IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: SEHEL, J.A., KEREFU, J.A. And MLACHA,J.A.)

CRIMINAL APPEAL NO. 395 OF 2019

ALEXANDER PETER MVUNGI @ ALEX KANDAMIZA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mpepo, SRM-Ext. Jur.)

dated the 25th day of September, 2019

in

Extended Jurisdiction Criminal Case No. 9 of 2016

.....

JUDGMENT OF THE COURT

5th & 13th December, 2023

SEHEL, J.A.:

This first appeal arose out of an incident that took place on 7th December, 2013 at Kikavu area within Moshi District in Kilimanjaro Region at the house of Jackson Diamond (PW2) and Elizabeth Jackson Diamond (PW1), the husband and wife. While the couples were at home, their neighbour, one Pili d/o Mwinyimvua (Pili or the deceased) arrived. They exchanged greetings. When the deceased was about to leave, Alexander s/o Peter Mvungi @ Alex Kandamiza, the appellant, appeared. He was holding a pair of shorts. The appellant called PW1 and PW2 by

their first names, that is, "Saumu Saumu" and "Jackson Jackson" and then pledged them to ask Pili to return a piece of cloth torn from his son's short. Pili replied that she has nothing to do with the said piece of the cloth. The appellant became furious, he withdrew a machete and a club and started attacking Pili. PW1 and PW2 raised an alarm for help. Having noticed what he has done, the appellant took to his heels and vanished.

At the same time, PW1 rushed to the village office to report the matter only to find out that it was closed. On her way back, she met Said Paul Mbalamwezi (PW4) and narrated to him as to what transpired at her home. PW4 hired a bodaboda driver, one Hamis and rushed to the scene of crime. At the scene of crime, they found Francis Daud Siyame (PW3), the ten-cell leader. The village chairman, one Swalehe Juma Msengezi (PW8) also arrived at the scene after having been informed of the incident by PW3. The deceased was rushed to TPC hospital but later on transferred to Kilimanjaro Christian Medical Center (KCMC). Unfortunately, the deceased succumbed to death on the same day at about 20:00 hrs.

The findings of Dr. Isaria Ansotsiona Maruchu (PW5) who performed an autopsy on the deceased's body was that, a body of a female gender had cut wounds and scratches, cut wounds on hands and legs and a lot of blood was lost. That, the wounds were caused by lethal weapon and blunt object with heavy impact. That, the cause of death was acute severe hypovolemic shock secondary severe hemorrhage. He recorded his findings in a Report on Post-Mortem Examination which was tendered and admitted as exhibit P1 at the preliminary hearing stage.

PW8 reported the incident to Hai Police Station. On the next day, the investigative officer, E. 8231 Detective Corporal Vitalis (PW9) visited the scene of crime and drew a sketch map which was tendered and admitted as exhibit P2.

On 17th December, 2019, the police officer with force number E. 6454 Detective Corporal Samwel (PW6) arrested the appellant at Morogoro at the house of one, Elias John and consequently charged him with the offence of murder. In his defence, the appellant denied the allegations and brought to the fore the defence of alibi. After a full trial, the appellant was found guilty as charged. Accordingly, he was convicted and sentenced to mandatory sentence of death by hanging.

Aggrieved with both the conviction and sentence, the appellant lodged notice of appeal to this Court followed by a six-point memorandum of appeal. Later on, pursuant to Rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), he lodged two separate supplementary memoranda of appeal containing a total of nineteen (19) grounds of appeal.

At the hearing of the appeal, the appellant was present in Court and he was represented by Messrs. Elia Johson Kiwia and Ally Mhyellah, learned advocates. On the other hand, Ms. Dorothy Massawe, learned Principal State Attorney assisted by Ms. Jacqueline Werema, learned State Attorney, appeared for the respondent Republic.

When invited to argue the appeal, the learned counsel for the appellant adopted the three sets of memoranda of appeal and informed the Court that, having discussed with their client, they have agreed to condense all the grounds of appeal into eight grounds. **One**; the amended Information was not read to the appellant thus depriving him a right to know the substance of the offence charged, and that, he was denied a right to cross-examine the four prosecution witnesses who gave their evidence before the amendment. **Two**; the appellant was not

properly identified because the prosecution evidence of PW1, PW2, PW3 and PW4 was full of contradictions. **Three**; exhibits P1 and P2 which were used to find a conviction on the appellant were unprocedurally admitted. **Four**; the material witness, namely Elias John and his wife were not called to corroborate the hearsay evidence of PW6. **Five**; the trial court failed to consider the appellant's defence of alibi. **Six**; the trial court failed to warn itself on the danger of relying on the evidence of PW1, PW2 and PW4 who came from the same family as they might have personal interest to serve. **Seven**, the prosecution failed to prove the case at the required standard of proof beyond reasonable doubt, and **eight**, the trial court unprocedurally allowed the assessors to cross examine witnesses.

Arguing on the first ground of appeal that the trial court denied the appellant a right to know and understand the substance of the charge as the amended Information was not read to him, the learned counsel for the appellant contended that, on 11th September, 2016, after the trial court granted the prayer made by the prosecution for amendment of the Information, it continued to receive the prosecution evidence without calling upon the appellant to plead on the amended Information. To

cement his argument, Mr. Mhyellah referred us to page 69 of the record of appeal where, after the ruling was read to the parties which allowed the prosecution to amend the Information, the trial court did not call upon the appellant to plead to a new endorsed Information. To fortify his submission, he cited the case of **Omary Juma Lwambo v. The Republic**, Criminal Appeal No. 59 of 2019 [2021] TZCA 463 (3 September 2021; TANZLII) in which we referred to the decision of **Thuway Akonaay v. The Republic** [1987] T.L.R. 92, where the Court dealt with the import of section 234 (1) and (2) of the CPA and reiterated that where the charge is amended or altered, it is mandatory for a plea to a new or altered charge to be taken from an accused person, and that, failure to do so renders a trial a nullity.

The learned counsel for the appellant further contended that, even after the amendment, the appellant was not addressed on his rights to have the witnesses who had testified to be recalled to either give evidence afresh or be further cross-examined. To support his argument, he referred us to the cases of **Balole Simba v. The Republic**, Criminal Appeal No. 525 of 2017 [2021] TZCA 380 (17 August 2021; TANZLII) and **Ezekiel Hotay v. The Republic**, Criminal Appeal No. 300 of 2016

[2018] TZCA 428 (2 October 2018; TANZLII). Mr. Mhyellah further argued that the omissions vitiated the entire proceedings and judgment with the effect rendering it a nullity. He therefore implored the Court to nullify the proceedings of the trial court, quash the conviction and set aside the sentence imposed on the appellant.

On the way forward, the learned counsel for the appellant urged the Court to release the appellant as he contended that the available evidence on record is insufficient to warrant conviction against the appellant, and that, if granted the prosecution would have a chance to fill in the gaps thus will prejudice the appellant.

In reply, the learned State Attorney admitted that there was an amendment of the Information after the four prosecution witnesses had testified. She further admitted that, after such amendment, the appellant was not called upon to plead on a new amended Information. However, Ms. Werema was quick to argue that the amendment made in the Information did not materially alter the statement and particulars of the offence to require the appellant to enter a plea afresh. The learned State Attorney pointed out that the amendment was for changing the district in which the offence took place, that is, from "*Moshi*" to "*Hai*", but all

other details remained the same. The learned State Attorney also argued that, the prosecution witnesses who had already testified, namely; PW1, PW2, PW3 and PW4, all said that the incident happened at Hai and not Moshi. Hence, there was no need to recall them. In the end, she argued, the omissions did not prejudice the appellant.

She further contended that section 276 (2) and (3) of the CPA does not require for recalling of witnesses. She differentiated the facts in the cases cited by the learned counsel for the appellant by pointing out that the cases discussed the import of section 234 (1) and (2) of the CPA which requires the court to inform the appellant of his rights to recall the witnesses who had testified to either give evidence afresh or be further cross examined after the charge had been amended, while, the present appeal is about applicability of section 276 (2) and (3) of the CPA. At the end, she urged the Court to find that the first ground of appeal is without merit.

Mr. Mhyellah rejoined that the appellant was prejudiced as after the amendment the appellant was not given a chance to plead to a new charge. He admitted that section 276 (2) and (3) of the CPA is not specific that the appellant has to be informed on his rights to recall the

already testified witness but he argued, the words used in section 276 (2) of the CPA is "*the court shall deem just*" which translates that there has to be a just trial.

From the submission of both parties, it is not in dispute that the Information was amended after four prosecution witnesses had testified. The procedure for amendment of an Information is contained under section 276 (2) and (3) of the CPA that reads:

> *"(2) 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.***
>
> *(3) Where an information is amended, a note of the order for amendment shall be endorsed on the information and the information shall be treated for the purposes of all proceedings*

in connection therewith as having been filed in the amended form." [Emphasis added].

We shall come back on the bolded part. The above provision of the law is crystal clear that, if at any stage of the trial, it appears to the court that the Information is defective, the court may order for amendment if the required amendment will not cause injustices to the other party. In the case of the **Director Public Prosecutions v. Lawretta Ani Chioma & 3 Others**, Criminal Appeal No. 540 of 2017 (unreported) the Court echoed that the court must have regard that amendment, if made, would not cause injustices to the parties.

In this appeal, the record bears out that, on 11th September, 2016 there was a prayer for amendment of the Information made by Ms. Lucy Kyusa, learned State Attorney. This is reflected at page 65 of the record of appeal. The counsel for the appellant objected to the prayer but it was overruled. At this juncture, it is instructive to reproduce the extract of the trial court's ruling which reads:

"Having overruled the objection raised, section 276 (3) [of the CPA] is hereby complied with, the amendment that the place to read Hai District instead of Moshi District is hereby endorsed and

shall be treated for the purpose of all proceedings in connection therewith as having been filed in the amended form."

From the above, it is clear that after granting the prayer for amendment, the trial court complied with the provisions section 276 (3) of the CPA by endorsing the amended Information. Thereafter, the trial court allowed the prosecution to continue with its case by calling the remaining witnesses without giving the appellant a chance to plead to the new endorsed Information. On our part, we find that failure to read the endorsed Information to the appellant did not prejudice him as the amendment made was in respect of the district within which the murder took place. All other details in the statement and particulars of offence remained the same. Besides, the cases which the learned counsel referred us dealt with the substitution of the entire charge whereas in the present appeal the amendment of the Information was on district where Kikavu area is situate. We therefore find that, in the circumstances of this appeal, the omission is inconsequential.

We further do not find merit on the argument that the appellant was required to be informed of his rights to recall the witnesses who had

already testified. This is because, the wording in section 276 (2) (3) of the CPA, quoted above, does not mandatorily require the court to inform the appellant of his rights to require a recalling of the witnesses. In the bolded part of section 276 (3) of the CPA, the court is mandated to make amendments upon such terms as it may deem just, unlike, depending on the circumstances of each case, section 234 (2) (b) of the CPA requires the appellant to be informed of his rights to recall the already testified witnesses. Therefore, we find that this first ground of appeal is lacking merit and we hereby dismiss it.

We shall come back to second ground of appeal after dealing with the eighth ground of appeal which also raise an issue of procedural flaws. Relying on the decision of this Court in the case of **Swalehe Mohamed v. The Republic**, Criminal Appeal No. 164 of 2017 (unreported), the learned counsel for the appellant contended that the duty of the assessors is to assist the judge in a fair trial thus have a duty to act impartially and not to test the veracity or weaken the evidence of the witnesses. He pointed out that the answers given by the appellant at page 86 of the record of appeal when responding to the questions put to him by the second assessor suggest that he was basically trying to

contradict, weaken and cast doubt on the evidence of the appellant. He further argued that the ailment tainted the trial court's proceedings. He therefore urged the Court to nullify the proceedings, quash the conviction and set aside the judgment and sentence imposed upon the appellant. Mr. Kiwia made same submission as of his learned friend, Mr. Mhyellah that the present appeal is not fit for ordering a re-trial. In that regard, he beseeched us to allow this ground of appeal and release the appellant from prison custody.

The learned State Attorney briefly replied that the assessors did not cross examine the witness and that even if it was done the same cannot vitiate the proceedings because the appellant was not prejudiced. To bolster her argument, she referred us to the decision of this Court in the case of **Safari Anthony @ Mtelemko & Another v. The Republic**, Criminal Appeal No. 404 of 2021 [2023] TZCA 17768 (23 October 2023; TANZLII) where the Court considered the role and participation of assessors in a criminal trial that their role is not central; only to assist the trial Judge.

Mr. Kiwia was very brief in rejoinder submission. He distinguished the facts in the case of **Safari Anthony @ Mtelemko & Another v.**

The Republic (supra) that the Court dealt with failure to address the assessors on their roles and on vital points of law involved win the trial. While, he argued, in the present appeal the assessors usurped the powers of the parties in the case by cross examining the witnesses.

We wish to begin with the position of the law on the roles of assessors. Section 265 of the CPA requires the High Court to conduct a criminal trial with the aid of assessors and that, in terms of section 177 of the Evidence Act, assessors are mandated to put questions to witnesses in order to help the Court to know the truth. Of course, we are alive with the fact that cross examination is the exclusive domain of the adverse party and that, assessors are not allowed to cross examine the witness. Nevertheless, upon our revisit of the record of appeal, we observed that the three assessors who sat with the learned trial SRM-Ext. Jur. were permitted to put questions to the witnesses in order to seek for clarification. With due respect, we do not agree with the submission of Mr. Kiwia that the second assessor was permitted to cross examine the appellant. Page 86 of the record of appeal, to which the learned counsel for the appellant referred us shows that she was allowed

to ask questions and not cross examine the appellant. For ease of reference, we reproduce that part of the record which reads:

> "***Question by 2nd Assessor Judith Kundi:*** *My name is Alexander Peter Mvungi. I was at Saweni to demand my money because all witness had contradictions..."*

The above extract speaks for itself that the second assessor was permitted to put questions to the appellant. That said, we find the eighth ground of appeal is devoid of merit.

On the merit of appeal, the learned counsel for the appellant argued on the second ground of appeal that the appellant was not properly identified because of the apparent contradictions on prosecution evidence of PW1, PW2 and PW3. Elaborating on it, Mr. Mhyellah submitted that there was material contradiction on the evidence of PW1 and PW2 concerning a pair of shorts which the appellant was holding on the incident day. He pointed out that at page 55 of the record of appeal, PW1 claimed to have seen short which was not torn, whereas, PW2's version, at page 57 of the record of appeal, was that "*the short was cut on the lower part of the leg*". He further contended that it was not possible for two witnesses who were alleged to be at the scene of crime

to give conflicting story on a thing which they claimed to have seen it at the same time and same place.

Another contradiction pointed out was on time when the incident occured, the learned counsel for the appellant pointed out that, at page 55 of the record of appeal, PW1 when asked a question by the second assessor, she responded that the incident took place at 06:45 hours while, PW3 said in her examination in chief, at page 59 of the same record, that it was around 13:00hrs. The learned counsel wondered why there was such a huge variation of time.

On the same ground, the learned counsel for the appellant contended that there were key items such as a club, a machete and a short which were mentioned by PW1 and PW2 but not tendered as exhibits. It was further submitted that non production of the said items daunted the credibility of the prosecution witnesses.

Responding to the argument that there were contradictions on prosecution witnesses, the learned State Attorney argued that the pointed contradictions are minor and did not go to the root of the case that Pili d/o Mwinyimvua was murdered on 7th December, 2013 as testified by PW1, PW2, PW3 and PW4. She admitted that, at page 55 of

the record of appeal, PW1 responded to the question put by the second assessor that it was about 06:45 hours. However, the learned State Attorney argued that, at page 53 of the record of appeal, this same witness (PW1), told the trial court that it was during the day time, and that, her evidence is corroborated by the evidence of PW4 appearing at page 62 of the record of appeal where he said it was during the day time. Furthermore, the learned State Attorney argued, at pages 59 and 75 of the record of appeal, PW3 and PW8 respectively said it was 13:00 hours. She also accepted the discrepancy on the description of a pair of shorts. With that submission, she implored the Court to find that the discrepancies in time and type of a pair of shorts were minor errors. In supporting her prayer, she cited to us the case of **Eliah Bariki v. The Republic**, Criminal Appeal No. 321 of 2016 [2019] TZCA 40 (11 April 2019; TANZLII) where it was held that contradictions can be escaped or avoided.

Responding to non-tendering of a club, a machete and a pair of shorts, the learned State Attorney contended that in proving the offence of murder, it is not necessary to tender the weapon used lest most murderers would end up not being prosecuted.

The learned State Attorney concluded her submission on this ground of appeal by arguing that the appellant is familiar to PW1, PW2 and PW3 as testified by these witnesses at pages 57, 60 and 63 respectively. Furthermore, she argued, the appellant did not cross examine any of the witnesses on the aspect of knowing him prior to the commission of the crime. Relying on the case of **Kanaku Kidari v. The Republic**, Criminal Appeal No. 326 of 2021 [2023] TZCA 223 (4 May 2023; TANZLII), the learned State Attorney contended, failure by the appellant to cross examine any of the witnesses he is deemed to have accepted the truth of their story.

The learned counsel for the appellant rejoined by reiterating that the contradictions go to the root of the case since the cloth was alleged to be the cause of attack. He further reiterated that a club, machete and a pair of shorts ought to have been tendered in evidence as exhibits because they were subject of the murder case.

Having considered the submissions from the parties, we wish to start with the complaint on contradictions on time. After having closely examined the record of appeal, we observed that, at page 55 of the

record of appeal, PW1 answered the question put to her by the second assessor as follows:

"It was about 06:45 hours."

It is significant to note that the question posed by the assessor is not indicated in the record of appeal. In that respect, we have no hesitation to state here that the submission made by the learned counsel for the appellant that PW1 was referring to the time the offence was committed is not supported by the record of appeal. In any event, we gathered from the record of appeal that the incident took place in broad daylight specifically at around 13:00 hours as testified by PW1, PW3, PW4 and PW8 at pages 53, 59, 62 and 75 of the record of appeal respectively. For the reason stated, we do not see any inconsistencies on time of the commission of the crime. The complaint is meritless and we dismiss it.

Much as we agree that there is discrepancy on the evidence of PW1 and PW2 concerning the description of a pair of shorts, we find such a discrepancy immaterial as it is normal to have some discrepancies in the witnesses' accounts. As rightly submitted by the learned State Attorney, contradictions by any particular witness or among witnesses

cannot be escaped or avoided in any particular case. Generally, contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence – see: the case of **Dickson Elia Nsamba Shapwata & Another v. The Republic** Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May, 2008; TANZLII) and **Lusungu Duwe v. The Republic**, Criminal Appeal No 76 of 2014 [2014] TZCA 162 (6 June, 2014; TANZLII). We therefore find that the pointed discrepancy does not go to the root of the matter that Pili died from unnatural death and that PW1 and PW2 saw the appellant attacking her with a club and a machete. This complaint is similarly baseless and we dismiss it.

Lastly, we wish to be brief on the complaint that a club and a machete was not tendered in evidence. At the outset, we find this complaint is misconceived because physical evidence of a murder weapon is not necessary for its prosecution though it might be helpful in establishing a guilty mind of an accused person. Consequently, we do not find merit on this complaint and we dismiss it.

Submitting on the third ground of appeal that exhibits P1 and P2 were improperly received into evidence, the learned counsel for the appellant forcefully argued that exhibit P1 which was tendered by PW5 was not properly identified by the witness. He referred us to page 69 of the record of appeal where PW5 said he filled PF3 whereas he later on tendered the Report on Post Mortem Examination which is usually used by coroner. Further, he argued that the said exhibit was not properly received because there was no prayer from the witness to tender it. Neither was the appellant given a chance to comment on it before it was admitted in evidence.

Regarding exhibit P2, he contended that the exhibit dose not depict the truth. Elaborating on his contention, he submitted that exhibit P2 shows that the deceased was attacked at points A, B, C and D whereas none of the prosecution witnesses said the incident took place in more than one place. He further submitted that the said exhibit shows that the house of the appellant and that of the deceased were closer to each other while there was no such evidence coming from any of the prosecution witnesses. With that submission, he urged the Court to expunge exhibits P1 and P2 from the record of appeal.

In reply, the learned State Attorney referred us to the original record of appeal where it is clearly indicated that exhibit P1 was admitted during the preliminary hearing; at that stage the learned counsel for the appellant did not object for its admission. She explained that, during the trial, PW5 was called to explain and clarify on the details contained in the said exhibit but the learned counsel for the appellant did not cross examine PW5 on the type or form she used. In the circumstances, the learned State Attorney argued that the appellant is estopped from questioning it. Responding to exhibit P2, she admitted that it added some features but argued that the additions does not warrant it to be expunged from the record of appeal because, she said, it was properly admitted.

The learned counsel for the appellant rejoined by arguing that exhibit P1 ought to have been formally tendered by PW5 during the trial, and also insisted that, exhibit P2 does not speak the truth.

We do not intend to belabour much on the complaint concerning exhibit P1 because it has been conceded that the exhibit was admitted in evidence at the stage of the preliminary hearing, well before the commencement of the trial, as reflected in the original record of appeal.

In addition, the appellant had legal representation when the report was being tendered in court but no objection was raised. Above all, as correctly submitted by the learned State Attorney when PW5 was testifying on the exhibit, she was not cross examined on the issues which the learned counsel for the appellant is raising in the present appeal. We therefore find that the complaints on the form and on a person who tendered it are nothing but an afterthought.

On exhibit P2, with due respect to the submission of the learned counsel for the appellant the discrepancies on exhibit P2 does not warrant for it to be expunged. That apart, we observed that it was not relied upon by the trial court to warrant conviction on the appellant. As such, we do not see any justification for the learned counsel for the appellant to raise concern on evidence that was not used by the trial court to convict his client.

In the fourth ground of appeal that the prosecution failed to call Elias John, the brother-in-law of the appellant, the learned counsel for the appellant contended that the said person was material witness to the prosecution case as he would have established on the manner the appellant was arrested. He contended that failure to call him was fatal to

the prosecution case and the Court has to draw adverse inferences on the prosecution for such failure.

The learned State Attorney found refuge to section 143 of the Evidence Act by contending that there is no particular number of witnesses which the prosecution is required to call in order to prove its case. The important, she said, is the credibility and worthiness of the evidence for the prosecution.

The learned counsel for the appellant countered the argument of Ms. Werema by reiterating that it was wrong to rely on the evidence of family members without warning itself.

We entirely agree with the submission of the learned State Attorney that, the general rule is that, the prosecution is under a *prima facie* duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution (see **Aziz Abdallah v. The Republic** [1991] T.L.R. 71.

In the present appeal, we do not see any reason for calling Elias John as he was not a material witness for the Court to draw adverse inferences. The fact that the appellant was arrested at Morogoro was established by PW6 that the appellant was arrested at Morogoro on 17th December, 2019. His evidence was supported by the evidence of the appellant. At page 85 of the record of appeal, the appellant replied to the question put to him by the first assessor that he got the information on the day of his arrest at Gairo on 13th. As such, the arrest of the appellant at Morogoro was not at issue to require the attendance of Elias John. We accordingly dismiss this ground of appeal for lacking merit.

Submitting on the fifth ground of appeal that the trial court failed to consider his defence of *alibi*, the learned counsel for the appellant argued that the trial court did not consider the appellant's defence of *alibi* while he said in his evidence, that he left to Saweni in Same District a day before the incident occurred on 7th December, 2013.

The learned State Attorney contended that the complaint is baseless because the record is clear as at page 124 of the record of appeal, the trial court considered his defence but it was ruled out.

On our part, we concur with the learned State Attorney that this ground of appeal lacks merit since the evidence on record does not support the submission of the learned counsel for the appellant. As pointed out by Ms. Werema, at page 124 of the record of appeal, the trial court considered the appellant's defence but it was ruled out. We, as well, find that the defence of *alibi* is wanting of merit as the appellant was rightly placed at the scene of crime by PW1 and PW2. We thus, dismiss this ground of appeal.

Regarding the sixth ground which is a complaint against the testimonies of PW1, PW2 and PW3 that they are close relatives who had interest to serve, the learned counsel for the appellant argued that these witnesses came from the family who had sold a piece of land belonging to the deceased and that when the deceased claimed for her land, they requested the appellant to pay them more money for the land he purchased. It was his submission that with that evidence on record, the trial court ought to warn itself on relying on the evidence of PW1, PW2 and PW3 who are close relatives.

The learned State Attorney responded to this complaint by arguing that the ground was without merit in that relatives are not barred by law

from testifying on an event they witnessed or saw. She referred the Court to the case of **Kanaku Kidari v. The Republic** (supra) where the Court cited the case of **Edward Nzabunga v. The Republic,** Criminal Appeal No. 136 of 2008 (unreported) where the Court was confronted with akin situation and held that there is no law barring relatives from testifying.

We are in agreement with the learned State Attorney that there is no law in our jurisdiction that bars near relatives from testifying on an event they witnessed or saw. This was the position we stated in the case of **Mustafa Ramadhani Kihiyo v. Republic** [2006] T.L.R. 323 where we cited the case of **R. v. Lulakombe s/o Mikwalo & Another** (1936) 3 EACA wherein Sir Sidney Abraham, C.J. said:

> *"There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship to an accused person."*

We reiterate the above position.

In this appeal, we agree that, PW1, PW2 and PW3 were family members. However, this close relationship did not bar them from

testifying for or against the prosecution. The important thing is the credibility of their evidence, where, the trial court found them to be credible. We therefore find this ground wanting in merits. We dismiss it.

The seventh ground of appeal is the general complaint to the effect that the prosecution failed to prove the offence of murder. The learned counsel for the appellant contended that, given the pointed-out discrepancies, including the failure to tender the alleged weapons used by the appellant to beat the deceased, the unprocedural tendering of exhibits P1 and P2 and that, the evidence coming from the same family members raise the question as to whether the murder took place. Mr. Mhyellah further contended that, the trial court, instead of resolving the discrepancies in favour of the appellant, it shifted the burden to the appellant by rejecting his *alibi*.

The learned State Attorney replied that the prosecution proved the case beyond reasonable doubt that the person who killed Pili is the appellant. She further argued that, at no point in time, the trial court shifted the burden of proof to the appellant. She added that, the trial cout believed the evidence of PW1, PW2 and PW4 who saw the appellant attacking the deceased on 7th December, 2013 and that these witnesses

were known to the appellant prior to the incident; the fact which the appellant does not dispute. Reyling on the case of **Jackson Stephano @ Magesa & Another v. The Republic**, Criminal Appeal No. 130 of 2020 [2020] TZCA 323 (9 June, 2022; TANZLII), the learned State Attorney contended that the fact that the incident took place during day time, the conditions for proper identification were favourable. It was her further submission that the weapons used by the appellant to attack the deceased were dangerous, as such, malice aforethought is inferred from the weapons used. She therefore urged the Court to dismiss the appeal.

As rightly submitted by the learned State Attorney, the appellant was positively identified on that day by PW1 and PW2 who saw him beating the deceased with a club and a machete. Furthermore, the appellant was well known by PW1 and PW2 prior to that incident. Contenting to this fact is our earlier finding that the incident took place in broad day light as evidenced by PW1, PW3 and PW8. We therefore entirely agree with the learned State Attorney that the identification of the appellant was water tight due to the surrounding circumstances under which the murder took place and that, the appellant was put at the scene of crime hence his defence of *alibi* was rightly rejected by the

trial court. Accordingly, we do not find merit on this ground of appeal and we dismiss it.

In the upshot we find that the appeal lacks merit, and it is hereby dismissed in its entirety.

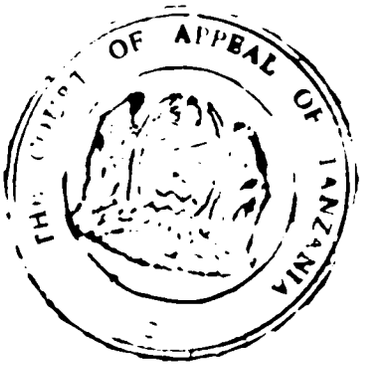
DATED at **MOSHI** this 13th day of December, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of Mr. Elia Johnson Kiwia, learned counsel for the appellant and Mr. Ramadhani Kajembe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL