v. Republic**, Criminal Appeal No. 540 of 2019 (unreported). He was of the contention that the omission affected exhibits P1, P2, P3 and P4 all of which were inadmissible. He prayed that they be expunged from the record.

Turning to the PW1's oral testimony, found at page 51 of the record of appeal, Mr. Haule argued that this deserved to be crossed off because it was adduced in contravention of section 289 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA), in that, the person named in the list of prosecution's witnesses is different from the person who testified as PW1. He argued that there is no evidence that these refer to the same person. Justifying his contention, Mr. Haule argued that, whereas the listed witness, Daudi Azaria was 42 years of age at the time of listing him and would be 45 years of age when he testified, David Azaria, the person who testified as

PW1 was 50 years of age at the time he testified. He argued that doubts exist as to the identity of these two persons, urging the Court to resolve the doubts in the appellants' favour.

In his further submission, Mr. Haule argued that conviction of the appellants was grounded on three variables. These are: identification of the appellants, credibility of PW1 and PW2, and confessional statements. Regarding identification, the learned advocate referred us to PW1's testimony which appears at pages 51 and 52 of the record of appeal, and contended that this testimony shows that the appellant, whom he described as panic-stricken, gave wavering assertions regarding identification. He singled out a few phrases to justify his contention. These were:

"I saw someone", meaning that he did not know the person.

"I met another person with a gobore", meaning that he did not identify the appellant and he did not mention anybody.

He also argued that PW1 did not mention any of the assailants he claimed to have identified, connoting that he did not identify any of them. Mr. Haule submitted that it was difficult to identify the 1st appellant who was at his back and his face was covered. He contended that the witness admitted (at page 55 of the record of appeal) that he was disturbed and could not identify the assailants.

Still on PW1, the appellants' counsel contended that, he did not mention the assailants at the earliest opportunity. It was his argument that, whereas the incident occurred on 13th October, 2013 at 06.30 hours, PW1 reported the incident on 15th October, 2013, two days later and without any justifiable cause. Mr. Haule further argued that, the evidence shows that the complainant's statement was recorded on 15th October, 2013, meaning that this is the date on which the incident was reported. He bolstered his argument by citing the decision of the Court in **Daniel Amos Mziho v. The DPP**, Criminal Appeal No. 221 of 2020 (unreported) and stressed that, identification in this case was not watertight as the assailants had their faces covered, and that, the trial court did not act cautiously and warn itself against confusion and lying. The learned counsel implored us to hold that conditions for identification were not fulfilled. On this, he referred us to the cases of **Sprian Mtungilei v. Republic**, Criminal Appeal No. 244 of 2021 and **Sabasaba Enos Joseph v. Republic**, Criminal Appeal No. 296 of 2022 (both unreported).

On credibility of the witnesses, Mr. Haule argued that PW1 was not a credible witness and that his credibility was eroded by his failure to name the suspects at the earliest opportunity. He took an exception, as well, to

PW1's act of responding to a question of the assessor instead of stating it in his evidence in chief.

Addressing us on the oral confession, Mr. Haule submitted that, the 1st appellant did not confess to the commission of the offence. He argued that, the testimony of PW2 was not corroborated and that it lacked coherence with other witnesses. He argued, in the alternative, that the 2nd appellant's cautioned statement was recorded in contravention of the law, as the provisions of section 58 of the CPA invoked were inapplicable. This is because the 2nd appellant, who cannot read and write, did not volunteer to record the statement. In his contention, the proper provision is section 57 of the CPA. He added that the statement is also defective for want of a proper certification provision. The learned counsel based his argument on the decision of the Court in **Petro Sule & 3 Others v. Republic**, Criminal Appeal No. 475 of 2020 (unreported). He prayed that the statement be expunged from the record.

Mr. Haule turned his attention to the extra-judicial statement (exhibit P4) the recording of which was, in his contention, flawed. He argued that the same does not have the qualities of a confession under the Evidence Act, Cap. 6 R.E. 2022, as it did not disclose who was killed.

Midway through his submissions, Mr. Haule prayed to add two new grounds of appeal. There being no objection by the respondent, the prayer was granted by the Court. The additional grounds touched on the impartiality of the trial court in the conduct of the trial proceedings and the sentence imposed on the 1st appellant.

On impartiality, Mr. Haule contended that the conduct of the trial Judge during the trial proceedings exhibited partiality and bias against the appellants. This, he argued, was discernible from the remarks he made when prosecution witnesses testified. He argued that, while glowing remarks were made with respect to the testimony adduced by prosecution witnesses, the antithesis of that was also done against the appellants. He cited pages 52, 54, 59, 66, 76, 92, 127 and 154 of the record of appeal which contained favourable remarks for prosecution witnesses, while pages 58, 111, 113, 145 and 170 of the record of appeal carry unflattering remarks against the appellants.

He firmly submitted that, these remarks showed that the trial Judge took a pre-meditated position and was more inclined towards the prosecution, thereby abdicating his duties of acting impartially. He contended that, even the act of discounting that the allegation of torture was belatedly raised was a demonstration of the Judge's partiality. Mr. Haule

buttressed his contention on this ground by referring us to our own reasoning in **Joseph Shirima & Another v. Filbertha Kayombo**, Civil Appeal No. 76 of 2022 (unreported) in which it was underscored that judicial officers should appear to be impartial.

Regarding the sentence, the contention by Mr. Haule is that, when the charges were instituted in court, the 1st appellant was 20 years old. Since the offence was committed four years prior to his arraignment in court, the 1st appellant must have been 16 years of age. He argued that section 26 (2) of the Penal Code prohibits a death penalty to a person under the age of 18 years. This is also consistent with section 119 of the Law of the Child Act, Cap. 13 R.E. 2019 which discourages child imprisonment. In his contention, a death sentence was an illegal sentence in the circumstances of this case. He prayed that the appeal be allowed.

Ms. Makungu's preambular argument was an expression of opposition to the appeal. Regarding the failure to read the substance of exhibits P1, P3, P4 and P7 during committal proceedings, Ms. Makungu's submission was that, failure to read the substance of these exhibits was a flawed indulgence and that the consequence is, as suggested by her counterpart, to expunge them from the record. She was quick to add, however, that with the

postmortem report (exhibit P1) out of the way, there still remains the testimony of PW6 which proved the cause of death of the deceased.

With regard to the age of PW1, the contention by the learned State Attorney is that this was a mere typing error. Regarding identification, Ms. Makungu argued that PW1 testified at pages 52 and 53 of the record of appeal and gave details of his identification of the 1st appellant. She contended that the witness gave details about the distance that he was from the 1st appellant and that the incident occurred at 07:00 hours.

On credibility of the witnesses, Ms. Makungu contended that, based on the testimony of PW4, PW6 and PW7, it was clear that the incident was reported on 13th October, 2013, the date on which PW6 visited the scene of the crime. She also submitted that there is also an oral confession stated by PW2 at page 58 of the record of appeal. The confession was allegedly made voluntarily. Her take is that, such confession was sufficient to base a conviction on. The learned counsel argued that at page 62 of the record of appeal, the defence was given an opportunity to cross examine but that opportunity was spurned. To fortify her position, she referred us to the cases of **Ngasa Sita @ Mabundu v. Republic**, Criminal Appeal No. 254 of 2017, and **Anna Jamaniste Mboya v. Republic**, Criminal Appeal No. 295 of 2018 (both unreported).

On partiality of the trial Judge, Ms. Makungu found nothing irregular in the observations made by the trial Judge, terming the remarks as taking note of demeanor of the witnesses, and that it was rather unfortunate that remarks on the demeanor of the appellants were negative.

Submitting on the sentence, Ms. Makungu was not convinced that the 1st appellant was 20 years at the time of his arraignment in court. This, she argued, is in view of the fact that at page 161 of the record of appeal the 1st appellant testified that he was 32 years of age, in 2022. Overall, Ms. Makungu urged us to dismiss the appeal.

In his brief rejoinder, Mr. Haule reiterated his earlier contention that the residual testimony is so insufficient to ground a conviction against the appellants. He maintained that, PW1's testimony should be cast away because of the difference in the names, arguing that the difference is not a mere typo error as contended by his counterpart. Regarding identification, Mr. Haule's argument is that the extent of tearing of the plastic bag with which the assailants covered their faces is not explained and it cannot be said that it allowed PW1 to identify the assailants. On bias or partiality of the trial Judge, the learned counsel maintained that, from the nature of his comments the Judge was not impartial.

From these contending submissions the broad and singular issue is whether the instant appeal is meritorious. Our disposal of the matter will, as much as possible, follow the pattern followed by learned counsel for the parties, without particular reference to grounds of appeal, save for two additional grounds which were raised in the course of the hearing.

We will begin with the appellants' consternation relating to what is alleged to be failure to read out the substance of the evidence contained in exhibits P1, P2, P3 and P4. Though listed in the list of exhibits the prosecution intended to rely on, their substance was kept in the prosecution's breasts, while keeping the appellants in the dark about what they would contend with.

It is common ground that committal proceedings are regulated by the provisions of sections 243 to 249 of the CPA. Besides other rituals as spelt therein, there is an imperative duty that the committal court is enjoined to discharge. This entails reading and explaining or causing to be read to the accused person the substance of the evidence that is intended to be relied upon by the prosecution. This duty is catered for by section 246 (2) of the CPA.

This mandatory requirement has been emphasized in numerous decisions of this Court. They include the case of **Fabian Edmund** (supra),

which quoted our previous decision in **The DPP v. Sharif Mohamed @Athuman & 6 Others**, Criminal Appeal No. 74 of 2016 (unreported), in which, we held as follows:

> *"Our understanding of the provisions of section 246 (2) of the CPA is that, it is not enough for witness to merely allude to a document in his witness statement, but that the contents of the document must also be made known to the accused person(s). If this is not complied with,* ***the witness cannot later produce that document as an exhibit in court.*** *The issue is not on the authenticity of the document but on non-compliance with the law. We, therefore, agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage."* [Emphasis added]

Gleaning from the record of appeal (pages 21 and 22), it is clear that, whereas the said exhibits were listed as part of the evidence that the prosecution would rely on, the Magistrate who committed the appellants did not read or cause them to be read to the appellants. This means that the appellants were kept oblivious of what the documents contained and, certainly, what to expect from their accusers. No effort was employed, either, to have the said documents admitted as additional evidence under section

289 (1) of the CPA, meaning that all avenues for tendering the documents were closed. An attempt to sneak them into the proceedings is, as amply stated in the cited decisions, a serious travesty that denied the appellants their right to a fair trial, and we need not overstate the consequence of this infraction. It is simply that such exhibits must suffer an exclusion, and we accede to the prayer by Mr. Haule. – see: **Francis Rwiza Rwambo v. Republic**, Criminal Appeal No. 17 of 2019 (unreported). In the result, we expunge the irregularly admitted exhibits from the record

As rightly argued by Mr. Haule, the postmortem examination report (exhibit P1) was one of the casualties of the anomalous conduct of the committal proceedings. The anomaly could not be cured by an uncontested admission during the preliminary hearing, conducted on 5th September, 2018 (see page 35 of the record of appeal). Mr. Haule has expressed his disquiet on what is left of the prosecution case after obliteration of the postmortem examination report. According to him, the prosecution case has been dealt a huge blow that has rendered it unable to support the conviction. This is in view of the fact that, without proving the cause of death of the deceased, the charge crumbles. With profound respect, we do not think that this is a correct position. The settled position is that death may as well be proved by

circumstantial evidence - see: **Ghati Mwita v. Republic**, Criminal Appeal No. 240 of 2011 (unreported).

The foregoing position is a reiteration of the Court's earlier position which was expounded in the case of **Herman Faida v. Republic**, Criminal Appeal No. 479 of 2019 (unreported) where it was observed as hereunder:

> *"...With respect, we are unable to agree with Mr. Matete on this point because, as correctly argued by Ms. Moshi, the cause of death can be proved by other factors apart from medical reports. There are various decisions of this Court which have dealt with this aspect..."*

In the instant appeal PW1 (at pages 51 to 57 of the record of appeal) and PW6 (at pages 82 to 88 of the record of appeal) have adduced evidence that shows that the deceased's death was unnatural, caused by gunshots. It is our considered view that, this factual setting sufficiently quells any fears that Mr. Haule had on the fate of the cause of death of the deceased in the absence of exhibit P1. We take the view that the cause of death was sufficiently proved in this case.

Regarding the aspect of credibility of witnesses, the disquiet by Mr. Haule that has been discounted by Ms. Makungu is that, there are apparent shortfalls in the testimony of PW1. The alleged shortfalls are a credibility issue to him, and he has picked a few examples to demonstrate what he

contended. As we delve into the matter, we wish to restate the trite position, as underscored in **Goodluck Kyando v. Republic** [2006] T.L.R. 363, that a witness is entitled to his credence and deserves to be believed. Thus, in **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2001 (unreported), the Court guided as follows:

> *"Credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of the witness can also be determined in two other ways. One, when assessing the coherence of the testimony of that witness and two, when the testimony of that witness is considered in relation to the evidence of the other witnesses including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court examining the findings of the 1st appellate court."*

See also: **Ali Abdallah Rajab v. Saada Abdallah Rajab & Others** [1994] T.L.R. 132.

Whilst there may be some fits of implausibility in some of what the witnesses testified, it is erroneous, in our considered view, to impute that the witnesses' credibility is wanting. A witness's credibility is not eroded or put on the line merely because his version of facts does not make sense to the adversary, as that is not synonymous with telling lies. We are not

convinced, one bit, that failing to name the suspects at the earliest opportunity, or responding to a question of the assessor instead of stating it during examination in chief constitutes lack of credibility by PW1. We find this contention hollow and are unable to go along with it.

Next in our discussion is the question of sentence imposed on the 1st appellant. The basis for Mr. Haule's contention is the particulars of the accused persons which were instituted in committal court alongside the amended charge sheet in respect of Inquiry No. 40 of 2017. These particulars (at page 4 of the record of appeal) show that the 1st appellant was aged 20 years when the charge sheet was filed in court on 19th February, 2018. In his contention, when the offence was allegedly committed, the 1st appellant was 16 years old, meaning that he was, in all respects, a child who should not have been sentenced to any custodial sentence or, most gravely, as is the case here, to death sentence. Ms. Makungu invited us to glance at page 161 of the record of appeal at which the 1st appellant, then testifying as DW1, stated that he was aged 32 years.

We, on our part, take note of the legal position as it currently obtains with regard to prohibition of death or custodial sentence to a child, and Mr. Haule's postulation on the legal principle cannot be faulted. However, we think his reasoning with respect to the age of the 1st appellant is flawed. The

reason for our position is threefold. **One**, that age of an accused person cannot be proved by particulars appended to the charge sheet. These are not part of the charge sheet, and their accuracy cannot be authenticated. After all, what founded the charges is the information filed in the High Court on 10th April, 2018 (page 25 of the record of appeal), and it did not have such particulars. **Two**, while we know that age of an accused cannot be proved by merely looking at the information that precedes his testimony, the fact that such information was stated by him and has not been contradicted by any other testimony means that this is the only source that can be relied upon. **Three**, there is no testimony on which to rely and hold that the 1st appellant's age fell in the bracket under which the cited provisions operate.

We are emboldened in our position by the trite position which is to the effect that an accused person or defendant bears the evidential burden (burden of evidence) in relation to defences, exceptions, exemptions, excuses, qualifications and justifications raised by him. This burden shifts from one party to another in the course of the proceedings depending on the exigencies of the case. Thus, in **Alicia O. Fernandez, Anthony Joey S. Tan, Reynaldo v. Cesa and Edgar v. Martinez v. People of the Philippines, G.R. No. 249606** (extracted from an article by Atty Eduardo T. Reyes – *http://www.daily guardian.com*), it was persuasively held:

"The burden of evidence is defined as that logical necessity which rests on a party at any particular time during a trial to create a prima facie case in his own favour, or to overthrow one when created against him. It is determined by the progress of the trial, and shifts to one party when the other party has produced sufficient evidence to be entitled as a matter of law to a ruling in his favour...."

It is our settled view that, in the absence of anything to the contrary, what appears at page 161 of the record of appeal remains to be the right age, and we find that the 1st appellant was accorded the right treatment with respect to the choice of the fitting sentence. We thus find Mr. Haule's contention devoid of merit.

Next is the appellants' complaints on the conduct of the proceedings and remarks which allegedly imputed bias and partiality by the trial judge. As we pronounce ourselves on this ground, we need to state, at the very outset that, the requirement of recording demeanor of a witness under section 212 of the CPA operates to trials conducted in the Magistrates' courts. It does not extend to the High Court. Even then, the presiding officer is not under any instruction on how the remarks on demeanor should be recorded. This implies, in our considered view, that even when a Judge of the High Court or a Magistrate with extended jurisdiction conducts trials, he is not

obliged to record demeanor of the witnesses who testify before him and, when he does, there is no guide on how it should be recorded. In such a case, disparities are bound to occur amongst the judicial officers.

In the instant case, the trial Judge borrowed a procedure applicable in subordinate courts and recorded some remarks on the demeanor of the witnesses. His invention, unfortunately, did not end with the witnesses, as he described the appellants' facial expression and the pensive mood that they wore when prosecution witnesses testified in court. In our considered view, the trial Judge did more than even what the practice he borrowed allows. We take the view that, it was a needless indulgence to record demeanor of the appellants when they were not testifying as that was fraught with dangers of misinterpretation as was the case in this matter. We shall come to the consequence of this indulgence in a bit.

With regard to the witnesses, we reiterate our earlier position that need did not arise for the Judge to make any remarks on the witnesses, and that the pick of words and phrases used to describe demeanor of the witnesses was, with respect, a little careless. But, while it may be appreciated that the trial Judge ought to have been a little moderate, the question raised by Mr. Haule and which requires our determination is whether the trial

Judge's act depicts any form of partiality. We will do that by delving a little into the question of impartiality of courts.

Courts and tribunals are under an unfailing duty of ensuring that conduct of proceedings that they preside over does not deviate from the norms. One of such norms is the duty to act impartially and independently. This duty is part of the international law covenants that include The Universal Declaration of Human Rights, 1948 whose Article 10 thereof provides as hereunder:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

Domestically, this requirement is cast in the Constitution of the United Republic of Tanzania through Article 107A (2) (a) which stipulates as follows:

> *"(2) in delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say-*
>
> *(a) impartiality to all without due regard to one's social or economic status."*

To be able to address the contention of partiality as raised by the learned counsel for the appellant, we find it apt to define the term

"impartiality". The publication titled: **Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers**, defines impartiality as follows:

> *".... it implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interest of one of the parties. The view held by the European Court of Human Rights is that the notion of impartiality contains both a subjective and objective element: not only must the tribunal be impartial, in that no member of the tribunal should hold any personal prejudice or bias, but also it must also be impartial from an objective viewpoint, in that it must offer guarantees to exclude any legitimate doubt in this respect."*

Our considered view is that, as we agree that the trial Judge ought to have been a little moderate and measured in his observations, the comments complained of by the appellant had built the impression that the learned Judge was biased. Equally missing, is the material from which an impression may be conveyed to us that guilt of the appellants was a premeditated affair by the Judge. We see nothing than what meets the eye in this respect and, in the result, we find that this ground of appeal is unmeritorious and we reject it out of hand.

The issue of visual identification has taken a significant part of the parties' submissions, and the contention by Mr. Haule is that the appellants were not identified. The divergence by the learned counsel relates to what PW1 testified during trial that, he identified the assailants one of them being the 1st appellant. The trial Judge was convinced that the visual and voice identification that PW1 testified on formed the basis for which conviction of the appellants was to be grounded. This has featured prominently at pages 249 to 251 of the record of appeal. In the trial Judge's wisdom, this testimony positively identified the assailants, the appellants in this case.

The trite law is that evidence of visual identification can be the sole basis for founding a conviction if such evidence is watertight and leaves no possibility of errors. In the case **Waziri Amani v. Republic** [1980] T.L.R. 250, the Court propounded conditions precedent for reliance on the evidence of visual identification to found conviction. The conditions were reiterated in numerous other decisions that came after it. They include **Chacha Jeremiah Murimi v. Republic**, Criminal Appeal No. 551 of 2015 (unreported) in which the Court held as follows:

> *"... To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: how long did the witness have the*

accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them in his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it?"

See also: **Alfredy Kwezi @ Alfonce v. Republic,** Criminal Appeal No. 216 of 2021 (unreported).

The long and short of the quoted excerpts and decisions is that identification that does not have the stated qualities should not be relied on as the basis for conviction. The question we ask ourselves is whether, in the instant matter, the identification was watertight enough to support the conviction against the appellants. The trial Judge was of the view that it did. With respect, we are of the divergent view, and we predicate our position on some of the issues that Mr. Haule raised, and we think the trial Judge ought to have given them a more careful consideration. PW1, the only prosecution witness at the scene testified at page 52 of the record of appeal,

stated that the assailant who fired and shot at the deceased was covered with a torn plastic bag on his face. Then, at page 55 of the record of appeal, the witness is recorded as saying that he could not recognize the assailant i.e. the 2nd appellant, at the scene of the crime and yet he claimed that he knew that he is the person who fired the gunshot. In our view, PW1 appears to suggest that he left the scene of the crime without being sure of the identity of the person who killed the deceased. The witness is silent on when exactly he came to identify him, or how he managed to identify the assailant who was behind his back and had his face covered.

With regard to the 1st appellant, our considered view is that, what is considered to be an identification fell short of the standard enunciated in the cited decisions, precisely because the said witness did not describe him to the next person he saw or even telling the court that. We also find that, though PW1 alleged that he knew the 1st appellant before the incident, he did not say how frequently he met him before, and the time that had elapsed between the date he allegedly saw him at the scene of the crime and the next time he met him. At this point, we agree with Mr. Haule that the trial Judge ought to have acted cautiously and find that it was unsafe to rely on PW1's wavering account on identification of the appellants. We are convinced that our reasoning in **Sprian Mtungilei** (supra) and **Sabasaba**

Enos Joseph (supra) serves to cement our view on the matter. In our considered view, these are shortfalls which were left unattended by the trial court and we consider them to be material. They profoundly blur the veracity of the testimony of identification.

The trial court's decision to give credence to the oral testimony has stirred an outrage to the appellants, and Mr. Haule has cast aspersion on what is considered to be the 1st appellant's confession. The argument is that the said confession is not corroborated, besides lacking in coherence with the testimony of other witnesses.

We need to state that, in law, oral confession of guilt is as good as any other form of confession and is admissible. It can also be solely acted upon as the basis for conviction provided that it carries sufficient weight, and courts exercise great care before they rely on it. Like other forms of confession, its reliance must be preceded by putting the testimony under the test of voluntariness, consistent with section 27 (3) of the Evidence Act – see: **Boniface Mathew Malyango & Another v. Republic**, Criminal Appeal No. 358 of 2018 (unreported). It must also have the quality of confession defined in section 3 (1) (a), (b), (c) and (d) of the Evidence Act, in that it must contain an admission by the maker of the culpable role he played in the offence he is accused of – see: **Emmanuel Lohay and**

Udagene Yalooha v. Republic, Criminal Appeal No. 278 of 2010 (unreported). Contrary to what Mr. Haule contended, the testimony does not require corroboration. This was accentuated in **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (unreported) in which we held that oral confession of a suspect may, by itself found a conviction against the suspect, but only if it is made before or in the presence of reliable witnesses.

In the instant matter, the testimony which is considered to be the oral confession of the 1st appellant is that of PW2, part of which features at page 58 of the record of appeal. It states in part as follows:

> *"...Ngeni who is a young brother of Emma came to me. He asked me: "What have you heard?" I pretended as if I had heard nothing. Then he said: "we have done an incident at the hill". He told me that, "we have killed a person at the hill." He said they were three; him, Mosi Mnaija and his brother called Emma...."*

The trial Judge was convinced that this testimony was worth of belief and he relied on it in finding the appellants guilt (see: page 251 of the record of appeal). Whilst the quoted excerpt sheds some light which may lead to a conclusion that the 1st appellant was involved in a murder incident, we take the view that the statement, call it a confession, is not revealing enough to

amount to an admission under section 3 (1) of the Evidence Act. The alleged confessor appears to be economical with facts on who they killed and whether the person said to be killed is the same person who is said to be the victim of the robbery incident. The 1st appellant did not tell PW2 that the death was a result of the robbery incident that the 1st appellant, his brother and the other elusive assailant allegedly participated. It is not clear, either, if this confession is an admission that laid bare all the ingredients of the offence and the role that the 1st appellant played in the incident. The requirement for such clarity was emphasized in the **Emmanuel Lohay and Udagene Yalooha** (supra), wherein it was highlighted that a confession must:

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

There is also the testimony of PW5 which was also relied upon by Ms. Makungu to fortify the contention that the 1st appellant confessed to the murder incident. In our view, this testimony lacks one key component especially when we know that, it was made before a police officer. It does

not assure us if it was given by a confessor who was a free agent as it was allegedly extracted when he was under restraint. The trial court did not come out clean on this aspect and we take the view that, it was unsafe to rely on such kind of testimony amidst uncertainty on that important aspect.

Overall, we take the view that, since these key requirements are missing in the 1st appellant's alleged confession, they discount the effectiveness and reliability of the oral confession. The position we take is that, the alleged confession did not pinpoint the specific culpable role that the 1st appellant and his alleged accomplices played in the alleged incident. Consequently, we are constrained to hold that, the alleged oral confession has failed the test of a confession and it was inappropriate to rely on it.

Having analyzed the quality of evidence on which the trial Judge based his decision, the next crucial question which carries the bulk of the appellants' consternation is whether the case against them was proved beyond reasonable doubt. Our unflustered answer to this question is in the negative. Our position is premised on the fact that, since conviction of the appellants was based on the testimony of visual identification, oral and written confessions (which included exhibits P3 and P4) all of which has been found to be discrepant, then the prosecution's case was significantly weakened and left limply. Not even the testimony of PW1 which was found

wanting in some respects, or any of the residual testimony can stiffen the prosecution's case. In our firm view, the case for the prosecution was not proved beyond reasonable doubt.

In the upshot, we allow the appeal, quash the convictions and set aside the sentence. We also order that the appellants be immediately set free unless held for some other lawful cause.

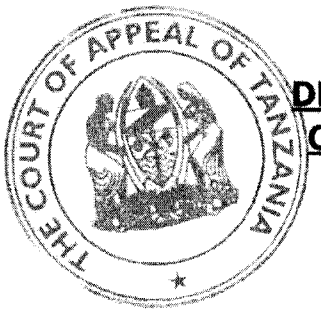
DATED at **DODOMA** this 23rd day of February, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of February, 2024, in the presence of the appellants in person and Ms. Rose W. Ishabakaki, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL