IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J. A., KWARIKO, J.A, And SEHEL, J.A.)

CRIMINAL APPEAL NO. 138 OF 2019

MASAMBA MUSIBA @ MUSIBA MASAI MASAMBA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Mugeta, J.)

dated the 29th day of March, 2019
in
Criminal Sessions Case No. 126 of 2015

.....

JUDGMENT OF THE COURT

9th & 28th June, 2021

SEHEL, J.A.:

The appellant, Masamba Musiba @ Musiba Masai Masamba had been put on trial for the murder of Bertha Mwarabu (the deceased). After a full trial before the High of Tanzania at Dar es Salaam (the trial court), the presiding Judge found him guilty as charged. He was thus convicted and sentenced to the statutory punishment of death by hanging. Aggrieved, he has appealed to this Court.

He initially filed a fifteen (15) point memorandum of appeal followed by two sets of supplementary memoranda of appeal. The two sets had a total of eighteen (18) grounds of appeal. Further, in terms of Rule 72 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (henceforth "the Rules") Mr. Majura Magafu, learned advocate who was assigned the dock brief filed another set of a supplementary memorandum of appeal comprised of nine grounds of appeal. In totality, the appellant advanced forty-two (42) grounds of appeal.

Before going into the merits of the appeal, we find it apposite to provide a brief background of the matter which led to the appellant's conviction and sentence.

According to Flora Chengule (PW4), a student at the University of Dar es Salaam, College of Education (DUCE) on 6th June, 2009 at around 21:00 hrs, while she was returning from her evening fellowship and when she was at the stairs leading to her room number 249, Block C at Mabibo hostel which was at the first floor, she saw the deceased outside her room talking to a man. They faced each other. The room of the deceased was adjacent to PW4's room, her room number was 250. As PW4 was nearing them, and while she was about ten (10) paces or meters away, she heard the deceased crying for help saying *"mama nakufa nakufa"* literally meaning *"Please help me, I am dying."* The

deceased fell down and PW4 saw the man on top of the deceased, as if, he was stabbing her. PW4 raised an alarm. The man looked at her, took the stairs on the right side of Block C and disappeared.

PW4 claimed that she was able to identify the man as a fellow student by the aid of a tube-light that illuminated the corridor. She described the attire he wore on that night as being a black shirt with long sleeves and he had a black back-pack on his back. She said that she recognized him as she frequently used to see him within the hostel compound and most of the time in company with the deceased thus, he was very much familiar to her.

The deceased tried to walk towards PW4 but she couldn't as she was bleeding profusely. She helplessly fell down. Her fellow students responded to the alarm, among them was Francis Martin (PW1) a student at DUCE occupying room number 310, Block C at Mabibo hostel. PW1 told the trial court that he found the deceased rolling on the floor and her body was full of blood. They tried to rush her to the University of Dar es Salaam dispensary but she succumbed to her death while on the way.

On that same night, Methew Matimba (PW2), a watchman at Mabibo hostel told the trial court few minutes after opening the gate in order to allow the car that carried the deceased to pass, he received a phone call from

hostel dispensary to notify him about students who wanted to take the law into their hands. He went to the scene and found the appellant surrounded by students. Some wanted to beat the appellant while others were defending him. The appellant was lying on the floor and he requested for a pen and a paper. He wrote therein a telephone number of his mother and Swahili words "*Bertha Mpenzi wangu nisamehe*" literally meaning "*Bertha, my lover, please forgive me*".

Having seen the commotion, PW2 called the police. Shortly, they arrived and took the appellant together with his belongings. That is a black back-pack which had in it some clothes of the appellant (Exhibit P1), the appellant's advanced and secondary school certificates (Exhibit P2 collectively), three photographs (Exhibit P3 collectively) and a knife (Exhibit P4).

The body of the deceased was identified by Florian Daniel Mwarabu (PW3), cousin of the deceased under the supervision of an investigative officer, one D. 7628 D/Sgt. Minsimba (PW5). According to PW3, the deceased's body had blood and wounds which seemed to have been caused by a sharp object.

The appellant's defence was that he was not at the scene of the crime and he left the hostel premises at around 16:00 hrs for food and drink. He further said that he was falsely implicated by Gasper, a fellow student who

had grudges against him. He admitted to have known the deceased as her friend. Further in his cross-examination, the appellant admitted to have written in a piece of a paper the words "*Bertha nisamehe mpenzi wangu*".

At the conclusion of the trial, the three assessors who sat with the presiding Judge unanimously returned a verdict of guilty against the appellant on account that PW4 properly identified the appellant. The presiding Judge concurred with the assessors and as the result, the appellant was found guilty and convicted.

In grounding the conviction against the appellant, the presiding Judge found the evidence of the prosecution witnesses was credible and reliable. He held that there was death of a person as established by PW1 who witnessed the deceased death while enroute to the hospital and corroborated by PW3 who identified the body at the hospital and later on buried it in Ifakara.

As to the cause of death, the presiding Judge held that it was unnatural death as PW4 witnessed the stabbing of the deceased and PW3 saw wounds and blood on the deceased body which were caused by a sharp object.

Regarding the link between the appellant and the deceased's death, the presiding Judge found that PW4 and PW2 were credible witnesses and there was no reason to doubt their evidence when PW4 said that she saw the appellant attacking the deceased and PW4 found the appellant with black

back-pack. He also found that chain of events irresistibly points to appellant's guilt that, PW4 saw the appellant with a black bag and shortly thereafter PW2 found the appellant restrained at the dispensary and with him he had a bag which had clothes, documents and photographs and a knife. At the end, the presiding Judge was convinced with the prosecution evidence and rejected the defence of *alibi* for being improbable and false.

At the hearing of the appeal, Mr. Majura Magafu, learned advocate appeared for the appellant whereas Ms. Mwasiti Athumani Ally, learned Senior State Attorney assisted by Ms. Florida Wenceslaus, learned State Attorney appeared for the respondent/ Republic.

At the very outset, Mr. Magafu informed the Court that having consulted with his client and upon agreeing with him, the forty-two (42) grounds of appeal were condensed into five (5) main grounds of appeal and he would start his submission with the second ground of appeal: -

> *"1. The learned trial appellate Judge erred in both law and fact by holding that the prosecution proved its case against the appellant concerning the murder of Bertha Mwarabu beyond reasonable doubt.*
>
> *2. That, the learned trial Judge erred in law and fact to receive the evidence of Flora Chengule (PW4) whose*

substance of evidence was not read to the appellant in the committal proceedings as required by section 246 (2) of the Criminal Procedure Act, Cap. 20 R.E 2019 (the CPA) and there was no notice issued for calling additional witness as required by section 289 of the CPA.

3. *That, the learned trial Judge erred in law and fact in admitting exhibits P1, P2, P3 and P4 and relying on them in convicting the appellant without considering that the exhibits were not read over to the appellant during the committal proceedings.*

4. *That, the learned trial Judge erred in law and in fact by convicting the appellant on the offence of murder without properly considering the defence of alibi raised by the appellant.*

5. *That, the learned trial Judge erred in law by invoking section 164 (1) of the CPA in admitting Exhibits P1, P2, P3 and P4 whereas section 246 (2) of the CPA is crystal clear in respect of documents which were not read in the committal proceedings."*

Although Mr. Magafu intimated that his submission would focus on the above five grounds of appeal but in his conclusion, he urged the Court to

consider the fifteen (15) grounds of appeal raised by the appellant in his initial memorandum of appeal.

We have carefully gone through the appellant's initial memorandum of appeal and noted that all fifteen (15) grounds of appeal revolve around the above five (5) grounds of appeal save for the following two grounds of appeal: -

> *"1. That the learned trial Judge erred in law and fact by failing to resummon PW1, PW2, PW3, PW4 and PW5 after the amendment of the information thus prejudiced the appellant.*
>
> *2. That the learned trial Judge contravened the provisions of section 293 of the CPA as he failed to address the appellant the rights available to him in making his defence and the manner in which he shall make his defence."*

We wish to start with the above two grounds of appeal which Mr. Magafu did not attempt to make any submission on them.

As to the failure to resummon the prosecution witnesses after the information was amended, Ms. Ally, conceded that the information was amended after the prosecution closed its case and after five witnesses had

testified. She also concurred that after the substitution of the information, none of the five prosecution witnesses were resummoned to testify. She, however, argued that the appellant was not prejudiced as the amendment was minor and that the omission was curable under section 388 of the CPA. The learned Senior State Attorney argued that the amendment was to the effect of reflecting the proper name of the accused person after the trial court had noted that there was variance in the accused person's name appearing in the information and his evidence. In that respect, the name of the accused person was changed from "*Masamba Musiba*" to "*Masamba Musiba @ Musiba Masai Masamba*". She added that after the information was amended, the same was read over to the accused person (the appellant herein) who pleaded not guilty to the charge. It was thus the submission of Ms. Ally that the amendment did not occasion any miscarriage of justice to the appellant and the ground of appeal ought to be dismissed.

On our part, we have examined both the earlier information and the substituted information and we entirely agree with Ms. Ally that the amendment was minor as it was only for correcting the names of the accused person which was mistakenly written in the information. The initial information had the names of "*Masamba Musiba*" whereas the names of the accused

person appearing in the substituted information were "*Masamba Musiba @ Musiba Masai Masamba*". There were no any other changes made to the information. The details in the statement of the offence where the accused person was charged with an offence of murder contrary to section 196 of the Penal Code remained the same in the initial information and the substituted information. Similarly, the details contained in the particulars of the offence remained the same. Since the only amendment made was to add the names "*@ Musiba Masai Masamba*" and there was no any other amendment in the statement and particulars of the offence, we are satisfied that the alteration in the information was minor which did not affect the evidence adduced by the five prosecution witnesses to require them to be resummoned. Accordingly, there was no prejudice or injustice caused to the appellant by such amendment. The ground of appeal lacks merit.

We turn to the non-compliance with section 293 (2) of the CPA. Ms. Ally submitted that though the record of appeal does not indicate that the appellant was addressed on his right to defend but there was no injustice caused to the appellant because, according to the record, the counsel who stood for the appellant in the trial knew the options available to the appellant and that is why she informed the presiding Judge that the appellant would

testify under oath and he did not wish to call any witness. She thus prayed for the ground of appeal to be dismissed.

As rightly submitted by the learned Senior State Attorney the record of appeal does not indicate as to whether the learned trial Judge explained to the appellant the rights available to him in making his defence. Nevertheless, we are of the firm view that the omission did not occasion any miscarriage of justice to the appellant because it is gathered from the record of appeal that the appellant was ably represented by an advocate who is presumed to know the law and we take that the learned advocate adequately informed the appellant his rights of defence and that is why he informed the presiding Judge that he would defend himself under oath and had no intention to call any witness.

In the case of **Bahati Makeja v. The Republic**, Criminal Appeal No. 118 of 2006 (unreported) when faced with an akin situation we held: -

> *"It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned. In the current matter there was no injustice occasioned in any way at all. It is palpably clear to us that the learned Judge must have addressed the accused person*

in terms of s. 293 of the CPA and that is why the learned advocate stood up and said that the accused person is going to defend himself on oath. But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply."

Flowing from the above, we are settled in our mind that the appellant who was effectively represented by the learned advocate in the entire trial court proceedings was fully aware of his rights hence the omission did not prejudice him. The ground also fails.

We now deal with the oral submissions made by Mr. Magafu. Starting with the complaint that the evidence of Flora Chengule (PW4) was wrongly received because the prosecution did not fully comply with the provisions of sections 246 (2) and 289 (1) of the CPA. Mr. Magafu contended that Flora Chengule was not among the witnesses listed during the committal proceedings hence her statement was not read over to the appellant. He added that although the notice to call additional witness was issued, the record does not indicate as to whether the said notice was in respect of this witness. Since the record is silent concerning the name of the intended witness to be added in the list of the prosecution witnesses the prosecution

cannot be taken to have complied with the requirement of the law. After the Court had adverted Mr. Magafu to the original notice on record, he changed his line of submissions and attacked a copy of the statement of the witness attached to the notice of the intention to call an additional witness. He contended that the statement was not original statement recorded at the police station by the witness because it lacked her signature and it was not dated. He argued that the law requires the notice to be attached with the original statement of the witness made at the police.

Ms. Ally briefly responded that the ground of appeal lacks merit as the prosecution fully complied with the provisions of section 289 (1) of the CPA in issuing the notice to produce additional witness. She contended that according to the provisions of section 289 (2), the notice to be issued ought to state the name, the address and the substance of the witness which the prosecution fully complied with it.

On our part, we gather from the counsel's submissions that they are in agreement that Flora Chengule who was the fourth prosecution witness (PW4) was not among the witnesses listed during the committal proceedings. They are also at one that, in terms of section 289 of the CPA, the prosecution did issue a notice of an intention to call additional witness. The section provides:

"289 (1) No witness whose statement or substance of the evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person of his advocate of the intention to call such witness.

(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give."

It flows from the above provision of the law that in a trial before the High Court, no witness whose statement or substance of evidence was not read at the committal proceedings shall be paraded by the prosecution at the trial unless a reasonable notice in writing is issued to the defence side of its intention to do so. The provision further prescribes the details to be contained in such a notice. These are three; the name, the address and the substance of the evidence of the intended witness. Mr. Magafu's impressed upon us to find that the notice was insufficient because, he argued, it was not attached with a copy of the original statement of the witness made before the police.

We respectfully differ with his submissions because the law does not prescribe such a requirement. It requires the notice itself to state the name and the address of the intended witness together with the substance of her evidence. Upon perusal of the notice, we noticed that the prosecution fully

complied with the provisions of section 293 of the CPA as the notice had the name and address of the intended witness. Furthermore, the notice was attached with a copy which had more than the substance of the intended witnesses. We therefore do not find merit in this ground of appeal.

For the 3rd and 5th grounds of appeal, Mr. Magafu faulted the learned trial Judge in relying on Exhibits P1, P2, P3 and P4 to convict the appellant while the same were admitted in contravention of section 246 (2) of the CPA which directs that information, evidence of the intended witnesses and documentary exhibits which the Director of Public Prosecutions (DPP) intended to use during trial be read out and explained to the accused person in the committal proceedings. Mr. Magafu pointed out that at page 29 of the record of appeal, the list of exhibits intended to be used by the DPP were read over and explained to the appellant in the committal proceedings conducted on 17th October, 2016 but the clothes (Exhibit P1), the advanced and secondary school certificates (Exhibit P2 collectively), three photographs (Exhibit P3 collectively) and a knife (Exhibit P4) were not among the list of exhibits listed in the committal proceedings and during the preliminary hearing.

He further contended that while the presiding Judge appreciated that there was a non-compliance with the law, he wrongly invoked the provisions of section 164 of the CPA to justify his action of admitting them. It was the submission of Mr. Magafu that section 164 of the CPA applies where there is no specific procedure in the law but since there is section 246 of the CPA, the presiding Judge erred in law to bring into section 164 of the CPA. He therefore urged the Court to expunge Exhibits P1, P2, P3 and P4 from the record of appeal for being wrongly admitted.

Responding to the submission, Ms. Ally conceded that the Exhibits were not listed in the committal proceedings and they were not mentioned in the preliminary hearing. She therefore agreed that the Exhibits ought to be expunged from the record.

It is borne out of the record of appeal that Exhibits P1, P2, P3 and P4 were not listed during committal proceedings as among the intended exhibits to be relied upon by the prosecution in the appellant's trial. Worse still they were also not listed in the preliminary hearing of the case. The spirit behind such requirement is to guarantee an accused person facing a homicide case a fair trial by affording him the opportunity to know and understand in advance the case for the prosecution for him to mount a meaningful defence. Since the documents were introduced during the trial of the case obviously the

appellant was highly prejudiced hence the exhibits are liable to be expunged. We accordingly expunge Exhibits P1, P2, P3 and P4 from the record.

On the 4th ground of appeal concerning the defence of *alibi*, Mr. Magafu submitted that the appellant in his defence denied to have been at the scene of the crime as he said at the time when the alleged crime took place, he was out of the hostel premises to buy food and drink. While outside, the police came and arrested him and that none of the prosecution witnesses were able to squarely place the appellant at the scene of the crime. He pointed out that PW4 in her evidence did not mention the appellant by his name but only said she saw a man who claimed to be the appellant but she did not explain how she was able to identify him. Also, at the time when PW2 claimed to have seen the appellant surrounded by his fellow students, the murder incident had already taken place. Mr. Magafu therefore faulted the presiding Judge for rejecting the appellant's defence of *alibi* without giving any weight to the appellant's defence. After being adverted by the Court on the reasons given by the presiding Judge, Mr. Magafu argued that the reasons was inadequate as the presiding Judge did not weigh the entire evidence especially the fact that there is no evidence as to when the appellant was arrested and even

PW2 and PW4 who allegedly claimed to have placed the appellant at the scene, their evidence does not connect him with the murder of the deceased.

In response, Ms. Ally submitted that by virtue of section 194 (4) and (5) of the CPA, the appellant was required to give prior notice, either before the hearing of the case commenced or before the closure of the prosecution case, that he would raise a defence of *alibi*. However, she contended that the appellant did not give notice. That apart, Ms. Ally argued, the learned presiding Judge rightly exercised his discretion and accorded no weight to the defence of *alibi* as it can be gathered from pages 112 and 113 of the record of appeal. She added that since the appellant was squarely placed at the scene of crime by PW4 and immediately thereafter he was arrested within the vicinity of the crime on the material day as testified by PW2, the presiding Judge rightly rejected the defence.

We have gone through the record of appeal and we agree with the learned Senior State Attorney that the appellant did not issue prior notice of his intention to rely on the defence of *alibi*. It is the position of the law that where an accused person intends to rely on the defence of *alibi* he is required to give notice of that intention to the trial court and the prosecution before the hearing of the case commenced (see section 194 (4) of the CPA). If the

notice could not be given at that early stage, the accused person is required to furnish the prosecution with the particulars of *alibi* at a later stage but before the prosecution closes its case (see section 194 (5) of the CPA). If the accused person raised it during the hearing of his defence case, as was the case herein, the trial court has to take cognizance of that defence and in exercise of its discretion, may accord no weight to the defence.

In **Mwita Mhere and Ibrahim Mhere v. The Republic** [2005] TLR 107 we considered the import of section 194 (6) of the CPA and laid down a procedure to be adopted by the trial court when faced with an accused person who had belatedly raised his defence of *alibi*. We held: -

> *"Where a defence of alibi is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, at least three things are important under the provisions of section 194(6) of the Criminal Procedure Act 1985 (now the CPA):*
>
> *a) the trial court is not authorized by the provision to treat the defence of alibi like it was never made,*
>
> *b) the trial court has to take cognizance of that defence, and*
>
> *c) it may exercise its discretion to accord no weight to the defence."*

In the instant appeal, the record shows that the presiding Judge took cognizance of the appellant's defence of *alibi* but accorded no weight to it. Mr. Magafu complained that the presiding Judge improperly applied his judicial discretion in rejecting the appellant's defence of *alibi*. The term "judicial discretion" as used under section 194 (6) of the CPA was defined in **Mwita Mhere and Ibrahim Mhere** (supra) as follows: -

> *"Judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; the court has to demonstrate, however briefly, how that discretion has been exercised to reach the decision it takes."*

In the appeal before us, the presiding Judge in his judgment explained the circumstances which led him to exercise his discretion and at the end he accorded no weight to the appellant's defence of *alibi*. This is gathered at pages 112 to 113 of the record of appeal when he said: -

> *"The defence of alibi raised by the accused person is highly improbable. I have decided to consider it despite being raised without notice. He could not have been arrested by the police at about 16:00 hours and later at about 21:00 hours be seen by PW4 and PW2 at the hostel. Since I have held that PW2 and PW4 are credible witnesses, I take their*

version of the story as true. I reject this defence as being a false statement."

From the above extract, it is obvious that the presiding Judge in exercise of his discretion did demonstrate how he exercised his discretion of not according any weight to the appellant's defence of *alibi*. On that evidence in the record, we find that the presiding Judge correctly applied the law and used his discretion to accord no weight to the appellant's defence of *alibi*. For that reason, we find this ground without merit.

The last ground of appeal argued was whether the case was proved beyond reasonable doubt. Mr. Magafu argued that there is a missing link between the death of the deceased and the appellant since the identifying witness, PW4 did not explain as to how she was able to identify the appellant. He pointed out that this witness told the trial court that she saw the man standing with the deceased facing each other, the distance between them was about ten paces and she claimed that she used to see the appellant with the deceased but she failed to state the name of the appellant. Mr. Magafu wondered how could the witness be able to identify a person when such witness was in a state of confusion as testified by herself, PW4. He also

submitted that there ought to have been conducted an identification parade but it was not done and instead PW4 made a dock identification.

Regarding PW2 identifying the appellant, Mr. Magafu argued that the fact that PW2 found the appellant surrounded by people cannot by itself be a conclusive proof that the appellant committed the murder because the place where the appellant was found by PW2 was not at the scene of the crime and that there is no connection between the evidence of PW4 and PW2 as they each claimed to have seen the appellant at different places. With that submission, Mr. Magafu argued that the case was not proved to the required standard and the appellant was convicted on suspicion evidence whereas suspicious however strong cannot be the basis for conviction.

The learned Senior State Attorney replied that the appellant was positively identified by PW2 and PW4 thus the ground of appeal has no merit. PW4 identified him at the scene of the crime and that the circumstances of his identification were favourable thus there was no mistaken identity. She contended that PW4 told the trial court that the appellant was familiar to her and that is why she was able to identify him on that incident day. He was a friend of the deceased which fact is also corroborated by the appellant himself in his evidence in chief and the two were residing in the same Block C as PW4

was at room 249, Block C and the appellant at room 343, Block C. Therefore, Ms. Ally submitted that the appellant was not a stranger to PW4 thus there was no need of the identification parade.

Ms. Ally further submitted that PW4 gave a detailed description on how she was able to identify the appellant on that night that there was a tube light in the corridor, he was not far from her as the distance between the two was about ten paces, the appellant wore a black shirt with long sleeves and he had a black backpack bag. Ms. Ally argued that all these factors proved that PW4 positively identified the appellant and there was no mistaken identity. She added that PW4 was in upright mind though she had a shock as to what she witnessed on that day. She further contended that the identification evidence of PW4 was corroborated by the evidence of PW2 who found the appellant surrounded by his fellow students at the dispensary area shortly after the incident. PW2 told the trial court that he saw the appellant had a black backpack bag. She was therefore of the firm submission that the prosecution proved its case against the appellant and there was no mistaken identity.

Having heard the contending arguments from both sides and on our re-evaluation of the evidence we find that this is a straightforward issue as the

appellant was well known to both identifying witnesses, PW2 and PW4. Both witnesses said that the appellant was their college mate and he was residing in the same Block C at Mabibo hostel. Further, PW4 said that she frequently used to see him with the deceased as they were friends. The appellant himself does not dispute it because he said in his evidence in chief that the deceased was his friend. As such, the identification of the appellant was more of the recognition than identification by the stranger.

In **Athumani Hamis @ Athuman v. The Republic**, Criminal Appeal No. 288 of 2009 (unreported) where the Court dealt with the identification of the appellant through recognition said: -

> *"Under the circumstances where the appellant recognised the appellant because of knowing him before, and given the conditions which made the complainant to recognise the appellant, it is safe to say that there was no mistaken identity of the appellant. In the Kenyan case of* ***Kenga Chea Thoye v. The Republic*** *Criminal Appeal No. 375 of 2006 (unreported), the Court of Appeal of Kenya held that:-*
>
> *"Recognition is more satisfactory, more assuring and more reliable than identification of a stranger."*

Further in **Rajabu Khalifa Katumbo and Three others v. The Republic** [1994] TLR 129 we held: -

"Although the offence was committed at night, there were two lamps in the corridor inside the house which facilitated the identification of the offenders. The accused were known to the witnesses well before the day of the incident; the witnesses, therefore, were extremely unlikely to mistake them."

In the instant appeal, given the surrounding circumstances of the appellant's recognition and his arrest, we do not agree with Mr. Magafu that it was necessary for the prosecution to conduct an identification parade. The identification parade would have been proper if the appellant was a stranger to the identifying witnesses. Since the identification of the appellant was through recognition which is more assuring and more reliable, we are satisfied that the appellant was positively identified by PW4 and PW2.

Lastly, among the ingredients establishing the offence of murder which the prosecution has to prove are that there was a death and such death was occasioned by unnatural cause. In this appeal we noted that the appellant disputed all the facts read over to him during the preliminary hearing. We further noted that the prosecution intended to tender the Post Mortem Examination Report (PMER) of the deceased and to call the doctor. However, the doctor was not paraded as a witness and the PMER was not tendered in evidence. That apart, as rightly submitted by the learned Senior State

Attorney and correctly found and held by the presiding Judge that PW3 established and proved that the murder took place and the deceased died from unnatural and violent cause since her body was found with wounds and full of blood. We are therefore like the presiding Judge satisfied that the prosecution proved its case beyond reasonable doubt against the appellant.

In the end, we uphold the conviction of murder, the statutory death sentence and we proceed to dismiss the appeal.

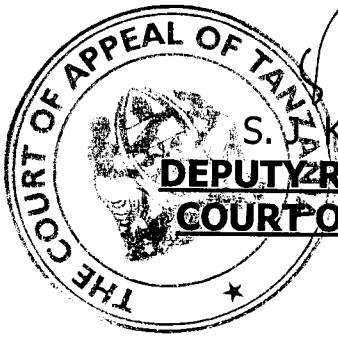
DATED at **DAR ES SALAAM** this 24th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 28th day of June, 2021 in the presence of the Appellant in person linked to the Court from Ukonga Prison by video conferencing facility and Mr. Adolf Kisima, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL