IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 484 OF 2020

SIX ILANGA @ MSAKA ..... APPELANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate of Mwanza at Mwanza)

(Ndyekobora, RM - Ext. Jur.)

dated the 12th day of August, 2020

in

Extended Jurisdiction Criminal Sessions Case No. 46 of 2019

JUDGMENT OF THE COURT

14th & 23rd February, 2024

NGWEMBE, J.A.:

The appellant, Six Ilanga @ Msaka, was charged with and convicted of the offence of murder contrary to sections 196 and 197 of the Penal Code (Cap 16 R.E. 2002) now R.E. 2022 (the Penal Code). The trial court, the Court of Resident Magistrate of Mwanza, held by the Resident Magistrate with extended jurisdiction, sentenced him according to law. The appellant was aggrieved with both, the conviction and sentence, hence this appeal.

It is discerned from the record of appeal that, the appellant and his nephew Abel Zumbe (the deceased) aged twenty (20) years old, were living in one house at Mhandu area within Nyamagana District in Mwanza Region. At the unknown date, the deceased took and sold a bicycle of the appellant without his knowledge. When the appellant noticed that his bicycle has been sold by his nephew, he turned wild. On 6th June, 2017, he decided to beat his nephew on various parts of his body by using an iron bar. Thereafter, he led and left him on the doors of Rahel Manyangu, wife of the appellant (PW2), who in turn seeing the deceased at ailing condition, took him to Nyakato Police station, where he was issued with a PF3 and together were transported in the police vehicle to Igoma Health Center. But upon arriving there, after thirty (30) minutes, the deceased was referred to Sekou Toure Hospital, where he was hospitalized for two days before his death on 8th June, 2017.

The appellant was arrested at his house and charged with murder. On 14th July, 2020, he was arraigned before the court to answer his charge of murder, which he denied. Hence, the prosecution paraded four (4) witnesses and tendered two (2) exhibits (PE1 and PE2) to prove it. The first prosecution witness Dr. Furaha K. Murema (PW1) testified that, he conducted a post mortem examination of the deceased body on 12th June, 2017 and at the end, he prepared a report, which report was

admitted in court unopposed and marked exhibit PE1. He proceeded to testify on the source of death of the deceased that, it was due to multiple injuries on his head, legs and arms, which led into poly-trauma and severe brain traumatic caused by external force (PW1 at page 38 of the record of appeal).

Rahel Manyangu (PW2) testified in court that, she was married to the appellant and their marriage was blessed with five (5) issues. They separated in April of 2017, but were not divorced. Proceeded to testify that, the appellant was staying with the deceased. On 6th June, 2017, the appellant brought the deceased to her house, while was badly injured. The appellant never said a word to her, rather left the deceased therein and disappeared. Hence, she took the deceased to the police, then to hospital, but the deceased could not survive the injuries he sustained in his body, thus, while was still hospitalized, on 8th June, 2017, he passed away.

Despite his death, from the beginning before his death the deceased disclosed to PW2 the source of his injuries that he was beaten by his uncle Six Ilanga @ Msaka (appellant) by using an iron bar. The same dying declaration was recorded at Police by PW3, and orally

declared to PW4 when he was still hospitalized at Sekou Toure Hospital (PW4 at page 47 of the record of appeal).

On the strength of the evidence of those prosecution witnesses together with two exhibits PE1 and PE2, the trial court found the appellant to have a case to answer.

Therefore, the appellant was afforded an opportunity to defend his case, where he denied generally to have killed his nephew, Abel Zumbi. Further he defended himself that, he neither married to Rahel Manyangu nor did he have children with her. More so, he denied to know neither Rahel Manyangu, nor the deceased Abel Zumbi and nor owned any bicycle (page 52 of the record of appeal). He added that, he was arrested by police on accusation of possessing narcotic drugs, but when he was arraigned before the court, surprisingly, he was charged with murder of a person whom he did not know.

Upon a full trial, the trial court was satisfied that, the prosecution had established and proved the charge against the appellant beyond reasonable doubt. Thus, the learned trial Magistrate convicted and sentenced him as intimated above.

Being dissatisfied with the outcome of his trial, he timely, lodged a notice of appeal and filed his appeal grounded with nine (9) grievances.

However, prior to the hearing date, the appellant under legal assistance of Mr. Inhard E. Mushongi, learned advocate, filed four (4) supplementary grounds of appeal, forming an aggregate of thirteen (13) grounds of appeal. We need not to recap them hereto, for good reason to be disclosed later.

At the hearing of his appeal, Mr. Mushongi appeared for the appellant, while Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Messrs. Adam Murusuli, Benedicto Pauguge and Christopher Ole Mbile, all learned State Attorneys appeared for the respondent/Republic.

Before the hearing of the appeal could take place in earnest, Mr. Mushongi informed the Court that upon reflection, he decided to abandon the earlier lodged grounds of appeal and remained with four (4) supplementary grounds of appeal filed on 2nd February, 2024. He thus, prayed to argue grounds one (1) and three (3) jointly, while grounds two (2) and four (4) separately. His prayer was granted which made him to argue the appeal mainly on the following grounds:

1. *The trial court erred in law and in fact by convicting the appellant relying on uncorroborated evidence of dying declaration.*

2. *That the trial court erred in law and in fact by convicting and sentencing the appellant basing on exhibit PE2, which was wrongly procured and admitted as evidence.*
3. *The trial court erred in law and in fact by relying on unreliable evidence of prosecution to ground conviction against the appellant.*
4. *That as a whole the prosecution case against the appellant was not proved to the required standard.*

Mr. Mushongi, addressed the Court on ground two (2) which is related to admissibility of exhibit PE2 (dying declaration). That, the exhibit was admitted during trial contrary to section 34B (2) (a) of the Evidence Act Cap 6 R.E. 2022 (the Act), which section provides conditional precedents to be followed by the maker. Submitted further that, the written dying declaration was not signed by the deceased Abel Zumbi. Added that, though the reason for not signing it was disclosed as due to injuries in his hands (PW3), yet he contradicted that reason by advancing another possibility of putting his thumb print in his statement. Failure to sign, or make thumb print was fatal because the alleged written dying declaration became inadmissible, he stressed. Also, the learned counsel insisted that, even if it can be admitted, yet same does not indicate if it was read to the deceased after recording it. Thus, he prayed this Court to expunge the exhibit PE2 from the record.

Submitting on grounds one (1) and three (3) jointly, Mr. Mushongi argued forcefully, that since Rahel Manyangu (PW2) and the appellant were husband and wife, then in law, she was a competent witness but not compellable witness. Insisted that, despite the fact that, the two were separated in April 2017, yet their marriage still existed. Therefore, according to section 130 of the Act, PW2 was a competent witness but not compellable witness. Thus, the trial court did not ask her as to whether she could testify against her husband. Such failure, was fatal because it contradicted the contents of section 130 of the Act, consequently the whole evidence of PW2 should be discarded.

The last ground (4) regarding proof of the offence of murder to the standard required by law, Mr. Mushongi submitted convincingly that, the prosecution failed to establish and proof malice aforethought of the appellant to cause death to the deceased. Argued that, the prosecution failed even to produce the alleged iron bar, which is alleged to have been used to beat the deceased. As a result, the appellant was wrongly convicted of the offence which was not proved to the standard required by law. He rested by a prayer that the appellant be released from prison.

Ms. Tibilengwa, intimated to the Court at the outset that, the respondent/Republic supports the trial court's conviction and sentence, thus resist the appeal. However, she conceded on grounds 1, 2 and 3, that the trial court failed to follow the letters of law in recording the evidence of PW2 as required by section 130 (1) of the Act. Although, at the beginning Ms. Tibilengwa, resisted the argument by referring the Court to subsection (2) (a) of section 130 of the Act, that it is only applicable to the charges related to Part XV of the Penal Code, yet after engaging her on some dialogue on the contents of subsection (3) of the same section, she conceded on the need to inform a spouse witness that he/she is competent but not compellable witness. Therefore, failure to do so is fatal. She thus urged us to expunge it from the record.

Equally, Ms. Tibilengwa conceded that, the dying declaration of the deceased which was recorded by PW3 as it appears on pages 43 – 45 of the record of appeal flawed the laid down procedures of recording it as guided by section 34B of the Act. She also pointed out that, even the tendering in court ought to have been prefaced with a notice of ten (10) days prior to the hearing date. As such, she conceded that the exhibit PE2 may be expunged from the record.

Despite the above concession, Ms. Tibilengwa, stood firm to oppose the appeal based on the remaining evidence that was capable of grounding conviction of the appellant. Justified her argument by referring to the oral dying declaration uttered by the deceased to PW3 and PW4 (pages 43 – 49 of the record of appeal). She stressed that, dying declaration may be made in two ways, written dying declaration or oral dying declaration. She stressed by citing the decision of this Court in the case of **Crospery Ntagalinda @ Koro vs. R,** Criminal Appeal No. 312 of 2015 (unreported). She expounded that, PW3 testified in court that he received an oral dying declaration from the deceased, that the appellant was the source of his death as was testified on page 44. The same declaration was made by the deceased to PW4 as per pages 47 – 48 of the record of appeal. The deceased therefore declared his source of death to be injuries inflicted on his body by the appellant using an iron bar. That the two witnesses (PW3 and PW4) were eye witnesses of the deceased body being swollen with many injuries prior to his death.

She proceeded to submit that, the evidence of PW3 and PW4 were corroborated by the testimony of the medical doctor (PW1) who conducted post mortem examination of the deceased body as per pages 37 – 39 of the record of appeal. Therefore, PW1 formed an expert opinion that, the source of death of the deceased was brain traumatic

injuries caused by external force. Rested her case by insisting that, the testimonies of PW1, PW3 and PW4 proved the offence of murder beyond reasonable doubt.

Responding to ground 4 of the appeal, Ms. Tibilengwa briefly submitted that, the prosecution properly established and proved both actus reus, that is, injuries on the deceased body inflicted by the appellant and malice aforethought, that is intention to kill or cause grievous body harm. She justified her submission that, the use of iron bar directed to the deceased's head, hands and legs was intended to kill the deceased or cause grievous bodily harm. Therefore, such beating proved malice aforethought of the appellant as per section 200 of the Penal Code. Substantiated her argument by referring this Court to the case of **Enock Kipela vs. R,** Criminal Appeal No. 150 of 1994 (unreported) which was referred in the case of **Crospery Ntagalinda @ Koro** (supra).

Ms. Tibilengwa insisted that, even the conduct of the appellant after the event proved malice aforethought because he abandoned the deceased helpless on the door of his wife (PW2). Finally, she prayed this Court to find the appeal is unmerited and dismiss it.

In rejoinder, Mr. Mushongi, briefly, responded that, the oral dying declaration when compared with the evidence of PW1, disproves the offence of murder against the appellant. He reiterated the prayer to this Court to find the appellant not guilty for murder.

As stated by this Court in many occasions, generally, a first appellate court has a legal duty to evaluate the whole evidence adduced by parties during trial, while a second appellate court may rarely disturb the concurrent findings of fact, only if it is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principles of law or practice: See the case of **Hamisi Mohamed vs. R**, Criminal Appeal No. 297 of 2011 (unreported).

Since this is a first appellate Court, we will, wherever possible venture to evaluate the evidence adduced during trial. We have examined the record of appeal including the decision of the trial court. We have also considered all the four (4) grounds of appeal. Also, we have reviewed the arguments advanced by learned counsel for the parties. We find therefore, with certainty that, the trial court discussed properly on the duties of prosecution in criminal cases. We find all key elements of murder were properly determined by the trial court on page 129 of the record of appeal.

We however, find the crux of the matter in this appeal is related to authenticity of evidence, which implicated the appellant to the offence charged with. It is evident, at the crime scene there were only two persons, the deceased and the appellant. Therefore, apart from the two, no other person witnessed the commission of the offence.

Despite the absence of an eye witness, words of the deceased immediately after the event and before his death constitutes good evidence on what exactly happened to him and its relationship with the appellant. It is on record that the deceased, prior to his death, managed to reveal and record in writing the source of his injuries and he implicated the appellant as the one who inflicted injuries into his body by using iron bar.

As a general rule of evidence under section 34B of the Act that dying declaration when properly recorded, is capable of grounding conviction on murder cases. This position was established and followed all along by our courts. See the case of **Damian Ferdinand Kiula & Charles vs. R** [1992] T.L.R 16, where the Court discussed at length on the validity of a dying declaration. In that case, the trial court solely relied on the dying declaration in convicting the accused for murder, which conviction and sentence were upheld by this Court because the

dying declaration was authentic, properly recorded and revealed what had happened to the deceased prior to his death.

In this appeal, the appellant in ground 2 is complaining on the validity and admissibility of the recorded dying declaration. Both learned counsel agreed on this ground that same was recorded contrary to section 34B of the Act. Among those preconditions of proper recording dying declaration are: ***first,*** the maker must sign; ***second,*** issue ten (10) days' notice to the court and the opposing party prior to the date of hearing; and ***third,*** the recording person must indicate that he read its contents to the maker. Despite the fact that the trial court exhaustively discussed the contents of section 34B of the Act (page 131 of the record of appeal), yet it failed to observe that, exhibit PE2 did not comply with the above legal requirements. Much as we agree with the analysis made by the trial Magistrate on dying declaration and agree that she cited relevant authorities, yet she overlooked that all conditions in section 34B of the Act must be complied with cumulatively. See the case of **Majulu Longo and Juma Salum @ Mhema vs. R,** Criminal Appeal No. 261 of 2011 (unreported). We therefore, accede to the unopposed ground 2 of the appeal that it is merited, consequently exhibit PE2 is hereby expunged from the record.

Equally, grounds 1 and 3 of the appeal cannot tie us much, because it is not contested that, Rahel Manyangu (PW2) is married to the appellant, though at the time of incident the two were separated, specifically in April 2017 and the offence occurred in June 2017, yet their marriage was still subsisting. As was rightly argued by the learned counsel for the appellant, either husband or wife is competent witness but not compellable witness that is the gist of section 130 of the Act. For clarity we quote the section hereto:

> *"Section 130 (1) where a person charged with an offence is the husband or the wife of another person* ***that other person shall be a competent but not a compellable witness on behalf of the prosecution,*** *subject to the following provisions of this section.*
>
> *(2) Any wife or husband, whether or not of a monogamous marriage, shall be a competent and compellable witness for the prosecution-*
>
> *(a) in any case where the person charged is charged with an offence under Chapter XV of the Penal Code or under the Law of Marriage Act:*
>
> *(b) in any case where the person charged is charged in respect of an act or*

omission affecting the person or property of the wife or husband or any of the wives of a polygamous marriage of that person or the children of either or any of them.

(3) Where a person whom the court has reason to believe is a husband and wife or, in a polygamous marriage. One of the wives of a person charged with an offence is ***called as a witness for the prosecution the court shall, except in the cases specified in subsection (2), ensure that, that person is made aware, before giving evidence, of the provisions of subsection (1) and the evidence of that person shall not be admissible unless the court has recorded in the proceedings that this subsection has been complied with"*** (Emphasis is ours)

To the best of our understanding, the section is as clear as possible that does not require an expert legal interpretation to grasp its meaning. Generally, the section provides that a spouse is a competent but not compellable witness to give evidence on behalf of the prosecution against his or her spouse. Moreover, in terms of subsection 3 above, the evidence of such spouse would be inadmissible if it is received by the trial court without the spouse having been made aware

of the provision of subsection (1) for him or her to decide to testify against his or her spouse. Such choice must be recorded in the proceedings prior to the testimony. This position of law was exhaustively considered by the Court in the cases of **Abdallah Athuman vs. R,** Criminal Appeal No. 669 of 2020; **Zamir Rahimu vs. R,** Criminal Appeal No. 418 of 2018 (both unreported) and in the case of **Joseph vs. R** [1993] T.L.R. 152 where all decisions meet in one conclusion that, the evidence of a spouse who has been compelled to testify against another spouse in a criminal case contrary to section 130 of the Act, is inadmissible.

We are, also aware of the general rule of practice that, when the words of a statute are unambiguous, judicial inquiry is complete. See **R, vs. Mwesige Geofrey and Another,** Criminal Appeal No. 355 of 2014; **Serengeti Breweries Ltd vs. Joseph Boniface,** Civil Appeal No. 150 of 2015 (both unreported).

In respect of this appeal, there is no dispute that PW2 and the appellant are husband and wife, thus the trial court overlooked the legal requirement of section 130 of the Act. As such, the evidence adduced by PW2 found on pages 40 – 43 of the record of appeal, becomes inadmissible. In totality, we agree with the arguments advanced by

both counsel that, the whole evidence of PW2 must be discarded, as we hereby do.

Having expunged the evidence of PW2 and the written dying declaration of the deceased in exhibit PE2, the question which follows is whether the remaining evidence is sufficient to ground conviction against the appellant. This question will be answered as we determine ground 4 of the appeal.

We now turn to determine ground four (4) of the appeal in respect of proof of the case against the appellant beyond reasonable doubt. It is a salutary rule of law and practice that the duty of the prosecution in criminal trials is to establish and prove the accusations to the standard required by law, which duty never shifts to the accused. Section 3 (2) (a) of the Act as was expounded in colossal decisions of the Court and courts below. See **Hemed vs. R [1987] T.L.R. 117** and **Habib vs. R (1971) HCD 370.** Therefore, the duty of proving the offence of murder beyond reasonable doubt is always on the shoulders of the prosecution, while the accused bears no duty to prove his innocence.

In respect of this appeal, the learned Principal State Attorney insisted that, the offence of murder against the appellant was established and proved to the required standard. Such proof was

through the oral dying declaration of the deceased himself made to PW3 and PW4, which same was corroborated by a medical doctor (PW1). On the contrary, the learned counsel for the appellant, stood firm to oppose it, that the offence of murder was not proved, hence urged this Court to set aside the appellant's conviction and sentence meted out by the trial court.

On our part, having considered the arguments of the learned counsel and upon careful analyzing the evidence on record of appeal, we are of the view that, the pivotal issues for consideration and determination are as follows: **one,** whether or not there is a link between the death of the deceased and the appellant; and **two,** whether malice aforethought has been established and proved.

It is common ground that, the appellant's conviction may be grounded on a dying declaration alone. In this appeal, the relevant part of the evidence of PW3 at page 44 of the record of appeal is quoted that:

> *"Abel Zumbi had body injuries in different parts of the body, the injuries were bleeding I did not know what happened.* ***Abel Zumbi told me that he got beaten by his uncle known as Six Ilanga*** *..... Six Ilanga beaten him by using*

iron bar because Six Ilanga alleged him to have stolen his bicycle." (Emphasis added)

In this parcel, the deceased told PW3 that the appellant was his assailant. Also, the same declaration was repeated to PW4 (page 47 of the record of appeal) as quoted hereunder:

> *"On 7th June, 2017 I succeeded to see Abel Zumbi at male ward with injuries on head, back neck, legs and arms. I discussed with him, ...* ***He managed to tell me that his uncle Six Ilanga was the one beaten him, by using an iron bar.*** *His uncle beat him because Abel Zumbe stolen his bicycle and sold it for a sum of 60,000/= Tshs".* (emphasis added)

Those words when considered together with section 34 (a) of the Act, in our view, amounted into a dying declaration. They explain how the deceased met his death. He was assaulted by his uncle (appellant), for stealing his bicycle and sold it for TZS. 60,000/=. According to the deceased utterance, the appellant was the only one mentioned to have caused his death.

We are also aware that, in law, a dying declaration can either be written or oral. What the deceased explained to PW3 and PW4 amounted into an oral dying declaration. Maybe we need to define the meaning of dying declaration hereto before we can proceed with our

consideration. To the best, dying declaration simply means a statement made by a deceased person as to the cause of his death. See **Onael Dauson Macha vs. R,** Criminal Appeal No. 214 of 2007 (unreported); **Hamis Said Mchana vs. R** [1984] T.L.R. 319; **Ally Bakari and Pili Bakari vs. R** [1992] T.L.R. 10; **Elisante Simon @ Kilinganya vs. R,** Criminal Appeal No. 154 of 2003 (unreported).

Equally important, is the testimony of the medical doctor who conducted post mortem examination of the deceased body (page 36 of the record of appeal) and exhibit PE1. He observed that the deceased body had injuries on head, legs and arms. Thus, the cause of death was due to poly-trauma and severe brain traumatic injury caused by external force. He defined poly trauma as injury occurred to the human body if there is external force. His evidence, in our view corroborated the oral dying declaration made by the deceased to PW3 and PW4. Moreover, the two witnesses were not cross examined on that fact related to dying declaration. As a general rule, even without citing any authority, failure to cross examine on an important point of fact is presumed an admission. Therefore, in this appeal, the dying declaration of the deceased was authentic, clear and portrayed the actual event happened to the deceased on the fateful date.

Even after considering the appellant's defence which was of a general denial, it is our opinion that, the oral dying declaration of the deceased should be believed as the best evidence of the cause of his death. Therefore, we agree with the learned trial Magistrate and the learned Principal State Attorney that, undoubtedly, the appellant was the only one who caused death of his nephew (deceased) by beating him in several parts of his body.

However, the second question to ground murder is whether the appellant when was assaulting the deceased had malice aforethought to kill him. We find no difficult to answer this issue because section 200 of the Penal Code, establishes various circumstances upon which, malice aforethought may be inferred. Similarly, **Black's Law Dictionary** (9th Edition) describes four (4) elements which are similar to the cited section. Therefore, malice aforethought may be construed when there are:

1. *The intent to kill;*
2. *The intent to inflict grievous bodily harm;*
3. *Extremely reckless indifference to the value of human life; and*
4. *The intent to commit a dangerous felony.*

Putting breath to the circumstances itemized above, this Court in the case of **Enock Kipela vs. R**, Criminal Appeal No. 150 of 1994 (unreported) came up with seven circumstances where malice aforethought may be established. Those are: ***First,*** the type and size of the weapon, if any, used in the attack; in this appeal, the instrument used is alleged to be an iron bar, but that iron bar was not produced as exhibit during trial for the court to know its nature and size. ***Second,*** the amount of force applied in the assault; obviously the deceased body was bleeding in many parts as was testified by PW1 and PW3, meaning force was used. ***Third,*** the part or parts of the body the blows were directed at or inflicted; according to the testimonies of PW1, PW3 and PW4, the blows were not directed into a specific place, but the deceased was randomly beaten. Specifically, the wounds were found on hands, legs and head. ***Fourth,*** the number of blows; in this appeal it is indicated that there were many blows. ***Fifth,*** the kind of injuries inflicted; according to PW1, the injuries caused swelling of the body of the deceased. ***Sixth,*** utterances of the attacker; in this appeal the evidence including the dying declaration of the deceased, did not disclose if there were any utterance from the appellant. ***Seven,*** the conduct of the attacker before and after the killing; in this appeal, the conduct of the attacker before the event is not known save only after

the event, which he behaved seemingly reasonable. Leaving the victim in the door, the prosecution considered it as a negative action, while we take it positively because that place enabled him to be attended immediately. Thus, on the very day the deceased was taken to Nyakato Police Station and immediately thereafter to hospital.

It is also evident from the oral dying declaration of the deceased, that he stole a bicycle of the appellant and sold it for TZS. 60,000/=, we cannot dismiss the possibility that such theft might have triggered the beating of the deceased. Therefore, considering the entire evidence on record, goes to establish lack of malice aforethought to kill the deceased. In the circumstance of this appeal, we think, it is not safe to infer malice aforethought as was decided in the **case of Zaveri Kanyika & 2 others vs. R,** Criminal Appeal No. 49 of 1979 (unreported) where Justice Mustafa, JA, was confronted with similar predicament on whether there was malice aforethought to kill the deceased. At the end of his consideration, he was satisfied that, where there is no clear intention to kill the deceased, it is not safe to convict the accused for murder. The Court substituted the conviction of murder for manslaughter and sentence of death for imprisonment. In this regard, it will always be safe to ground a conviction of manslaughter instead of murder when malice aforethought is not clearly established.

In totality, the evidence on record is satisfactory, the appellant assaulted the deceased, and that assault cumulatively caused death to the deceased after two days. However, the circumstance which is vividly disclosed in this appeal indicates clearly as follows: ***first,*** that no evidence was brought up if at all the appellant uttered any words when he committed the assault to the deceased; ***second,*** the beating was not directed into a specific part of the deceased body, rather was random beating; ***third,*** as is the contents of the dying declaration, the source of assault was the deceased stealing the appellant's bicycle and he sold it for TZS. 60,000/=; ***fourth,*** the conduct of the appellant after the event, that he remained in his house until when he was arrested, indicates that, he had no intention to kill the deceased; ***fifth,*** the appellant after the assault, he did not leave the deceased in the crime scene rather took him to a place where he could presumably be attended; ***sixth,*** failure of the prosecution to produce and tender the alleged iron bar which was used to inflict injuries to the deceased, to support establishment of malice aforethought. From those reasons cumulatively, we gather that the appellant lacked malice aforethought in the death of the deceased.

In the light of the above, the trial Magistrate ought to have convicted the appellant of a cognate offence of manslaughter.

For the foregoing reasons, we allow the appeal, quash conviction of murder against the appellant and set aside the sentence of death passed, and substitute for a conviction of manslaughter. We sentence him to seven (7) years imprisonment commencing from the date he was sentenced by the trial court.

It is so ordered.

DATED at **MWANZA** this 22nd day of February, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

Judgment delivered this 23rd day of February, 2024 in the presence of the appellant appeared in person, unrepresented, and Ms. Brenda Mayalla, 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