IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 256 OF 2017

NTOBANGI KELYA..... 1ST APPELLANT
NGISA MAHILA.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated the 2nd day of June, 2017
in
Criminal Session No. 81 of 2015

JUDGMENT OF THE COURT

10th & 23rd August, 2021.

KITUSI, J.A.:

A headless body of a human being was found in a rice field in a village within what used to be Bariadi District in Shinyanga Region. The body was immediately identified to be that of Magembe Ntemi @ Lubeti, because a mobile phone lying by its side had a sticker bearing that name. In addition, one Sini Mkalasini (PW2), the deceased's cousin brother also identified that body. Ntobangi Kelya and Ngisa Mahila, the first and second appellants, respectively, were arrested in connection with that homicide and subsequently charged with murder vide a charge sheet that reads: -

"STATEMENT OF OFFENCE

MURDER contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002].

PARTICULARS OF THE OFFENCE

NTOBANGI s/o KELYA, NGISA s/o MAHILA AND MBOJE s/o MAREMO on 8th day of December 2010 at Mwanhuzi Village within the District of Bariadi in Shinyanga Region did Murder Magembe s/o Ntemi @ Lubeti.

Dated at Shinyanga this 23rd day of May, 2011.

.....
Signed
State Attorney."

There was no dispute that on 8/9/2010, herd boys informed one Joseph Sanike (PW1), that while grazing their flock, they had stumbled onto the body beside which there was a mobile phone. PW1 went to the scene, and on seeing the sticker on that phone he linked it with the deceased and broke the bad news to PW2.

The appellants denied being the perpetrators of the murder, but the prosecution presented two sets of evidence allegedly implicating them. The first was basically circumstantial, in that the second appellant had asked the deceased to help in brick making at his residence. It was PW2 who testified to this fact, and that the said second appellant was the last person he saw

with the deceased alive when he approached him to ask for his hand in brick making.

The second set of evidence was confessions allegedly made by the appellants, and this was also in two categories. First it was alleged that the appellants made oral confessions leading to discovery of a head believed to be that of the deceased. On this, there was evidence from PW2 and Perpetua Masuke (PW3), the Village Executive Officer (VEO) of Mwanunui village. There was no dispute that after PW1 informed PW2 about the discovery of his cousin brother's body, an alarm popularly known around the area as *"mwano"* was raised, to which many people responded.

At the said gathering, the second appellant who was arrested immediately, was interrogated by members of the vigilante group, 'sungusungu', in the course of which PW2 and PW3 heard him confess to the crime. The first appellant was arrested on 12/9/2010 and upon being interrogated by 'sungusungu', he also confessed and led the people to Simiyu River, from which he produced a polythene bag in which there was the head of the deceased and his clothes. The testimony to this fact came from PW2 and PW3 as well.

It is alleged that thereafter the appellants made to A/Insp. Gaudence (PW5) cautioned statements which he recorded, and that in the course they

voluntarily confessed to the offence of the murder of Magembe Ntemi @ Lubeti.

The appellants denied the charge as earlier said, and testified to exonerate themselves from liability. Common in the two accounts given by the appellants, is the fact that on 8/9/2010 at the request of the second appellant, the deceased was at his home with the first appellant, and two other people known as Nzela Masuke and Migumba Dalo. These five men met to help the second appellant make bricks. It is also common in their stories, that after the work and a meal, all four men who had come to help the second appellant left, while he (second appellant) stayed home with his children. The second appellant was specific that the deceased, who was staying with him, told him that he would be going to see his mother known as Mine Kampumu.

In his defence the second appellant who was arrested first, stated that nothing happened on 9/9/2010 and he was at home the whole day. However, on 10/9/2010 he heard the alarm and responded to it as did other members of the village. On arrival, he saw many people most of them members of 'sungusungu'. He saw the beheaded body of a person who turned out to be the deceased in this case. According to the second appellant, his arrest was prompted by two facts which are not disputed.

These, he said, are that he was living with the deceased at his house and that on 8/9/2010 he was seen with him and others making bricks. He further stated that PW3 arrived at the gathering and found the second appellant already under arrest. She called the police who arrived and took him away. The second appellant said despite answering questions from the 'sungusungu' and the police, he never made any oral or written confession to them. He therefore knew nothing about the discovery of the head at the river.

The first appellant's defence was that he had been at his home in Nghomango village before his arrest and that he did not respond to the alarm because it was in Mwanunui village which is far from his village. Upon his arrest, he was taken to a 'sungusungu' commander known as Salu Sadala, from where he was taken to Bariadi Police Station. Regarding the alleged confessions, the first appellant said that all he did was to tell the 'sungusungu' commander that he did not kill the deceased, and the police did not interrogate him before the said 'sungusungu' commander. He said that the police just whisked him away to the police station.

At the police station he was taken in a room where there were two police officers scribbling on papers. He said he was illiterate so he did not sign the papers, nor were the contents thereof read over to him. He

therefore denied making the alleged oral confession leading to discovery as well as the cautioned statement.

The High Court took the view that based on the doctrine of last person to be seen with the deceased and the two confessions one of which leading to discovery, the prosecution evidence led to no conclusion other than that the appellants were the ones who carried out the grisly murder of Magembe Ntemi @ Lubeti.

It therefore rejected the defence, concluding that the cautioned statements were just too detailed to have been a concoction of an uninvolved person, and further that there was no suggestion that there was found another headless body around the village, to which the head found in the river could have belonged. Closing submissions by counsel for the defence raising issue with the prosecution's failure to produce DNA test results and photographs of the second appellant holding the head, were also not good enough to tilt the scales in favour of the appellants. The learned judge was of the view that the head was not available for DNA test because it was buried, and further that it was not necessary for the prosecution to exhibit the DNA test results and photographs because the confessions made by the appellants were sufficient to prove the case against them.

The appellants were aggrieved by that decision and have appealed to the Court. Learned counsel Mr. Paul Kaunda who represented the first appellant before us, filed and argued three grounds. The second appellant was represented by Mr. Frank Samwel, also learned counsel. Mr. Samwel adopted the very grounds of appeal which the second appellant had earlier filed. However, after fully associating himself with the submissions made by Mr. Kaunda, he only highlighted on three issues, as we shall later see.

Mr. Kaunda argued grounds 1 and 3 together, and we shall reproduce them so as to appreciate their theme: -

1. *That, the trial court grossly erred in law and fact by failure to evaluate the gross variance between the content(s) of the charge sheet and evidence adduced.*
3. *That, the prosecution failed to prove the offence beyond reasonable doubt.*

Arguing grounds 1 and 3, Mr. Kaunda drew our attention to the charge sheet dated 23rd May, 2011 which we reproduced at the outset, and pointed out two features. One, the date of the alleged murder is, 8th December, 2010 according to the charge, contrary to what all witnesses for the prosecution testified to, that it was 8th September, 2010. Two, the charge sheet shows that the alleged murder took place at Mwanhuzi village, while the evidence

led by the prosecution suggests that it was at Mwanunui village. The learned counsel prayed that under section 58 of the Tanzania Evidence Act, [Cap. 6 R.E. 2002] hereafter the TEA, we should take judicial notice of the geographical locations of the two villages. He submitted that Mwanhuzi village is within Meatu District in Shinyanga, while Mwanunui village is within Bariadi District.

Mr. Kaunda then made two twin arguments in relation to the charge and proof thereof. The first is that it has always been this Court's emphasis, which he called upon us to repeat, that those who prepare charge sheets should take great care and do it properly. He cited the case of **Mohamed Koningo vs. Republic** [1980] T.L.R. 279 in which such emphasis was made. The second is that, when the prosecution makes certain allegations against a person it is expected to prove them. For this he cited the case of **Anania Turian vs. Republic**, Criminal Appeal No. 195 of 2009 (unreported). He wrapped up by submitting that no witness testified that the appellants committed murder on 8th December, 2010, at Mwanhuzi village.

The learned counsel submitted further that section 234(1) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA) provides a safety valve for the prosecution to amend a charge sheet if defects are detected. He wondered why that provision was not made use of, even after a retrial

that resulted into this appeal. He concluded by submitting that the appellants were prejudiced by the variance, and that the same cannot be cured by section 388 of the CPA.

Mr. Kaunda argued ground 2 in the alternative. The said ground of appeal reads:-

> *"2. That, the trial court erred in law and fact when it acted on the contradictory and uncorroborated evidence of PW2, PW3, PW4 and PW5."*

The learned counsel submitted that assuming there is no defect in the charge and that the alleged murder took place on 8/9/2010, and going by the contention that the head was fished out of the river on 12/9/2010, it means that head had been in that river for about four days. Connected to that, the learned counsel referred us to some aspects in the evidence, that is the evidence of PW3 and PW5, showing that the river was high and its water running and that of PW5 showing that there were even crocodiles in it. He then raised questions; how the said head would be found at the same spot it had been hidden four days earlier, in a flowing river with crocodiles. Why didn't the crocodiles eat that head he asked.

The issue of DNA test results was raised again by Mr. Kaunda. Referring to the evidence of PW4, he submitted that since the witness

testified that the second appellant was found in possession of a blood-stained T-shirt samples of which were taken, why did the prosecution not tender the results? Those were Mr. Kaunda's chief submissions.

On his part, the three issues on which Mr. Samwel submitted were; the cautioned statements, discovery of the head and the doctrine of last person to be seen with the deceased. The learned counsel was conveniently brief on each.

Beginning with the cautioned statements, Mr. Samwel referred to the record of appeal showing that their admission was objected to during the trial on the ground that they were recorded outside the statutory basic time. He then attacked the ruling of the trial court admitting those statements, even after being satisfied that they were recorded outside the time stipulated under section 50 of the CPA. He submitted that it was wrong for the learned Judge to invoke section 169 of the CPA that empowers the court to admit illegally obtained evidence, upon being satisfied that it is in the public interest to do so.

The learned counsel submitted that the provisions of section 169 of the CPA would only be applicable if the prosecution had first conceded that the statements were recorded out of time, which they did not, and after satisfying the court that it was in the public interest to admit that evidence,

which they also did not. He referred to the submissions that were made by the prosecution during the trial, maintaining that the statements were recorded within time, then submitted that there was no need to invoke section 169 of the CPA to admit the statements that were recorded within time. The learned counsel invited us to expunge the cautioned statements.

As for the discovery of the head, Mr. Samwel submitted that there were contradictions in the testimonies of PW3 and PW5 regarding what took place. While PW3 stated that after taking photographs of the first appellant holding the lifeless head, the same was buried, PW5 stated that after the photographs, the head was taken to Bariadi Police Station. Then, Mr. Samwel wondered why didn't the prosecution tender the pictures and the clothes that had wrapped the head? He concluded this point by submitting that there is no connection between the head and the body that was discovered.

The last issue Mr. Samwel argued was the doctrine of last person to be seen with the deceased alive. He submitted that according to PW2, he was told by people who did not testify, that they saw the appellants heading towards the river with the deceased. He submitted that since those people were not called to testify, it was wrong for the trial court to act on PW2's hearsay in concluding that that doctrine applied in this case.

The respondent Republic was represented by Ms. Edith Tuka and Mercy Ngowi, both learned State Attorneys. It was Ms. Tuka who prosecuted the respondent's case, beginning with the issue of variance between the charge and evidence. She conceded right away that there was indeed variance as to dates and place of the commission of the alleged murder. She quickly submitted however, that the defects referred to in this case are not the type that would necessarily attract an amendment of the charge. To support her submissions, she cited section 234 (3) of the CPA and two unreported decisions of the Court, that is; **Khatibu Hamisi & Another vs. Republic**, Criminal Appeal No. 90 of 2016 and; **Damiani Ruhere vs. Republic**, Criminal Appeal No. 501 of 2007.

The learned State Attorney submitted in addition, that all witnesses for the prosecution as well as the appellants in defence, referred to the date of the murder as being 8/9/2010. Further with regard to the place where the alleged murder took place, she submitted that all witnesses referred to Mwanunui village. According to the learned State Attorney, the defects were a mere slip of the pen, curable under section 388 of the CPA because according to her, the appellants were not prejudiced.

Addressing the second ground of appeal argued by Mr. Kaunda, the learned State Attorney was of the view that the main evidence that

implicates the appellants is the oral confessions as defined by section 3 of TEA. She cited the cases of **John Shini vs. Republic**, Criminal Appeal No. 573 of 2016 and **Tumaini Daudi Ikera vs. Republic**, Criminal Appeal No. 158 of 2009 (both unreported). Ms. Tuka further referred us to the contents of the cautioned statements submitting that they tally with the testimonies of prosecution witnesses. When her attention was drawn to the record showing that PW5 referred to the contents of the cautioned statements even before they had been cleared for admission, she conceded that it was wrong. But then she hastened to rationalize the procedure by submitting that PW5 was referring to those details as an investigator. She concluded this part by submitting that the case against the appellants was proved beyond reasonable doubt.

Turning to the points that were raised by Mr. Samwel in his submissions, Ms. Tuka submitted, in relation to the validity of the cautioned statements, that the High Court Judge was correct in admitting them even though they had been recorded out of time. She submitted further that the Judge was justified in considering that investigation was on going. She cited the case of **DPP vs. James Msumule @ Jembe**, Criminal Appeal No. 392 of 2018 (unreported), which, she said, had circumstances similar to the instant case.

As for the doctrine of last person to be seen with the deceased, Ms. Tuka submitted that the implicating fact was the second appellant's invitation to the deceased to take part in brick making.

In a short rejoinder Mr. Kaunda sought to distinguish the case of **Khatibu Hamisi** (*supra*) from this one. He submitted that in the former case, two witnesses testified on the dates cited in the charge sheet, unlike in this case where none of the witnesses testified on the dates cited in the charge sheet. Similarly, on the case of **Damian Ruhere** (*supra*) Mr. Kaunda submitted that it was a slip of the pen in that case but it cannot be a slip of the pen in this case in which the mistake was maintained even in a retrial.

He wound up by submitting that an oral confession before 'sungusungu' vigilante must be corroborated because the maker may not have been a free agent. He cited the case of **Ndalahwa Shilanga And Another vs. Republic**, Criminal Appeal No. 247 of 2008 (unreported).

Those are the competing views of the matter now for our consideration. As it were, we have to begin with the validity of the charge although the Republic concedes to the variance between it and the evidence. The question left is whether the defect is curable and whether then the case against the appellants was proved beyond reasonable doubt. Ms. Tuka relied

on section 234 (3) of the CPA as well as case law to argue that the defects may be ignored. Let us take a look at statutory provisions and the case law.

Our starting point is section 132 of the CPA which provides:-

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

It is common ground that the particulars of the offence in our case are at variance with the evidence. Recently in **Rajabu Khamis @ Namtweta vs. Republic,** Criminal Appeal No. 578 of 2019 (unreported), we said the following with regard to defective charges: -

> *"We need not emphasize here that particulars of offence are more informative to accused persons (most of them being lay persons) than the statement of offence. In our view, it is simple and easy for an accused person to understand what is elaborated in the particulars of offence and prepare his defence than in the statement of offence which is somehow technical having been made of provisions of laws."*

It is also true as submitted by Ms. Tuka that variance between the charge and evidence is not always a hopeless trap, and that it can be cured by an amendment. She cited section 234 (3) of the CPA to support her submission that not every variance between charge and evidence must lead to an amendment of charge. The said section provides as follows: -

> *"(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."*

We agree with Ms. Tuka that in the two cases she has cited, section 234 (3) was used to salvage the situation. We however note the import of that provision is on the time as opposed to dates. That is why in **Khatibu Hamisi** (*supra*) the case of **Nkanga Daud Nkanga vs. Republic,** Criminal Appeal No. 316 of 2013 (unreported) was cited and the following passage reproduced: -

> *"The incident occurred at 2:00 hours after 25.7.2009 had just changed to 26.7.2009 which Mr. Karumuna refers to as "deep in the night". In our view, that is*

not a big deal because after all, such a variance was curable under section 234 (3) of the CPA."

In addition, as we stated in **Rajabu Khamis @ Namtweta** (*supra*), particulars of the offence are important in informing the accused for him to prepare his defence.

Before we proceed, it must be clear that section 234 of the CPA which learned counsel referred to, applies in proceedings before subordinate courts. The relevant provision for dealing with defective charges before the High Court, is section 276 (2) of the CPA which provides:-

"Where before a trial upon information or at any stage of the trial it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendment cannot be made without injustice; and all such amendments shall be made upon such terms as to the court shall seem just."

The two provisions though they apply in trials before different courts, are, in our view, similar in the requirement to amend the charge if it is defective. See our decision in **Diaka Brama Kaba & Another vs. Republic**, Criminal Appeal No. 211 of 2017 (unreported). In that case we

cited our previous decision in **Ramadhani Hussein Rashid @ Babu Rama and Another vs. Republic,** Criminal Appeal No. 220 of 2018 in which we stated that section 234 (3) of the CPA is similar to section 276 (2) of the CPA. Section 234 (3) of the CPA is only more specific in that it deals with variance of the charge and evidence while section 276 (2) of the CPA deals with defect in the charge and places on the court the duty to order amendment.

Anyhow, would we be justified to say; 'it is not a big deal' for a charge to cite 8th December, 2010 as the date of commission of the murder which the evidence alleges it took place on 8th September, 2010?

In our view, if we took that path, then there will never come a time when a charge will need to be amended for being at variance with the evidence. We instead, accept Mr. Kaunda's invitation to emphasize the need for care in preparing charges as it was stated in the case of **Mohamed Kaningo vs. Republic** (*supra*). Very recently in **Maweda Mashauri Majenga @ Simon vs. Republic,** Criminal Appeal No. 255 of 2017 (unreported) a retrial of one accused proceeded in a charge that cited seven other accused who had earlier been discharged. We declined the invitation to find the defect curable under section 388 of the CPA. Just like in this case,

an amendment was needed but none was effected. We thus decline Ms. Tuka's invitation to find the defect curable.

Mr. Kaunda's argument connected to the above is that since all the witnesses for the prosecution referred to events of 8th to 12th September, 2010, then there was no proof of the alleged murder that occurred on 8th December, 2010. Certainly, going by the decision of the Court in **Anania Turian vs. Republic** (*supra*), which Mr. Kaunda cited to us, that is the logical conclusion. In that case the Court held, *inter alia*: -

> *"When a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the basis of that specified date. The defence invariably includes the defence of alibi. If there is a variation in the dates, then the charge must be amended forthwith and the accused explained his right to require the witnesses who have already testified, recalled.* ***If it is not done the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right****. Short of that, a failure of justice will occur."*
>
> [Emphasis ours].

Going by our decision in **Anania Turian** (*supra*), the charge remained unproved as argued by the learned counsel.

We would have stopped here, but we are prepared to go an extra mile and consider the rest of the arguments. Although we are alive to the principle that the charge is the foundation of a criminal trial and that once it is found to be defective then reference to the evidence is uncalled for, the peculiar circumstances of this case and the seriousness of the allegations involved, incline us to go beyond. We will adopt the scheme used by the learned counsel for the appellants and address the following issue; assuming the charge is not defective, was the case against the appellants proved?

First of all, the conviction of the appellants was found on mainly the alleged confessions. The appeal raises issue with the validity of those confessions so we shall scrutinize them, beginning with the cautioned statements.

Mr. Samwel charged that the learned trial Judge wrongly invoked section 169 of the CPA because the prosecution did not concede that the statement had been recorded out of time, neither did they prove public interest. Ms. Tuka on the other hand maintained that investigation was ongoing.

We note that by submitting that investigation was ongoing, Ms. Tuka is still suggesting that the statements were taken within the prescribed time. However, that is contrary to the position the learned trial Judge took in

admitting the statements. For, if the statements were recorded within time, then the learned Judge would not have invoked section 169 of the CPA.

Application of section 169 (2) of the CPA has been tested in our pervious decisions. For example recently in **Rashid Omary vs. Republic**, Criminal Appeal No. 106 of 2020 (unreported), the Court held:-

> *"... the trial judge invoked the provision despite the fact that neither did the prosecution establish the conditions precedent as set out in the provision nor show how the admission of the appellant's confessional statement would be in the public interest without prejudicing the rights and freedoms of the appellant. As pointed out by the appellant's counsel, the interests of the appellant had to be considered too.*
>
> *An examination of section 169 of CPA also infers that the conditions therein found in subsection (2) have to be fulfilled conjunctively as held by the Court in* ***Jabril Okash Mohamed vs. Republic,*** *Criminal Appeal No. 331 of 2017 (unreported)."*

With respect, in this case not only did the prosecution not discharge its burden under section 169 (2) of the CPA, but we think the learned Judge made an unsolicited application of that provision in the course of composing judgment, without hearing the parties. With respect, that was an error.

In view of the foregoing, we cannot leave that decision to stand. We hold that the cautioned statements were wrongly admitted, having been recorded out of time and there having been no suggestion, let alone proof, that their admission was in public interest. It was also wrong for PW5 to refer to the contents of the cautioned statements before they had been cleared for admission. See the case of **Robinson Mwanjisi and 3 Others vs. Republic** [2003] T.L.R 218. We therefore expunge exhibit P3, the said cautioned statements of the appellants.

We now turn to the oral confessions. First, we have to make one preliminary finding as to who the alleged confessions were made to. The evidence of PW2 and PW3 shows that the appellants confessed as a result of interrogations conducted by the 'sungusungu'. PW2 said the following at page 23 of the record: -

> *"They were many people when the Commander was questioning the 1st accused. On that day there was no "mwano" it was just the Commander and his boys. The 1st accused told us that the head of the deceased was in the River Simiyu ..."*

It is clear from the above excerpt and from the testimony of PW3, that the appellants confessed to the 'sungusungu' militia not to PW3, a person of authority. Here then comes the argument by Mr. Kaunda for our

consideration. His argument is that a confession to members of 'sungusungu' militia needs corroboration. The case of **Ndalahwa Shilanga & Another** (*supra*) which Mr. Kaunda cited to us, carries this caution in relation to confessions made before members of 'sungusungu' militia: -

> *"Equally, the appellant is alleged to have made such confessions in the presence of a group of village vigilantes (sungusungu). In* ***Regina Karantina and Another v. R.****, Criminal Appeal No. 10 of 1998 (unreported) it was held that* ***although in law sungusungu were not policemen, in real life, they had more coercive power than ordinary citizens and therefore feared****. In fact PW2 admitted that he was their Commander. Such confessions must be corroborated as a matter of practice."*
>
> [Emphasis added].

It is relevant to note that according to PW2 at page 23 of the record, the whole village was there. PW3 said at page 29 of the record that these people were armed with sticks. Then PW2 stated that in such situations, the 'sungusungu' are in control. This is what he said further at page 23: -

> *"The commanders were interviewing the 2nd accused because "mwano" is supervised by "sungusungu". "Mwano" is traditional procedures while village*

Chairmen VEO are responsible with government. I cannot remember each and everybody who came at the "mwano". It was the whole village."

We are inclined to hold that in the situation as described above, the possibility that fear loomed large on the part of the suspects, and that they were far from free, cannot be overruled. We conclude that the appellants were not free and shall therefore take what transpired at the "mwano" with circumspect.

In considering if the remaining evidence was sufficient to ground a conviction of the appellants or not, we join Mr. Kaunda and Mr. Samwel in interrogating a few facts. Mr. Kaunda wondered why did the head remain on the river bed for four days even though the water was running and there were crocodiles? Mr. Samwel wondered why didn't the prosecution tender the photographs allegedly taken of the first appellant holding the head of the deceased? Mr. Kaunda has also asked; why didn't the prosecution tender the results of the DNA tests from samples of blood taken from the second appellant's T-shirt?

The question of DNA test and photographs was raised during the trial, so it is not new. The learned trial Judge took the view that the prosecution is at liberty to present in court exhibits of their choice, and that it did not consider the photographs and DNA test necessary. We have to decide if that

conclusion is justified. We shall start with the omission to tender photographs and DNA test results. The learned Judge's conclusion that the head allegedly found under the river bed was in itself conclusive proof that it belonged to the deceased, appears to have shifted to the appellants the duty to prove that it did not belong to the deceased. That is why she stated that, there was no suggestion that another headless body was spotted somewhere else. We think much as the prosecution are at liberty to choose which evidence to adduce in court, if in the process, they leave out material evidence, then it is at their own disadvantage. See the cases of **Kennedy Yaled Monko vs. Republic,** Criminal Appeal No. 265 of 2015, and; **Benard Masumbuko Shio and Another vs. Republic,** Criminal Appeal No. 213 of 2007 (both unreported). The disadvantage of withholding relevant evidence was discussed in **Katabe Kachochoba vs. Republic** [1986] T.L.R 170, the Court had this to say in an almost similar scenario, at page 172: -

> *"It may well be that the heart and kidney were human remains, as found by the judge.* ***But that evidence is not conclusive and better and more conclusive evidence in that respect was available and for reasons which are not clear to us, was not produced. We are not prepared to accept a layman's view that the kidney and heart and part of a skull were human remains in the circumstances.*** *And naturally we cannot*

therefore conclude that those remains were without doubt those of Ali Malela who had been killed and burnt."

[Emphasis supplied].

Similarly, in this case, the prosecution withheld better and more conclusive evidence leaving the matter to mere conjuncture.

In addition to the above, let us examine the doubts that were suggested by learned counsel for the appellants, beginning with whether the head would be found where it had been kept four days previously. That question, in our view, is not all too irrelevant in view of the fact that the water was running, and more in view of the fact that there were crocodiles in that river. The alleged oral confessions would require corroboration as a matter of practice, more so considering the doubts that have emerged. With respect, we see no such corroboration in this case.

After concluding that the cautioned statements were wrongly admitted and having concluded that the alleged oral confessions to 'sungusungu' vigilante were not voluntarily made therefore unworthy, the remaining evidence against the appellants is the contention that the second appellant was the last person to be seen with the deceased. However, application of that doctrine is not without its flaws also. First of all, those who told PW2 that the second appellant was seen going to the river with the deceased, did

not testify. Secondly in rejecting the second appellant's defence that suggested that the deceased may have gone to see his mother, the learned Judge said the said second appellant did not prove it. With respect, that was wrongly shifting burden of proof again, and we shall demonstrate this by case law. In **Fakihi Ismail vs. Republic**, Criminal Appeal No. 146 "B", we reproduce the following paragraph from the case of **Joseph John Makune vs. Republic** [1986] T.L.R 44 :-

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities..."*

The second appellant had no duty to prove that the deceased had gone to visit his mother. It is therefore our conclusion that the doctrine of last person to be seen with the deceased, did not apply in the circumstances of this case. That crumbles the prosecution case.

In line, we find merit in the appeal for the reasons discussed. Although the trial proceeded on a defective charge, which would have sufficed to dispose of the appeal, the case against the appellants was not proved to the

required standards. We quash the conviction, set aside the sentence and order the appellants' immediate release, unless they are otherwise held for a lawful cause.

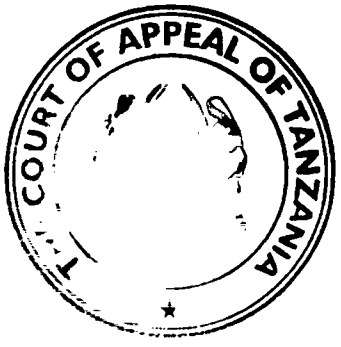
DATED at **SHINYANGA** this 23rd day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of August, 2021 in the presence of the Appellants in person, unrepresented and Mr. Jukael Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL