IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: KEREFU, J.A., RUMANYIKA, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 555 OF 2021

LUCAS DAUDI WAGE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Dyansobera, J.)

dated the 23rd day of September, 2021
in
Criminal Sessions Case No. 22 of 2020

JUDGMENT OF THE COURT

29th May & 5th June, 2024

KEREFU, J.A.:

The appellant, LUCAS DAUDI WAGE was charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 in the High Court of Tanzania at Mtwara in Criminal Sessions Case No. 22 of 2020. It was alleged that, on 24th May, 2019 about 13:00 hours at Mkalapa Bondeni Village within Masasi District in Mtwara Region, the appellant murdered one David Dominick (the deceased). The appellant pleaded not guilty to the charge. However, after a full trial, he was convicted and sentenced to suffer death by hanging.

Before embarking on the merits or demerits of the appeal, we find it apposite, albeit briefly, to give sequence of events leading to the arraignment and conviction of the appellant as obtained from the record of appeal. That, at the material time, Augusta Luis Mwambe (PW2) and her husband were residents of Mkalapa Village. Apart from being employed, PW2 was also an entrepreneur who owned a motorcycle make SanLG with Registration No. MC 226 BZJ and Registration Card No. 780731 (exhibits P8 and P1, respectively) for commercial purposes. Initially, PW2 handed over the said motorcycle to the appellant, who was then, a commercial motorcyclist (commonly known as *bodaboda*), on agreed terms that, he would remit to her, a sum of TZS 40,000.00 every week. It was the testimony of PW2 that, things did not go as planned because, the appellant failed to honour the agreed contractual terms. Thus, the motorcycle was taken away from him and handed over to the deceased for the same business. According to PW2, the deceased's performance, on her *bodaboda* business, was better compared to the appellant.

On 22nd May, 2019 around 22:00 hours, while PW2 was on her normal business routine, she called the mobile phone of the deceased but it was not reachable. On the following day, her husband informed her that the whereabouts of the deceased was unknown, and he was

being traced. On 23rd May, 2019, PW2 engaged motorcyclists of that area to trace the deceased but, in vain. PW2 stated further that, on 24th May, 2019 her husband informed her that the deceased was found dead and the motorcycle was found buried inside the appellant's house.

Joseph Severine Chilala (PW1), the deceased's grandfather supported the narration by PW2 as he confirmed that his grandson, the deceased, was a motorcyclist and he was engaged by PW2 on the *bodaboda* business. PW1 also testified that he was informed about the missing of his grandson and recalled that, he last saw him on 18th May, 2019.

The news regarding the missing of the deceased was reported to Hadija Dadi (PW6), the Village Executive Officer, who communicated the said information to the villagers and also reported the matter to INSP. David Mwangawa (PW8), the then OCS at Ndanda Police Station. PW8 also ordered the militia and the villagers to trace the deceased.

While the deceased was being traced, PW8 was informed by Stella Caspar Chilala (PW3) that, the deceased was last seen on 22nd May, 2019 at around 20:00 hours standing together with the appellant. Thus, the appellant was arrested and upon interrogation by PW8, he admitted that he was with the deceased on that night as he hired him to ferry him

to his lover, but they parted ways after the said lover declined to go out in that night. PW8 suspected the appellant as, he did not disclose the name of the said lover and when asked to avail her mobile number, he declined, saying that he did not save it.

PW3 went on to state that, on that night of 22nd May, 2019, when she last saw the appellant and the deceased standing together, she was on her way to watch video show at Suma with Joyce Charles, the daughter of her brother. That, the appellant was playing with his mobile phone while the deceased was standing leaning against a motorcycle and they were facing each other. PW3, greeted them. It was her further testimony that, she managed to recognize them by their voices as they were not strangers to her because, she lived with them in the same village from her childhood for about nineteen years. PW3 also added that, she managed to identify them through the aid of a light from the appellant's mobile phone and the moonlight. Then, on 23rd May, 2019 at 09:00 hours, PW3 was informed by her brother that the deceased was missing, and he was being traced. PW3 told her brother that she saw the appellant with the deceased on the previous day.

Fadhili Abdalla Bakari (PW7), the appellant's neighbour, testified that, on 22nd May, 2019, at night, the appellant went to his house and

borrowed a spade which he gave him and the appellant brought it back in the morning of the following day when it was with wet soil. The spade and the certificate of seizure were admitted in evidence as exhibits P5 and P6.

John Benedict (PW4), was among the people who participated in the exercise of tracing the deceased. PW4 stated that, the efforts of tracing the deceased could not bear fruits until on 24th May, 2019, when they came across a farm which was not used for many years. In that farm, they saw a path which was cleared and they decided to follow it. Suddenly, they found a hump of soil with a rubber band hanging upwards. Having suspected it, they phoned PW6, who went there and informed PW8 about the hump of soil. PW8 told PW6 to request the people around to dig up the area and if they find a dead body they should stop and wait for the police. The area was dug in the presence of PW1 and found a dead body of the deceased. Instantly, PW6 informed PW8 who came to the scene together with Dr. Onesmo Augustino. The dead body was exhumed and found that the neck of the deceased was tightened around by a rubber strap and a wire and his eyes were perforated. An autopsy on the deceased's body was conducted and concluded that the cause of his death was strangulation. A post mortem report to that effect was admitted in evidence as exhibit P4.

On 9th June, 2019 at 11:00 hours, PW6 found a piece of paper inserted inside her office showing that it was written by one Xaver Mteu who revealed to have been assigned to take the motorcycle to the appellant's house. That, the said motorcycle was buried inside the appellant's room. PW6 informed PW8 on the discovery of that note. Having received that information, PW8 recalled that, during the interrogation, the appellant mentioned Xaver Mteu to be his accomplice. Thus, PW8, in a company of DC Hassan, Mustapha, PW6 and the appellant, went to the appellant's house and found it locked with a latch. They searched inside the appellant's house and found a pit under the bed in one of the rooms. The bed was removed and they found the motorcycle buried in the said pit and its steering bars had been removed. The motorcycle was identified to be the one used by the deceased before he went missing. The motorcycle and a certificate of seizure together with the certificate acknowledging the said seizure were prepared by PW8 and signed by the appellant, Anord Alberto, PW6 and PW8 himself. The said certificates were admitted in evidence as exhibit P7 collectively. A piece of paper found inside PW6's office was also admitted as exhibit P3.

No. E. 8206 D/CPL Sangwa (PW5) and No. F. 8723 Detective Mustapha (PW9), testified that they were also involved in the

investigation of the murder incident. Specifically, PW5 stated that he was assigned to draw a sketch map of the scene of crime (exhibit P2) and PW9 interrogated the appellant and recorded his cautioned statement (exhibit P10). In the said statement, the appellant confessed to have murdered the deceased while assisted by his friend Xaver Mteu.

In his defence, although, he admitted to know the deceased as a *bodaboda* rider and a village mate, and that, previously he was engaged by PW2 in her *bodaboda* business on the same motorcycle which was used by the deceased, the appellant denied any involvement in the alleged offence. He stated that he was arrested on 23rd May, 2019 in connection with the alleged offence and on the same date a search was conducted in his house but nothing was retrieved. He contended that, on 9th June 2019, he was not involved in the search which was conducted inside his house when the motorcycle was retrieved. According to him, it was the said Xavier Mateu who knew the person who was responsible with the murder of the deceased. He however, admitted to have borrowed the spade from PW7, his neighbour on the night of 22nd May, 2019 but he said he used it to block the ditch in the foundation of his house as it had rained. The appellant also, apart from admitting that he knew PW3 as his lover and a village mate since their childhood, he denied to have been seen by her on 22nd May, 2019 with

the deceased. He contended that PW3 gave an untrue story before the trial court due to the existing grudges between them after he dumped her. He thus repudiated his cautioned statement alleging that he was tortured and forced to sign it.

At the conclusion of the trial, the three assessors who sat with the learned trial Judge unanimously returned a verdict of guilty against the appellant. The learned trial Judge, by invoking the doctrine of recent possession and the principle of the last person to be seen with the deceased together with the appellant's cautioned statement, concurred with the assessors. Thus, the learned trial Judge found that the prosecution case was proved beyond reasonable doubt and as a result the appellant was convicted and sentenced as indicated above.

Aggrieved, the appellant has come to this Court challenging the High Court's finding, conviction and sentence. In the memorandum of appeal, he has raised three grounds of complaint; **one**, the prosecution case was not proved to the required standard; **two**, the appellant's cautioned statement was unprocedurally admitted in evidence; and **three**, the appellant's visual identification was not watertight.

At the hearing of the appeal, the appellant was represented by Messrs. Rainery Norbert Songea and Alex Peter Msalenge, learned

counsel. At the outset, Mr. Msalenge prayed for and obtained leave of the Court to argue the following additional ground:

> *"That, the learned trial Judge erred in law to rely on the appellant's cautioned statement which was not part of the committal proceedings contrary to the requirement of section 246 (1) and (2) of the Criminal Procedure Act, Cap. 20 of the revised laws."*

He then intimated that he would start to argue the above additional ground which touches on the procedural irregularity followed by the grounds in the memorandum of appeal.

On the adversary side, the respondent Republic was represented by Mr. Credo Rugaju and Ms. Faraja George, both learned Senior State Attorneys but it was Ms. George who addressed us first by stating categorically that the respondent Republic is opposing the appeal. We shall therefore determine the grounds of appeal, in the same manner proposed above and the related grounds will be determined conjointly.

However, before doing so, it is crucial to state that, this being the first appeal, it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own

conclusion of fact - see **D.R. Pandya v. Republic** [1957] EA 336 and **Demeritus John @ Kajuli & 3 Others v. Republic,** Criminal Appeal No. 155 of 2013 (unreported).

Starting with the additional ground, Mr. Msalenge argued that, the appellant's cautioned statement (exhibit P10) was improperly acted upon by the learned trial Judge as there was non-compliance with the provisions of section 246 (1) and (2) of the Criminal Procedure Act, Cap. 20 (the CPA) which stipulates clearly that, the information and/or the evidence of the intended witnesses together with documentary exhibits which the Director of Public Prosecutions (the DPP) intends to rely upon during the trial, should be read out and explained to the accused person during committal proceedings. To amplify his argument, he referred us to pages 21 to 22 of the record of appeal and pointed out that, the committal proceedings, in respect of this appeal, were conducted on 18th May, 2020 where the information, statements of witnesses and documents intended to be relied upon by the DPP were read over and explained to the appellant but exhibit P10 was not among the list of the intended documents and as such, was not read over and explained to the appellant prior to the trial. On that omission, the learned counsel urged us to expunge exhibit P10 from the record. It was his further argument that, after expunging exhibit P10 from the record, the

remaining evidence would not be sufficient to ground the appellant's conviction.

Responding to the additional ground, Ms. George, readily conceded that exhibit P10 was un-procedurally admitted in evidence as it was not part of the committal proceedings and its' contents were not read out to the appellant. She thus also urged us to expunge exhibit P10 from the record. She was however quick to point out that, even after expunging the said exhibit from the record, the remaining evidence is still sufficient to sustain the appellant's conviction.

Having closely considered the parties' submissions on the additional ground and examined the record of appeal in respect of exhibit P10, we agree with them that the same was improperly admitted in evidence as, indeed, the record of appeal bears it out at page 22 that exhibit P10 was not part of the committal proceedings contrary to the provisions of section 246 (3) and (4) of the CPA. We thus outrightly discount it and find the additional ground together with the second ground in the memorandum of appeal meritorious.

Having discounted exhibit P10 from the record, the next question is whether the remaining evidence on record is sufficient to mount the

appellant's conviction as argued by Ms. George. This takes us to the remaining grounds.

On the third ground, Mr. Msalenge argued that the visual identification of the appellant at the scene of crime, which was relied upon by the trial court to convict him was not watertight to eliminate the possibility of any mistaken identity. He argued that, although, PW3, the only prosecution's eye witness at the scene testified that she managed to identify the appellant through the aid of the light from the appellant's mobile phone and moonlight, she did not explain the intensity of that light, the size of the area illuminated and the distance at which she observed him. He referred us to page 41 of the record of appeal and argued that, PW3, apart from stating that the appellant was in a black trouser, she did not offer adequate description of him. He contended further that, although, at page 40 of the same record, PW3 testified that she recognized the appellant and the deceased by their voices, the same is the weakest and most unreliable kind of evidence as there is always a possibility that a person may imitate another person's voice. As such, Mr. Msalenge implored us to find that PW3 was incredible and unreliable witness. He added that, since the incident happened at night under unfavorable conditions, all conditions of visual identification ought to have been met. To buttress his proposition, he cited the cases of **Waziri**

Amani v. Republic [1980] TLR 250; **Didas Siria v Republic,** Criminal Appeal No. 20 of 1979 (unreported) and **Muganyizi Peter Michael & 3 Others v. Republic,** Criminal Appeal No. 144 of 2020 [2022] TZCA 499: [9 August 2022: TanzLII]. He then urged us to find the third ground of appeal with merit.

In her response on the third ground, Ms. George challenged the submission of her learned friend by referring us to pages 39 to 42 of the record of appeal where PW3 testified that she recognized the appellant visually and by voice because she knew him very well prior to the incident, as they lived together in the same village from their childhood for about nineteen years. Ms. George added that, even the appellant himself at pages 107 to 108 of the same record, he admitted to those facts as he also testified that he knew PW3 from her childhood as they were village mate and at some point, PW3 was his lover, but later, he dumped her. It was therefore the strong argument by Ms. George that, in the circumstances, no way, PW3 would have made a mistaken identity of the appellant as suggested by Mr. Msalenge. She insisted that, since PW3 and the appellant were familiar to each other prior to the incident and taking into account that at the scene there was a light from the phone and moonlight and the distance between them were only five

paces, there could be no room for mistaken identity as the appellant was positively recognized by PW3.

On the claim that PW3 was not credible and reliable witness, Ms. George referred us to page 40 of the record of appeal and argued that PW3 was credible witness as, immediately upon being informed by her brother that the deceased went missing, she mentioned the appellant to her brother, PW2's family and PW8 that, the appellant was the last person she saw together with the deceased. To support her argument, she cited the case of **Chacha Jeremiah Murimi & 3 Others v Republic**, Criminal Appeal No. 551 of 2015 [2019] TZCA 52: [4 April 2019: TanzLII] and urged us to find that the third ground is devoid of merit.

Having heard the contending arguments by the learned counsel for the parties and our re-evaluation of the evidence on record, we find that this is a straight forward issue as in their evidence, both, PW3 and the appellant clearly indicated that they knew each other for such a long time prior to the incident. For instance, in her evidence found at pages 39 to 42 of the record of appeal, PW3 testified that:

> *"On 22.5.2019 at 2000hrs, I was at home going to Suma at a video show. Before arriving there, at water tap and water tank, I and the child of*

my brother drew near to drink some water. ***We met Lucas and David standing together. Lucas was playing with a cell phone; David was on motorcycle. I knew the voice*** *but the light from the cell phone also assisted me in identifying David. We were facing each other;* ***both are residents of Mkalapa and we were born there.*** *We proceeded with our journey... We did not see them again. On 23.5.2019 at 0900hrs* ***my brother informed me that David was missing, but I said that I had seen David with Lucas the previous day...I knew their voices all of them as we were born there and have been with them for nineteen years."*** *(Emphasis added).*

On his part, the appellant, at page 108 of the same record, testified that, *"PW3 was my former love partner and may be after she was displeased when I forsook her and that is why she decided to testify against me..."* Again, and upon being cross examined by Mr. Ndunguru, the appellant testified that, *"I reside at Mkalapa Village. The same applies to PW3. She has been there from her childhood."*

From the above extracts, we find no difficult to agree with the submission advanced by Ms. George that there was no dispute that the appellant and PW3 were familiar to each other prior to the incident as

they lived together in the same village from their childhood. The appellant himself admitted to those facts and added that, at some point PW3 was his lover but later, he dumped her. In **Nicholaus James Urio v. Republic,** Criminal Appeal No. 244 of 2010 [2012] TZCA 101: [7 September 2012: TanzLII], the Court quoted with approval the decision of the Court of Appeal of Kenya in **Kenga Chea Thoya v. Republic,** Criminal Appeal No. 375 of 2006 (unreported) where it was stated that:

> *"On our own evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by witness PW1 who knew him. This was clearly a case of recognition rather than identification. It has been observed severally by this Court that recognition is more satisfactory, more assuring, and more reliable than identification of a stranger."*

We made corresponding remarks in **Athumani Hamis @ Athuman v. Republic,** Criminal Appeal No. 288 of 2009 (unreported) and **Masamba Musiba @ Musiba Masai Masamba v. Republic,** Criminal Appeal No. 138 of 2019 [2021] TZCA 270: [28 June 2021: TanzLII].

Similarly, in the case at hand, in view of the evidence of PW3 which was corroborated by the appellant himself, we are settled that,

this is a clear case of recognition rather than identification as both, PW3 and the appellant knew each other very well prior to the incident. This fact is further cemented by the fact that, PW3 mentioned the appellant to her brother, PW2 and PW8, as the last person to be seen with the deceased, immediately, upon being aware that the deceased went missing. We therefore agree with Ms. George that, the act of mentioning the appellant at the earliest opportunity, adds credence to the reliability and assurance of the PW3's evidence.

We are however mindful of the fact that, when challenging the visual identification of the appellant, Mr. Msalenge relied on our previous decisions in **Didas Siria** (supra) and **Muganyizi Peter Michael & 3 Others** (supra), which reiterated the principle on the quality of the evidence of visual identification required to ground an accused person's conviction. We agree with him on that principle. However, and with profound respect, we are unable to go along with his argument that the appellant's visual identification was not watertight. Having made our finding that, the appellant was positively recognized by PW3 at the scene, we see no reason to fault the learned trial Judge on that aspect. We are increasingly of the view that, even the cases he cited on this matter are distinguishable with the facts of this appeal. As such, we find the third ground of appeal devoid of merit.

On the last ground, Mr. Msalenge argued that the prosecution's case against the appellant was not proved to the required standard as the evidence by the prosecution witnesses was tainted with contradictions and inconsistencies. To clarify, he referred us to page 52 of the record of appeal where PW6 stated that the search at the appellant's house was conducted on 9th June, 2017 and they found the house had no padlock, while PW8 at page 63 of the same record said the search was conducted on 9th June, 2019 and they found the appellant house locked (*imefungwa na Komeo*).

In addition, Mr. Msalenge referred us to page 62 of the record of appeal where PW8 stated that he was informed by PW7 that when the appellant went to his house to pick the spade he went with the motorcycle, while PW7, in his evidence, did not mention that fact. He contended that, there was no scientific examination of exhibit P5 to prove that, the soil found on it was the same soil found at the hump of soil where the deceased's body was exhumed. According to him, the pointed-out contradictions raised doubts in the prosecution case which should have been determined in favour of the appellant. He thus implored us to find that, PW6, PW7 and PW8 were incredible and unreliable witnesses. To support his proposition, he cited the case of

Toyidoto Kosima v. Republic, Criminal Appeal No. 525 of 2021 [2023] TZCA 17305: [5 June 2023: TanzLII].

As such, Mr. Msalenge faulted the learned trial Judge to convict the appellant based on the evidence of PW6 and exhibit P3 as he argued that the appellant was not mentioned in that exhibit. He contended that, since the appellant was under restraint since 23rd May, 2019 and his house was not locked, anyone could have used that opportunity to hide the deceased's motorcycle in the appellant's room to implicate him with the murder case. It was his argument that, the person who wrote exhibit P3, should be in a position to know the culprit of the murder of the deceased. Based on his submission, he urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and set him at liberty.

In response, Ms. George insisted that, the prosecution case was proved beyond reasonable doubt through the evidence of PW2 who narrated on how she engaged the appellant and the deceased, at different intervals in her *bodaboda* business and how the deceased went missing. The evidence of PW2 was corroborated by PW1 PW4, PW6, PW7, PW8 who clearly narrated what transpired and how the appellant was connected with the murder incident. That, the evidence of PW3

proved that the appellant was the last person to be seen with the deceased on 22nd May, 2019. That, the evidence of PW3 was substantiated by the fact that the deceased's body was found buried in a hump of soil and the motorcycle was found buried inside the appellant's house. It was her contention that, since the appellant was the last person to be seen with the deceased and he failed to give a plausible explanation on that aspect, he was responsible with the death of his friend.

As for the alleged contradictions in the evidence of PW6, PW7 and PW8 on the date when the search to the appellant's house was conducted, Ms. George argued that there is no any contradiction as all witnesses testified that the search was conducted on 6th June, 2019 and they found the appellant's house locked with a latch and not with a padlock. She however, added that even if there are contradictions, the same are minor and do not go to the root of the matter. She thus urged us to find that PW1, PW2, PW3, PW4, PW6, PW7 and PW8 were credible and reliable witnesses as they gave a detailed account which proved the case against the appellant to the required standard. Finally, and based on her submissions, she urged us to find the appellant's appeal unmerited and dismiss it in its entirety.

In his brief rejoinder, Mr. Msalenge reiterated his earlier submission and stressed that the prosecution case was not proved to the hilt. He thus, once again, urged us to allow the appeal and release the appellant from the prison.

There is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed the appellant committing the offence. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of circumstantial evidence as discussed in the case of **Jimmy Runangaza v. Republic,** Criminal Appeal No. 159B of 2017 [2018] TZCA 188: [27 August 2018: TanzLII], when this Court remarked that:

> *"In order for the circumstantial evidence to sustain a .conviction, it must point irresistibly to the accused's guilt. (See Simon Musoke v. Republic, [1958] EA 715). Sarkar on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:*
>
> *1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*

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

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

Therefore, in determining the last ground, we shall be guided by the said principles to establish whether or not the available circumstantial evidence in the case at hand irresistibly points to the guilt of the appellant.

In the instant appeal, the evidence on record which tend to implicate the appellant heavily and which apparently was used by the trial court to convict him, among others, is, **first,** the oral account by PW2, who narrated on how she engaged the appellant and the deceased, at different intervals in her *bodaboda* business and how the deceased went missing; **second,** that, the appellant was the last person to be seen with the deceased by PW3 on 22nd May, 2019 at around 20:00 hours; **third,** upon receiving that information, PW8 interviewed the appellant on how he parted ways with the deceased on that night and the appellant admitted to have been with the deceased at 20:00

hours on that night as he hired him to ferry him to his lover, but the said mission was not accomplished. However, the appellant did not disclose the name of the said lover and when asked to avail her mobile number, he declined, saying that he did not save it; **fourth,** oral account of PW7, the appellant's neighbour, who testified that, on 22nd May, 2019, at night, the appellant borrowed a spade and when he returned it back, in the next morning, it was with wet soil. It is on record that, in his evidence, the appellant admitted to have borrowed the said spade on that night from PW7, although he stated that, he used it to clean the ditch which was blocked by rainy water that was running towards the foundation of his house.

Fifth, oral account of PW6 and exhibit P3 which linked the appellant with the theft of the motorcycle which was used by the deceased before he met his death. Exhibit P3 led to the discovery and retrieval of the motorcycle that was being used by the deceased which was found buried inside the appellant's house.

We are mindful of the fact that, in his submission Mr. Msalenge has challenged the search exercise leading to the discovery of the motorcycle claiming that there were contradictions between the evidence of PW6 and PW8 who participated in that exercise. Mr.

Msalenge argued that since the appellant did not participate in the said search as he was under restraint since 23rd May, 2019 and his house was not locked, anyone may have used that opportunity to hide it in the appellant's house to implicate him. For clarity we have revisited the evidence of PW6 and PW8 to ascertain what exactly transpired. In her testimony found at page 50 of the record of appeal, PW6 testified that:

> *"The accused (Luka) was present when exhuming the motorcycle, on top of it there was found a bed sheet which had hidden it. The motorcycle was taken from the pit. They produced two papers which I signed. One was handed over to Luka."*

Again, and upon being cross and re-examined, PW6 at page 52 of the same record testified that: "*The search was conducted on 9/6/2017. We all arrived there at the same time. The house was not locked...The accused's house had no padlock. It was locked with outside lock (Komeo la nje).* Then, at pages 63 to 64 of the record of appeal, PW8 testified that:

> *"On 9/6/2019, PW6 informed me that in her office she had found a piece of paper written by Xavier Mteu explaining where the motorcycle had been hidden. The accused in his statement during the interrogation, mentioned Xavier Mteu*

to have been a person with whom they had committed the charged offence. I informed OC - CID of the information. The accused was brought from Masasi and I with DC. Hassan in a company of Mustafa we went to the accused's house. The accused house was locked (imefungwa na komeo). In one room under the bed there was a pit. We removed the bed dug up a pit and we found a white sheet. Under it was a motorcycle whose steering bars were removed. The motorcycle was identified to have been the one the deceased was driving before he went missing...Since the motorcycle was found in his house and he was the seizure, the accused signed."

The testimonies of PW6 and PW8 were supported by exhibit P7 which contained a certificate of seizure together with the certificate acknowledging the said seizure both dated 9th June, 2019 and signed by the appellant, Anord Alberto, PW6 and PW8. In the circumstances, and taking into account that the appellant did not challenge exhibit P7 when was admitted in evidence during the trial, we agree with Ms. George that challenging it at this stage of an appeal, is nothing but an afterthought. This applies also to exhibit P5 in which Mr. Msalenge has as well raised issues of failure by the prosecution to conduct scientific examination of

the wet soil found on it, while during the trial when exhibit P5 was admitted in evidence, they did not raise that issue.

It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find solace in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 (unreported) and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 [2013] TZCA 347: [25 September 2013: TanzLII]. We thus equally agree with Ms. George that the pointed-out contradictions, in respect of the search conducted in the appellant's house together with exhibit P5, are minor and do not go to the root of the matter and dispute the fact that the motorcycle which was being used by the deceased before he went missing was retrieved inside the appellant's house. **Lastly,** is the fact that the deceased's body was found buried in the hump of soil, thus he died unnatural death.

It is therefore our considered view, and as rightly found by the learned trial Judge, all these facts provide overwhelming evidence of the appellant's participation in the commission of the offence. The

incriminating circumstances are irresistible inference that the appellant killed the deceased.

In addition, and taking into account that the appellant was the last person to be seen with the deceased on 22nd May, 2019 and he failed to give a plausible explanation when asked on the whereabouts of the deceased, he cannot exonerate himself on this matter. In the case of **Mathayo Mwalimu and Another v. Republic,** Criminal Appeal No. 147 of 2008 [2009] TZCA 53: [2 November 2009: TanzLII], this Court held that:

> *"...**if an accused person is alleged to have been the last person to be seen with the deceased,** in the absence of a plausible explanation to explain the circumstances leading to the death, **he or she will be presumed to be the killer**..." [Emphasis added].*

Following the above principle and considering the oral accounts of PW1, PW2, PW3, PW4, PW6, PW7 and PW8 the reasonable inference to be drawn is that the appellant murdered the deceased.

In the light of the foregoing, and looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the trial court properly held that the case against the appellant was

proved beyond reasonable doubt. Consequently, we find no merit in the appeal and we hereby dismiss it in its entirety.

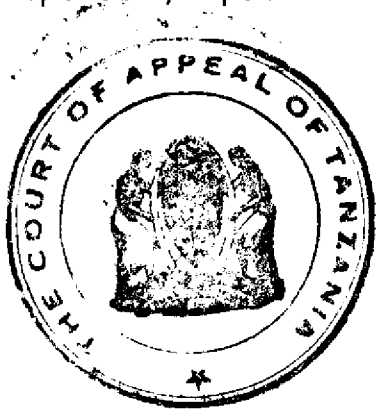
DATED at **MTWARA** this 5th day of June, 2024.

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2024 in the presence of Mr. Ahyadu Sadiki Nannyohe who took brief for Mr. Rainery Norbert Songea and Mr. Alex Peter Msalenge both learned counsel for the Appellant and Ms. Farida Mukhsin Kiobya, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL