IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 191 OF 2018

DEUS JOSIAS KILALA @ DEO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlyambina, J.)

dated the 21st day of June, 2018
in
HC Criminal Appeal No. 371 of 2016

.....

JUDGMENT OF THE COURT

14th September & 8th October, 2020

NDIKA, J.A.:

The appellant, Deus Josias Kilala @ Deo, was convicted of unlawful possession of firearm contrary to section 4 (1) and (2) of the Arms and Ammunition Act, Cap. 223 R.E. 2002 on the first count and sentenced to ten years' imprisonment by the District Court of Kinondoni. He was acquitted of the same charge on the second count and, in addition, his three co-accused not parties to this appeal were acquitted on both counts. His first appeal to the High Court of Tanzania sitting at Dar es Salaam against both conviction and sentence was fruitless, hence this second appeal.

The prosecution produced a total of seven witnesses to prove what was alleged in the charge sheet, on the first count, that the appellant and his co-accused were, on 25th July, 2014 at Yombo Kilakala area within Temeke District in Dar es Salaam Region, found in possession of two firearms, namely, a Sub-Machine Gun ("SMG") with serial number 13975 and a Mark IV with its number erased, without having a permit or licence previously sought and obtained.

The testimonies of the prosecution witnesses, knitted together, present the following narrative: acting on a tip from a whistleblower, Inspector Godfrey (PW1) on 25th July, 2014 led a contingent of ten police officers to a bar called Bony M at Tandika in Temeke District where they arrested the appellant. Moments later, they also arrested one of the appellant's co-accused. They took both suspects to Chang'ombe Police Station where, upon being interrogated, the appellant admitted to not only have participated in a murder but also to being possession of firearms, namely an SMG and a Mark IV. Immediately, the appellant led the police to his home at Yombo Kilakala where his other two co-accused were found and arrested. Upon searching the appellant's home, an SMG with serial number 13975, a Mark IV rifle with its number erased, two magazines and several rounds of ammunition were retrieved in the presence of the Ten Cell Leader

Hawa Hemed Chacha (PW5) and the appellant's landlady Chiku Masoud (PW6). PW1 had a certificate of seizure (Exhibit P.1) filled out and duly signed by the appellant as well as the witnesses.

In their evidence, PW5 and PW6 fully supported PW1's account on the retrieval of the firearms and ammunition. PW5 added that the police search was as well witnessed by the appellant's wife and brother.

There was further evidence that the appellant and his co-accused confessed to possessing the firearms and ammunitions in their respective cautioned statements. In this regard, police officer No. D.8323 D/Sgt Mussa (PW2) tendered in evidence a cautioned statement recorded on 25th July, 2014, which was attributed to the appellant. It is to be noted that this statement was admitted as Exhibit P.2 (a) despite the appellant having repudiated it. Two further police officers (No. F.3931 D/Sgt Thabeet and WP.3246 Cpl Joyce) separately tendered two cautioned statements allegedly made by two of the appellant's co-accused (Exhibits P.3 (a) and P.4 (a)). These statements too were accepted after the trial court had brushed away the protestations against their admissibility.

In order to establish that the seized firearms were active, the prosecution produced Inspector Paul Methusela Mgema (PW7), a ballistic

expert. He confirmed to have received the two guns on 29th September, 2014 and that he tested them by firing two rounds of ammunition. From this test, he confirmed that the two guns were active. The two spent cartridges and a ballistic test report were admitted as Exhibits P.5 and P.5 (a) respectively.

In their defence, the appellant and his co-accused denied the charges against them. In particular, the appellant refuted having been arrested at Bony M bar as alleged but said that he was actually apprehended at Tandika Bus Stand on 25th July, 2014. He was taken to Chang'ombe Police Station where he was forced to sign a certain document two days later. He also denied possessing the firearms and ammunition, saying that the place from which they were seized was not his home.

As hinted earlier, the trial court acquitted the appellant's co-accused of both charges but found the appellant guilty on the first count of unlawful possession of the two firearms without licence. The conviction was based on the evidence adduced by PW1, PW5, PW6 and PW7 that the firearms were retrieved from the appellant's home underneath a bed and that both of them were active. It is noticeable that the learned trial Resident Magistrate, for no apparent reasons, did not mention or act on the cautioned statements in his analysis of the evidence on record.

On the first appeal, the learned High Court Judge sustained the conviction having upheld the trial court's finding that the firearms were recovered from the appellant's home underneath a bed. However, on the authority of **Robinson Mwanjisi & Others v. Republic** [2003] TLR 218 he expunged the cautioned statement (Exhibit P.2 (a)) attributed to the appellant on the ground that it was not read out after it was admitted in evidence. The appellant's defence, he said, did not displace the prosecution's claim that the firearms were retrieved from his home.

The appellant now challenges the above outcome on ten grounds of appeal he raised in his Memorandum of Appeal and a supplementary Memorandum of Appeal. As some of the grounds of complaint raised are entwined, we have taken the liberty to reformulate them as follows: **one**, that the charge was incurably defective; **two**, that the certificate of seizure (Exhibit P.1) and the ballistic expert report (Exhibit P.5) were not read out after they were admitted in evidence; **three**, that the evidence of PW1, PW5 and PW6 was contradictory and unreliable; **four**, that the chain of custody of the seized firearms was broken and that PW1 failed to lay the foundation of his competence to tender the firearms (Exhibit P.2); **five**, that his defence was not considered; and **six**, that the prosecution case was not established beyond reasonable doubt.

At the hearing of the appeal before us, the appellant appeared in person through a remote link from the prison where he sojourned whereas the respondent Republic had the joint services of Ms. Faraja George and Ms. Monica Ndakidemi, both learned State Attorneys.

The appellant adopted the grounds of appeal he raised in his memoranda of appeal as amplified in the written submissions that he lodged in support of the appeal. He then rested his case praying that the appeal be allowed. On the other hand, Ms. George supported the appeal arguing that the prosecution case was not proved beyond reasonable doubt. That the certificate of seizure and the ballistic expert report were wrongly handled by the trial court, hence liable to be expunged. That the chain of custody of the seized firearms was broken. And that the testimonies of PW1, PW5 and PW6 on how the guns were seized allegedly from the appellant's home were materially contradictory.

We propose to deal with the submissions of the parties in detail in the course of determining the grounds of complaint as reformulated above, beginning with the complaint that the charge on the first count was incurably defective.

Submitting on the alleged defect in the charge, the appellant contends that the charge on the first count was incurably defective as it was at variance with the evidence which was adduced in its support. He stressed that while the charge alleged that he and his co-accused were found in possession of two guns make, SMG with serial No. 13975 and one gun make Mark IV, the evidence advanced talked about only one gun make SMG instead of two such guns. Relying on the cases of **Masasi Mathias v. Republic**, Criminal Appeal No. 274 of 2009 and **Mashala Njile v. Republic,** Criminal Appeal No. 179 of 2014 (both unreported), the appellant contended that such variance renders the charge defective. He urged the Court to find merit on this ground. It is noteworthy that the respondent did not address us on this ground of complaint.

The first ground need not detain us. It is clearly misconceived. What the appellant contended on this ground in his written submissions as summarized above is a variance between the charge and the evidence in its support as opposed to a defect in the charge. We have revisited the impugned charge and found that it is proper both in form and substance. Its statement of the offence and particulars of the offence clearly disclose the accusation against the appellant and his co-accused that they were found on 25th July, 2014 at Yombo Kilakala area within Temeke District in Dar es

Salaam region, in possession of two firearms, an SMG with serial number 13975 and a Mark IV with its number erased, without a licence.

Furthermore, the alleged existence of variance between the charge and the evidence in its support is equally farfetched. It is not true that the evidence advanced by the prosecution suggested that only one gun (an SMG) was found, instead of two guns. The record shows PW1 to have adduced that the two firearms he tendered as Exhibit P.2 were seized from the appellant's home along with two magazines and several rounds of ammunition. PW5 and PW6 confirmed witnessing the seizure of the two firearms, among others. We shall later in the course of this judgment revert to the cogency and reliability of the testimonies of these three witnesses but for now we hold that the first ground of appeal is without merit. We dismiss it.

The complaint on the manner the trial court handled the certificate of seizure (Exhibit P.1) and the ballistic expert report (Exhibit P.5) after it had admitted them in evidence poses no difficulty. Both the appellant and Ms. George were concurrent, rightly so in our view, that the two documents were not read out after they were admitted in evidence contrary to the guidance in the case of **Robinson Mwanjisi** (*supra*). Indeed, the record bears it out at pages 21 and 47 that both documents were not read out after they were

admitted. At this point, we should reaffirm the procedural imperative as we stated in **Robinson Mwanjisi** (*supra*) that contents of every documentary exhibit that has been cleared for admission and actually admitted in evidence must be read out as the party against whom the document is sought to be proved is entitled to know the contents thereof. In the premises, we find merit in the second ground of appeal as reformulated above and proceed to expunge the two documents.

As hinted earlier, the third ground contends that the evidence of PW1, PW5 and PW6 was contradictory and unreliable. On this ground, the appellant argued that the evidence of PW1, PW5 and PW6 differed materially from each other as regards what was seized in the search. While PW1 said that they recovered two firearms, an SMG Reg. No. 13975 and another one make Mark IV whose butt was cut off and whose serial number was erased, two magazines, 11 rounds of SMG and 4 rounds of Mark IV; PW5 said they found a black bag and when it was opened they saw an SMG and another firearm which had bullets and an SMG which had 11 bullets, but did not talk about the two magazines. On the other hand, PW6 talked about two guns which she said were found underneath the bed. In view of such evidence, the appellant contends that these three witnesses were not reliable

witnesses because there was obviously no corroboration of their respective accounts.

For the respondent, Ms. George agreed with the appellant that in the absence of the certificate of seizure, the prosecution case, relying upon the testimonies of PW1, PW5 and PW6, was too contradictory and unreliable to support the conviction against the appellant. She reasoned that the said testimonies were so materially contradictory on how the firearms and rounds of ammunition were allegedly retrieved from the appellant's bedroom. She elaborated that while PW1 adduced that the two firearms were retrieved from a mattress, PW5 averred that the firearms were recovered from a black bag found underneath a bed and gave insufficient description of the firearms. PW6's account was equally contradictory in that she said that the firearms were retrieved from underneath the bed.

We deem it necessary to reiterate that contradictions by any particular witness or among witnesses cannot be avoided in any particular case: see **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In that case, this Court observed that regularly in all trials, normal contradictions or discrepancies 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 of the incident. The Court added that a material contradiction or discrepancy is that which is not normal and not expected of a normal person, and that courts have to determine the category to which a contradiction, discrepancy or inconsistency could be characterized. In the premises, the Court held that minor contradictions, discrepancies or inconsistencies which do not go to the root of the case for the prosecution, cannot be a ground upon which the evidence can be discounted and that they do not affect the credibility of a party's case.

In its earlier decision in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported), the Court observed that due to the frailty of human memory and if the contradictions or discrepancies in issue are on details the Court may overlook such contradictions or discrepancies. For, as held by the High Court in **Evarist Kachembeho & Others v. Republic** [1978] LRT n.70, which we cite with approval:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

Having scrutinized the portions of the evidence on record referred to by the appellant and Ms. George, we have no hesitation to say that the complaint at hand is plainly baseless. Certainly, the accounts given by the

three witnesses were not one hundred percent congruent. For, while PW1 adduced that the two firearms were retrieved from a mattress, PW5 averred that the firearms were recovered from a black bag which was found underneath a bed and PW6 said that the weapons were retrieved from underneath a bed. Whether the weapons were recovered from a black bag or from a mattress or underneath a bed is but a minute detail. We cannot expect the testimonies of these witnesses to be matching in such small details especially because they gave evidence in 2016, two years after the appellant had allegedly been found in possession of the weapons. Stripped of the minute details, the testimonies of these witnesses establish in their totality that the two weapons were seized from the appellant's bedroom following a search on his home on 25th July, 2014. It is significant that all the three witnesses identified the weapons at the trial as those confiscated from the appellant's home. Accordingly, we find no merit in the ground of appeal at hand. It falls by the wayside.

The foregoing leads us to the contention that the chain of custody of the seized firearms was broken and that PW1 failed to lay the foundation of his competence to tender the firearms (Exhibit P.2).

On the question of chain of custody, the appellant referred the Court to the cases of **Paulo Maduka & 4 Others v. Republic**, Criminal Appeal No. 110 of 2007; and **Julius Matama @ Babu @ Mzee Mzima v. Republic,** Criminal Appeal No. 137 of 2015 (both unreported) that the prosecution had to establish the chain of custody of the seized weapons and ammunitions to assure the trial court that the said confiscated materials tendered at the trial were the ones confiscated from the appellant's home. He challenged that none of the prosecution witnesses on the present case adduced evidence showing where and how Exhibit P.2 was kept from the day it was recovered to the day it was tendered at the trial. He also cited the decisions of the Court in **Twalibu Omary Juma @ Shida v. Republic,** Criminal Appeal No. 262 of 2014 (unreported); and **Iluminatus Msoka v. Republic** [2003] TLR 245.

Ms. George, once more, agreed with the appellant's submission. She was emphatic that apart from how the firearms were allegedly seized at the appellant's home, no evidence was led on how and where the weapons were kept nor was there any account as to how they were taken to the ballistic expert (PW7) and finally tendered in evidence by PW1. The absence of any documentation on the movement of the weapons from their seizure and

introduction in evidence was fatal, she submitted. She thus urged us to find the chain of custody broken.

To begin with, we agree with the appellant that our decision in **Paulo Maduka** (*supra*) is authority of the peremptory requirement for the prosecution to produce evidence or chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of an exhibit allegedly seized from the accused. While we appreciate the aforesaid statement of principle, we think, as we held in **Vuyo Jack v. Republic,** Criminal Appeal No. 334 of 2016; **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017; and **Kadiria Said Kimaro v. Republic,** Criminal Appeal No. 301 of 2017 (all unreported), the said requirement must be relaxed in cases relating to items which cannot change hands easily and therefore not easy to tamper with.

In **Issa Hassan Uki** (*supra*) and **Kadiria Said Kimaro** (*supra*), we referred to our earlier decision in **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported), which involved the chain of custody of a motor cycle. The Court in **Joseph Leonard Manyota** (*supra*) stated that:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced*

and accepted by the court as evidence, regardless of its nature. ***We are certain that this cannot be the case say, where the potentiai evidence is not in the danger of being destroyed or polluted, and/or in any way tampered with.*** *Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course this will depend on the prevailing circumstances in every particular case."* [Emphasis added]

We are, accordingly, guided by the above stance.

At first, we acknowledge the concurrent view by the parties herein that except for the evidence that the weapons and ammunitions (Exhibit P.2) were seized on 25th July, 2014 and that subsequently on 29th September, 2014 they were taken to a ballistic expert (PW7), the prosecution proffered no evidence or chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of that exhibit until it was finally tendered at the trial by PW1. That may be so but we are decidedly of the view that the absence of such evidence was clearly inconsequential. For both weapons were clearly identified by the witnesses by their respective unique features. While the SMG was identified by the

witnesses by its unique serial number 13975, the other gun, Mark IV, was identified by the fact that its number was erased and its butt cut off. In addition, we think that such weapons are a kind of item that does not change hands easily and that there was no danger of them being tampered with.

On the propriety of the admission of Exhibit P.2, the appellant posited that PW1 was incompetent to tender it in evidence. Ms. George did not specifically address this issue. It is clear, in our considered view, that PW1 established fully his familiarity with the weapons, which he retrieved from the appellant's home in the presence of PW5 and PW6. That account sufficiently established the foundation of his ability to identify and authenticate the guns. Even though he did not state how he came by immediate custody of the exhibit before he tendered it, he was competent to do so on account of his knowledge of it. For, it is settled that a witness who at one point in time possessed any item that is a subject matter of a trial, is not only a competent witness to testify on that thing but also competent to tender it in evidence – see **Director of Public Prosecutions v. Sharif s/o Mohamed @ Athumani & Six Others**, Criminal Appeal No. 74 of 2016; **Director of Public Prosecutions v. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016; and **Director of Public**

Prosecutions v. Mirzai Pirbakhshi @ Hadji and Others, Criminal Appeal No.493 of 2016 (all unreported). The complaint under consideration fails.

We now turn to the complaint that the appellant's defence was not considered by the courts below.

It is striking that the appellant did not address us on this ground in his submissions in support of the appeal. Nonetheless, being a point of law we prompted Ms. George to address us on it. In her very brief submission, the learned State Attorney was categorical that both courts below did not consider the appellant's defence. It was, therefore, her contention that this omission was itself fatal to the appellant's conviction.

It is settled jurisprudence that a trial court is duty bound to consider and evaluate the defence case before arriving at a conviction. In **Leonard Mwanashoka v. Republic,** Criminal Appeal No. 226 of 2014 (unreported) this Court held that:

> *"The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing.* ***Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or***

inferences resulting in miscarriage of justice."

[Emphasis added]

See also **Elias Steven v. Republic** [1982] TLR 313, **Hussein Idd & Another v. Republic** [1986] TLR 166 and **Venance Nkuba & Another v. Republic**, Criminal Appeal No. 425 of 2013 (unreported).

Looking at the trial court's judgment appearing at pages 84 to 87 of the record of appeal, we would agree with Ms. George that, indeed, the trial court convicted the appellant without even a cursory evaluation of the appellant's defence. However, on first appeal, the learned Judge at page 121 of the record appeared to have stepped into the shoes of the trial court as he considered the appellant's defence in the following terms:

> *"The appellant in this case was found in actual possession of the firearms and ammunitions. There was no defence that he was not aware of the same. The only defence was that the exhibits were also tendered in another criminal case involving him, the allegation which was overruled during admission of Exhibit P.1. There is no strong evidence to the contrary to disprove that the firearms and ammunitions were not in the possession of the appellant."*

Admittedly, the learned Judge did not address a line in the appellant's defence that the home from which the weapons were confiscated was not his. But that was far cry from a serious contention that his defence was completely ignored by the first appellate court. Given these circumstances, we are enjoined to scrutinize the appellant's defence in whole to see if it raises any reasonable doubt in his favour.

Putting the appellant's defence in its proper perspective, we note that the said defence was mainly a self-serving denial of liability punctuated with a chronicle on how he was arrested, locked up, forced to sign a cautioned statement and finally taken to the trial court for arraignment and trial. All these could not displace the prosecution's claim that the firearms were retrieved from his home. As regards his line of defence that the home from which the weapons were confiscated was not his, we reject it on the ground that he did not cross-examine PW6, the landlady, on that incriminating aspect. The appellant's failure to cross-examine that witness on such an incriminating matter was an outright acceptance of its truthfulness – see the decisions of the Court in **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007; **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010; and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327

of 2013 (all unreported). The ground of appeal at hand is without merit. It stands dismissed.

Finally, we interrogate the question whether or not the prosecution case was established beyond reasonable doubt.

Here the appellant was insistent that the prosecution did not prove the case against him beyond reasonable doubt. He asserted that there was no cogent evidence to prove that he was found in possession of the said firearms, particularly so when it is considered that the alleged search was conducted against the procedure laid down by law because the police officers were eight in number and were armed with pistols and four SMGs at the time they allegedly arrested him at Bony M. Bar at Tandika. After all, he added, they contradicted themselves as to where he was arrested; was it at Bony M. Bar or at a local Bar at Tandika area. On this, he cited to us the case of **Mohamed Said Matula v. Republic** [1995] TLR 3 in which he said the Court stressed the trial court's duty to resolve inconsistencies.

He finally raised yet another ground in the course of his submissions that it was wrong for the first appellate Court to sustain his conviction based on a retracted and/or repudiated cautioned statement (Exhibit P.5 (a)) which was unprocedurally tendered by PW2 and that no trial within trial was

held to determine whether it was offered voluntarily. He referred us to the case of **Rashid & Another v. Republic** [1969] EA 138 and **Selemani Abdallah and 2 others v. Republic**, Criminal Appeal No. 384 of 2008 (unreported).

Besides what he said regarding failure to hold a trial within trial, the appellant submitted similarly that the said cautioned statement was not read out in Court after it was received as evidence. He once again referred us to the case of **Robinson Mwanjisi** (*supra*). He thus urged the Court to expunge that piece of evidence in line with what was done in the case of **Rashidi Amiri Jaba & Another v. Republic**, Criminal Appeal No. 204 of 2008 (unreported).

As we indicated earlier, Ms. George agreed with the appellant that the charge was not proved beyond reasonable doubt on the ground that in the absence of the discounted certificate of seizure and the ballistic expert report and that the chain of custody of the seized firearms was broken, the testimonies of PW1, PW5 and PW6 were too contradictory and unreliable.

The ground under consideration raises three issues, the first of which is on the legality of the search on the appellant's home. Looking at the circumstances of the case we take the view that the search was rightly and

lawfully executed as an emergency search under section 42 of the Criminal Procedure Act, Cap. 20 R.E. 2002. For, it is on record that PW1 and his faction of police officers had to act swiftly to reach the appellant's home at Yombo Kilakala failure of which two of the appellant's co-accused who were at his home and had become aware of his arrest would have possibly removed the weapons before the police arrived.

The second issue concerns the complaint against the cautioned statement attributed to the appellant. We should hasten to say that this grievance is plainly misconceived. As we indicated earlier, the learned High Court Judge resolved the appellant's complaint against the handling of the repudiated cautioned statement by expunging it from the record on the authority of **Robinson Mwanjisi** (*supra*) because it was not read out at the trial after it was admitted in evidence. Thus, the first appellate court did not act on the statement in upholding the conviction against the appellant.

However, we would, incidentally, remark that even though the learned first appellate Judge ultimately expunged the impugned cautioned statement he had erroneously held that the trial court did not have to conduct an inquiry into the admissibility of the cautioned statement after it had been repudiated by the appellant. The learned Judge's view that *"there is no mandatory procedural requirement of conducting an inquiry"* in criminal proceedings

before a subordinate court was based on an unfortunate misreading of the decision of this Court in **Kulwa Athuman @ Mpunguti & 3 Others v. Republic**, Criminal Appeal No. 29 of 2005 (unreported), which he cited as his authority. In that decision the Court expressly re-affirmed the need to inquire into the voluntariness of the statement once the defence had objected to its voluntariness or otherwise – see also **Rashid & Another** (*supra*) and **Selemani Abdallah** (*supra*) cited by the appellant.

This takes us to final issue whether the prosecution case was established beyond reasonable doubt. We have no difficulty in answering this issue in the affirmative. As demonstrated earlier, the evidence adduced by PW1, PW5 and PW6 was cogent and reliable to the effect that the firearms (Exhibit P.2) were retrieved from the appellant's home and that both of them were active. All these witnesses identified Exhibit P.2 as the items seized from the appellant's home on the fateful day. There was further evidence from PW7 that the two guns were tested and confirmed to be active. As found earlier, we think that the appellant's defence did not displace the prosecution's evidence that the guns were retrieved from his home.

It is necessary that we put it on record at this point that we heard this appeal on 14th September, 2020 sitting as a standard panel of three justices of appeal including the late Mmilla, J.A. who was the presiding Chairperson.

The hearing was immediately followed up by our conference, again presided over by him, where we reached a complete consensus on the reasoning and the outcome of the appeal. Unfortunately, Mmilla, J.A. passed away on 24th September, 2020 before this judgment was composed and signed. We recall that the Court once faced an unhappy occurrence like this in **Ahamad Chali v. Republic** [2006] TLR 13 but at the time the rules of the Court were silent on the matter. Gratefully, this situation is at present governed by Rule 39 (11) of the Tanzania Court of Appeal Rules, 2009, as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, G.N. No. 344 of 2019, which states as follows:

> *"(11) Where one of the members of the Court dies, ceases to hold office or is unable to perform the functions of his office by reason of infirmity of the mind or body, the remaining members, if-*
>
> *(a)* ***after considering the facts of the appeal or matter before them have concurring opinion, shall deliver the judgment****; and*
>
> *(b) they do not concur, the matter shall be referred to the Chief Justice for constituting another panel to conduct a fresh hearing."* [Emphasis added]

This judgment is, therefore, made pursuant to Rule 39 (11) (a) above as it expresses our concurring opinion as surviving members of the panel.

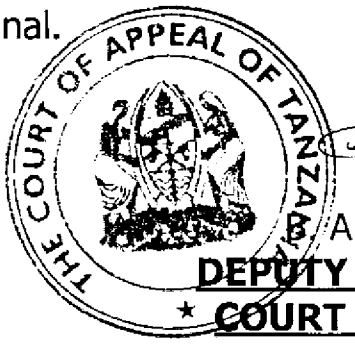
In sum, we hold that the present appeal was lodged without any merit. It stands dismissed in its entirety.

DATED at **DAR ES SALAAM** this 7th day of October, 2020.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 8th day of October, 2020, in the presence of the Appellant linked through video conference from Ukonga Prison and Ms. Imelda Mushi, State Attorney for the Respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL