IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: SEHEL, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 550 OF 2019

ANTHONY KAYAGA @ MNIBHI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mdemu, J.)

dated the 11th day of September, 2019
in
Criminal Sessions Case No. 180 of 2016

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JUDGMENT OF THE COURT

22nd & 30th April, 2024

SEHEL, J.A.:

The appellant, Anthony Kayaga @ Mnibhi, was arraigned before the High Court of Tanzania at Musoma (the trial court), with the offence of murder contrary to sections 196 and 197 of the Penal Code.

It was alleged that, on 13th May, 2015, at Changuge village within Bunda District in Mara Region, the appellant murdered, one, Maria d/o Kigombe, a child aged four years. For the purpose of this judgment, we shall refer her as "the child" or "the deceased". Having denied the charge, a full trial ensued whereby the prosecution lined up four witnesses and tendered two documentary exhibits namely; the postmortem report of the deceased, exhibit P1 and the cautioned statement of the appellant, exhibit

P2. On the defence side, the accused person testified under oath but produced no other witnesses. He also did not have any exhibit to tender.

Pili Kaitira (PW1), the grandmother of the deceased, recounted that, on 13th May, 2015, she woke up early in the morning and went to the farm leaving behind her three grandchildren, namely, the deceased, Prisca and Kaitira. She returned home at around 10:00 hrs but none of the grandchildren were at home. She started looking for them. She inquired to the neighbours on the whereabouts of the children. Mama Nyangoko told her that she only saw Prisca and Kaitira. While still searching for the child, PW1 met with the appellant and Mashaka Philipo (PW2). They were returning home from grazing. She asked them as to whether they saw the child. According to PW1, the appellant informed her that he returned her home.

The evidence of PW2 was to the effect that, on 13th May, 2015, he went with the appellant to graze cattle around Changuge mountains. While there, they saw a child seated, alone, on the rock. As the appellant was familiar to the child, PW2 requested him to take the child home and he will look after his cattle. The appellant obliged and left with the child at around 11:00 hrs but belatedly returned to the grazing ground, at around 16:00 hrs.

PW1 raised an alarm and the search for the missing child started but, as the sun was setting down and the child was nowhere to be seen, the search was halted till next day.

Butegi Katinde (PW3) who participated in the search recalled that, on 14th May, 2019, the deceased's body was found near the grazing ground with bruises and marks in the neck and blood in her private parts.

The matter was reported to Bunda Police Post. Police officers including Detective Corporal Frank Nchanila (PW4) went to Changuge village where the homicide took place and found the appellant under restraint and the deceased body was lying between two rocks. The doctor performed an autopsy, and thereafter, the body was taken to her home for burial services.

Post Mortem Examination Report, Exhibit P1, indicates that the body of the deceased had severe injury on vaginal canal and signs of strangulation, and that, the deceased died from strangulation causing failure to breath and rape causing severe injury on genital organs.

The appellant was taken to Bunda Police Station. PW4 recorded the cautioned statement of the appellant which was admitted in evidence as exhibit P2.

At this juncture, we find it instructive to point out that when the cautioned statement was sought to be tendered in evidence, the learned counsel who represented the appellant in the trial court objected that it was taken contrary to the dictates of section 57 (4) of the Criminal Procedure Act (the CPA). Having heard the submissions from the counsel for the parties, the trial court overruled it.

In his sworn evidence, the appellant admitted to have taken the child home but denied to have murdered her. He said that he took her home safe where he found two other children. He warned them to remain at home and left. He returned to the grazing yard and continued with the grazing activity till late in the evening. In the evening, he went to the place where the child got lost and participated in the search.

At the conclusion of the trial, the three assessors who sat with the learned trial Judge unanimously returned a verdict of guilt against the appellant. The learned trial Judge concurred with the assessors and as a result, the appellant was found guilty, convicted and sentenced to suffer death by hanging.

In grounding the conviction against the appellant, the learned trial Judge relied on the circumstantial evidence and the principle that the deceased was last seen alive in the hands of the appellant. The learned trial Judge listed ten strands of circumstantial evidence including that PW2

saw the appellant leaving with the child alive, and that, PW1 did not find the child at home. He also found that the cautioned statement corroborated the prosecution case. He observed that the appellant was not consistent in his evidence as he gave three different explanations on his delayed return to the grazing ground. Therefore, he labelled him as a liar. At the end, he concluded that the appellant failed to offer any plausible explanation regarding circumstances leading to the death of the deceased, as such, there was no any other possible explanation than a verdict of guilt.

Aggrieved, the appellant lodged a memorandum of appeal comprised of the following five grounds:

> *"1. That, the trial court erred in law and fact in convicting the appellant of the offence of murder while there was no eye witness to the killing of the deceased, and that, the circumstantial evidence was not water tight to sustain the conviction.*
>
> *2. That, the trial court erred in law and fact to convict the appellant relying on cautioned statement, exhibit P2, which was illegally obtained and wrongly admitted in evidence.*
>
> *3. That, the evidence of PW1, PW2 and PW3 was weak, incredible and doubtful to warrant a conviction to the appellant.*

4. That, there was no independent evidence to corroborate the allegation that the appellant was the last person to be with the deceased i.e the allegation was on pure suspicion which cannot be taken to implicate the appellant as the one who killed the deceased.

5. That, the prosecution evidence did not prove the case against the appellant beyond reasonable doubt as law requires".

At the hearing of the appeal, Mr. Cosmas Tuthuru, learned advocate, appeared for the appellant, whereas, Ms. Wampumbulya Shani and Mr. Tawabu Yahya, learned State Attorneys, appeared for the respondent/ Republic.

When Mr. Tuthuru took the floor to submit on the appeal, he informed the Court that, he consulted with his client and they agreed to argue the first, third and fifth grounds of appeal together while the second and fourth grounds of appeal would each be argued separate.

Starting with the second ground of appeal, Mr. Tuthuru submitted, the evidence on record shows that the appellant does not know how to read and write, as such, the cautioned statement, exhibit P2, appearing at pages 52 – 55 of the record of appeal ought to have complied with the dictates of section 57 (4) of the CPA read together with section 33 (4) of the Police Force and Auxiliary Services Act (the Police Force Act). He

contended that, looking at exhibit P2, it only indicates that PW4 certified to have read the contents of the statement to the appellant but the said certification does not show whether he asked or permitted the appellant to correct, alter or add anything to the recorded statement. It was his submission that PW4 did not cumulatively comply with each and every requirement stipulated under section 33 (4) (a) (i) (ii) (iii) and (b) of the Police Force Act. To cement his argument that the procedural rights have to be strictly observed not only for the benefit of an accused person but also to ensure justice is done, he referred us to the case of **Twaha s/o Ally v. R** [2010] 2 E.A 446 where the Court reiterated the need of the trial court's proceedings to reflect that an accused person was informed of his rights and the response he has given.

Further, relying on the authority in the case of **Chamuriho Kirenge @ Chamuriho Julias v. The Repulic** (Criminal Appeal No. 597 of 2017) [2022] TZCA 98 (7 March, 2022) which cited the case of **Bulabo Kabelele & Another v. The Republic**, Criminal Appeal No. 224 of 2011 (unreported), the learned counsel for the appellant argued that a police officer who records the cautioned statement of an accused person has a statutory duty to comply fully with the provisions of sections 57 and 58 of the CPA, and that, such failure is fatal as it is not curable under section 169 of the CPA. Therefore, Mr. Tuthuru argued that the learned trial Judge

erred in law in his ruling when he held that the omission was a curable irregularity.

He added that the prosecution bears a burden under section 169 (3) of the CPA to explain the reason why the cautioned statement should be admitted in evidence, and that, in absence of any reasoning, no weight should be attached to the tendered cautioned statement. To fortify his submission, he referred us to the case of **Marwa Rugumba @ Kisiri v. The Republic** (Criminal Appeal No. 225 of 2011) [2013] TZCA 415 (1 August, 2013).

Mr. Tuthuru further contended that the cautioned statement was obtained through torture as testified by the appellant, and that, the fact that PW4 read the investigation file first and thereafter went to interview the appellant supported the allegation of the appellant that the statement was illegally obtained.

At the end, Mr. Tuthuru urged the Court to expunge from the record the cautioned statement, exhibit P2.

Arguing jointly the first, third and fifth grounds of appeal, at the outset, Mr. Tuthuru acknowledged that there was no eye witness on how the child met her death. For that reason, he pointed out that the learned

trial Judge relied on the circumstantial evidence, the last person seen principle and the appellant's cautioned statement to convict the appellant.

On the circumstantial evidence, Mr. Tuthuru contended that the ten strands which the learned trial Judge considered to be pointing finger to the appellant break the connection, thus, dissociating the appellant from the death of the child. **First**, the learned counsel contended that the argument that PW2 saw the deceased seated on the rock while there is no explanation as to who placed her on the rock raise suspicion on the involvement of the appellant. He added that though the appellant was familiar to the deceased but it was PW2 who requested the appellant to take the child home, and that, the appellant did not volunteer to take her home. Therefore, Mr. Tuthuru argued that it was unjust to blame the appellant for returning the child home safe. He went on that, according to the evidence of the appellant found at pages 36 – 37 of the record of appeal, he safely returned the child home where he found two other children and warned them to stay inside.

Secondly, Mr. Tuthuru attacked the evidence of PW1 found at page 23 of the record of appeal when she said that upon returning home, she did not find any of the children at home, and that, mama Nyangoko told her that she saw Kaitira and Prisca. However, Mr. Tuthuru argued, the said mama Nyangoko did not mention the place where she saw the two

children. In that respect, he contended, the evidence of PW1 was doubtful which ought to be resolved in favour of the appellant.

Thirdly, Mr. Tuthuru assailed the learned trial Judge's finding that the appellant was a liar. He contended that there was no evidence in the record suggesting that the appellant was a liar apart from it being raised by the learned State Attorney in the closing submission. He further contended that the appellant gave a justifiable reason why he belatedly returned to the grazing yard. Mr. Tuthuru pointed out that the appellant said he went for lunch and to drink water, which is, a common act by any herdsman. It was his submission that it was wrong for the trial court to treat it as one of the circumstances pointing to the appellant's guilt.

According to Mr. Tuthuru, on the whole, the circumstantial evidence considered by the learned trial Judge do not irresistibly leads to the conclusion that the appellant killed the deceased.

On the fourth ground of appeal, Mr. Tuthuru vehemently submitted that, given that there is some lacking information on the circumstantial evidence, the doctrine of the last person seen with the deceased was not proved beyond reasonable doubt by the respondent.

With that submission, Mr. Tuthuru prayed to the Court to quash the conviction, set aside the sentence and release the appellant from prison.

It was Ms. Shani who made a reply submission on behalf of the respondent. At the outset, Ms. Shani expressed her stance that she was not supporting the appeal. Thereafter, she responded to the appeal in the manner submitted by Mr. Tuthuru.

Responding to the second ground of appeal, Ms. Shani argued that the appellant's cautioned statement was recorded in compliance with the dictates of the provisions of section 57 (4) of the CPA. She took us to page 55 of the record of appeal where both the appellant and PW4 certified at the end of the cautioned statement. She pointed out that the certification made by the appellant is crystal clear that the contents of the statement were read over to him, and that, he was satisfied with its contents as correct and depicts nothing but the truth. The learned State Attorney further argued that the act of the appellant to place his thumb print meant that he acknowledged what was read over to him by the recording police officer. Ms. Shani added that even the police officer who recorded the statement verified in the cautioned statement that he complied with the provisions of section 57 (1) (2) (3) and (4) of the CPA. She went on that, if there was anything which the appellant wanted to be corrected or added it would have been reflected in the statement but it appears, from the record of appeal, the appellant was satisfied with what was recorded by PW4.

Further, Ms. Shani argued that the issue of torture was an afterthought as the appellant raised it in his defence evidence and not when the cautioned statement was sought to be tendered in evidence. To support her submission, she referred us to the case of the **Director of the Public Prosecutions v. Nuru Mohamed Gulamrasul** [1998] T.L.R. 82. She, therefore, urged the Court to dismiss this ground of appeal.

With regard to the circumstantial evidence, the learned State Attorney supported the findings of the trial court. She conceded that there was no eye witness but argued that the circumstantial evidence which the prosecution side relied on irresistibly lead to establishing the guilty of the appellant beyond reasonable doubt, and that, there were no any other co-existing circumstances which would have weaken or destroyed the inference of guilt as submitted by Mr. Tuthuru. Ms. Shani went on to point out the circumstances leading to the conviction of the appellant, that, on 13th May, 2015, while PW2 was at the grazing ground with the appellant saw a child seated on the rock; the appellant happened to know the child, thus, PW2 requested him to take her home; the appellant admitted in his defence to have taken the child home but, according to the evidence of PW1, the child was not at home. PW1 started to look for her, and that, on the way, she met PW2 and the appellant. PW1 asked them whether they saw the deceased and the appellant told her that he took her home but

she was not at home. To the contrary, her body was found lying in the mountains on the next day. All these inculpatory facts, she argued, are incompatible with the innocence of the appellant.

In addition, on the lies of the appellant, Ms. Shani referred us to page 37 of the record of appeal where the appellant gave three different explanations why he delayed to return to the grazing ground. She argued that lies of the appellant were drawn from the evidence and not from the final submissions made by the learned State Attorney. Therefore, she urged this Court to find that lies told by the appellant corroborated the prosecution case. To support her prayer, she cited to us the case of **Mathias Bundala v. The Republic** [2007] T.L.R. 53.

Ms. Shani acknowledged that mama Nyangoko did not mention the place where she saw the two children but such failure, she argued, did not affect the evidence of PW1 that the deceased was not at home. Further, she argued, PW1 was not cross-examined on that fact which means that the appellant accepted the truth of the statement. To cement her position, she referred us to our earlier decision in the case of **Mathias Bundala v. The Republic** (supra).

Lastly, Ms. Shani responded to the fourth ground of appeal that the deceased was seen alive with the appellant by PW2, Ms. Shani argued that the appellant claimed to have taken the child home but PW1 did not find

her at home. On that basis, the learned State Attorney invited us to dismiss the appeal for lack of merit.

Mr. Tuthuru briefly rejoined that the cautioned statement was objected when the prosecution witness wanted to tender it in evidence. He argued that since it was objected then its contents were also objected. Regarding the last seen principle, he reiterated that the appellant clearly stated that he returned the child home where he also found two children and warned them to stay home.

Having duly considered the submissions of both parties and reviewed the record, we wish first to state that this being a first appeal, the Court is entitled to re-evaluate and reconsider the evidence tendered before the trial court, and if appropriate, arrive at its own decision. We shall do so in this appeal. In determining this appeal, we shall adopt the sequency of the submissions made by the learned counsel for the parties.

Starting with the second ground of appeal, the appellant complained that the cautioned statement was taken in contravention of section 57 (4) of the CPA read together with section 33 (3) of the Police Force Act. Section 57 (4) of the CPA provides:

> *"57. (4) Where the person who is interviewed by a police officer is unable to read the record of the interview or refuses to read, or appears to the*

police officer not to read the record when it is shown to him in accordance with subsection (3) the police officer shall-

(a) read the record to him, or cause the record to be read to him;

(b) ask him whether he would like to correct or add anything to the record;

(c) permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the police officer to make;

(d) ask him to sign the certificate at the end of the record; and

(e) certify under his hand, at the end of the record, what he has done in pursuance of this subsection."

The wording of the above provision of the law is *pari materia* with section 33 (3) of the Police Force Act. From the above provision, after the interviewing officer has finished to record the statement, he is mandatorily required to read it over to the appellant. In the case of **Chamuriho Kirenge@ Chamuriho Julias v. The Republic** (supra), we stated the reason behind such requirement is to verify the correctness of the recorded statement and to avoid imputing words on the appellant's mouth.

In this appeal, it is on record that the appellant does not know how to read and write, thus, the policer officer, PW4 who recorded the appellant's cautioned statement was mandatorily required to read it over to the appellant. Mr. Tuthuru does not have any qualm on the fact that the cautioned statement was read over to the appellant. His complaint was that the record does not indicate whether the appellant was asked or permitted to correct, alter or add anything to the recorded cautioned statement. He argued that section 57 (4) of the CPA read together with section 33 (3) of the Police Force Act was not fully complied with.

Having carefully revisited the record of appeal, we gathered from page 55 of the record that, both the appellant and PW4 verified at the end of the cautioned statement. The appellant's verification reads:

> *"Mimi Antony s/o Kayaga nathibitisha kuwa maelezo yangu niliyotoa ni ya kweli na ni sahihi kama nilivyoyatoa na nathibitisha kuwa nimesomewa na kuridhika kuwa ni sahihi.*
>
> *R.T.P."*

The above literally translates that, I, Antony s/o Kayaga, do hereby verify that my recorded statement is correct and reflects nothing but the truth. I further verify that the same was read over to me and satisfied to be correct. The record further shows that the appellant placed his right-hand thumb print to seal what he verified. This means that the appellant

was satisfied with what was read over to him by PW4 and accepted the contents to be correct which did not require any correction or further alteration or addition. As rightly submitted by the learned State Attorney, if the appellant made any correction, alteration or addition it would have been reflected in the verification clause. Our position is further fortified with the verification made by PW4 that he recorded the cautioned statement of the appellant under section 57 (1) (2) (3) and (4) of the CPA, and that, he read over the said statement to the appellant who does not know how to read and write. Accordingly, we are satisfied that PW4 fully complied with the dictates of section 57 (4) of the CPA read together with section 33 (3) of the Police Force Act in recording the cautioned statement of the appellant.

On this ground of appeal, Mr. Tuthuru also complained that the cautioned statement was procured after the appellant was tortured by PW4. We are alive with the position of the law that the trial court has a duty to consider all the surrounding circumstances leading to the admission of the cautioned statement including whether the law was complied with in extracting the said confessional statement and, especially, where an accused person claims that he was tortured and is backed by visible marks of injuries. We held so in the case of **Steven s/o**

Jason & 2 Others v. The Republic, Criminal Appeal No. 79 of 1999 (unreported) that:

> *"... it is common ground that the admissibility of evidence during the trial is one thing and the weight to be attached to it is a different matter. In this case, it is clear from the record that after closing the prosecution case, long after the caution statement had been admitted as exhibit P4, the first appellant alleged in his defence that he made the caution statement under torture .... it was [therefore] incumbent upon the learned trial Judge to be more cautious in the evaluation and consideration of the cautioned statement."*

In the present appeal, we observed that, in its judgment, the trial court considered that the appellant was under restraint of PW3 and others before PW4 took him to Bunda Police Station. The appellant was questioned by PW4 few minutes after his arrival at the police station. The evidence in chief of the appellant and the contents of exhibit P2 corroborated the prosecution evidence of PW1, PW2 and PW3. Further, the trial court referred to the evidence of PW4 and found it credible that PW4 fully informed the appellant his rights before interviewing him, and that, the appellant had no bruises. It is for these reasons; the learned trial Judge declined the invitation made by the learned counsel for the caution

statement to be expunged. We, like the trial court, do not find merit to this complaint. Accordingly, we find that the trial court rightly rejected it.

In addition, we do not subscribe to the submission of Mr. Tuthuru that PW4 fabricated the story. We say so because, the appellant was interviewed immediately after his arrival at Bunda police station, therefore, we strongly believe that the file had little information to enable PW4 to extract any story for fabrication.

Regarding the ruling of the learned trial Judge, having revisited the record of appeal, we observed that the irregularity discussed by the learned trial Judge was not in respect of non-compliance with section 57 (4) of the CPA rather on the mixing up of sections 57 and 58 of the CPA which he rightly ruled that such irregularity is curable. In the end, we find that the second ground of appeal is meritless. We dismiss it.

This brings us to the first, third and fifth grounds of appeal that the strands of circumstances did not lead to the guilt of the appellant. The law relating to circumstantial evidence has long been settled in our jurisdiction that, in order for the court to found a conviction on circumstantial evidence, it must be satisfied that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of any other reasonable hypothesis than that of his guilt -see: the cases of **Ilanda Kisongo v. R** (1960) E.A. 780 at page 782; **Abdul Mganyizi v. The**

Republic (1980) T.L.R. 263; **John Magula Ndongo v. The Republic** (Criminal Appeal No. 18 of 2004) [2005] TZCA 41 (30 August, 2005) and **Mathias Bundala v. The Republic** (supra).

It is in that respect, in the case of **R v Exall** (1866) 4 F & F 922 at 929, 176 ER 850 at 853, Pollock CB compared the circumstantial evidence with a rope comprised of several cords. He said:

> *"... One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of."*

In this appeal, the trial court referred to ten strands of circumstantial evidence which it held that they linked the appellant with the death of the child. Mr. Tuthuru attacked some of the strands alleging that they raise suspicion. With due respect to his submission, as rightly submitted by Ms. Shani that the appellant acknowledged in his defence evidence that he left with the child to take her home. The appellant's evidence corroborated the evidence of PW2 that after seeing the child alone in the mountains, he

asked him to take the child home which he did. The appellant claimed that he returned the child home where he found two other children at home. However, looking at the prosecution evidence, we find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of any other reasonable hypothesis than that of guilty. According to the evidence of PW2, the appellant left with the child at around 11:00 hrs and he belatedly returned to the grazing yard. When the appellant was cross-examined as to why he was late, he gave three different accounts. **First**, he claimed that he passed via another place to drink water. **Secondly**, he went to eat. **Thirdly**, he claimed that his leg was injured. We further gather from the record that, at first instance, the appellant said he went straight to where PW2 was. We, thus, find that the issue of the appellant's lies was derived from the evidence and not from the final submission made by the respondent as claimed by Mr. Tuthuru. Furthermore, it was the evidence of PW1 that when she returned home at around 10:00 hrs nobody was at home.

On the argument that there was no mention of the place where mama Nyangoko saw the two children thus there is doubt on the prosecution case, we do not wish to say much on this meritless complaint. We entirely agree with Ms. Shani that the fact that mama Nyangoko did not mention the place where she saw the two children does not by itself

absolve the fact that the appellant was last seen with the child alive who was found dead on the following day.

Therefore, taking into account these strands of evidence coupled with the fact that the appellant gave three different explanations on his belated return to the grazing yard, we are satisfied that the strands create a strong conclusion of the appellant's guilt. Accordingly, we find that the first, third and fifth grounds of appeal have no merit and we dismiss them.

Turning to the fourth ground of appeal, we agree with the counsel for the parties that the convictions of the appellant was also anchored on the principle of the last person to be seen with the deceased alive. According to the evidence of PW2, the appellant left around 11:00 hrs with the deceased in order to take her home. Further, the appellant admitted in his defence evidence that he was the one who took the child home but he claimed that he safely returned her home and found two other children at home. However, if one weighs the prosecution evidence with the appellant's defence, will find that there is no plausible explanation given by him. It is trite law that if an accused person is alleged to have been the last person to be seen with the deceased, in absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. Besides, the evidence of PW2 who saw the appellant with the deceased alive is corroborated with his defence

evidence. In that respect, we are satisfied that the doctrine was rightly applied and we see no reason to disturb the finding of the trial court that it was the appellant who killed the deceased with the requisite malice aforethought. Accordingly, this ground of appeal lacks merit and we dismiss it.

In the end, we find that the appeal was lodged without any merit. Accordingly, we dismiss it in its entirety.

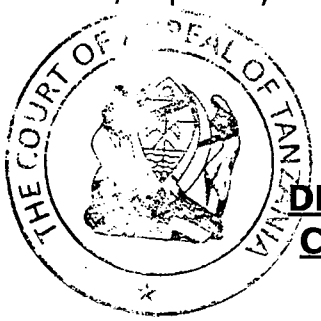
DATED at **MUSOMA** this 29th day of April, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of April, 2024 in the presence of the Appellant in person and Mr. Yese Temba, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL