

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 649 OF 2023

RASHID ABDALLAH ATHUMANI

ANOTHER VERSUS THE REPUBLIC

COURT
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IN THE COURT OF APPEAL OF TANZANIA AT MOROGORO fCORAM: MKUYE. 3.A. KAIRO. J.A. And MLACHA. J.A.^ CRIMINAL APPEAL NO. 649 OF 2023 RASHID ABDALLAH ATHUMANI..... 1st APPELLANT ND JOSEPH JOKTAN NYANGASE @ CHAM BO 2nd APPELLANT VERSUS THE REPUBLIC RESPONDENT Appeal from the Judgment of the High Court of Tanzania, at Morogoro) (Chaba, J.) dated 30th day of December, 2022 in Criminal Sessions Case No. 99 of 2022 JUDGMENT OF THE COURT 7th June, & 3rd September 2024 MKUYE. J.A,: The appellants, Rashid Abdallah Athumani and Joseph Joktan Nyangase Chambo (hereinafter referred to as the 1st and 2nd appellants) were arraigned before the High Court of Tanzania sitting at Morogoro for the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap

16. It was alleged that the appellants, on 29/10/2019 at Dunduma area, Kilimanjaro village within Mvomero District in Morogoro Region, murdered one, Shaban Mwidini, the deceased. At the end of the trial, they were each convicted and sentenced to the mandatory sentence of death by hanging. Aggrieved by that decision, they have now appealed to this Court. The brief background of the matter leading to this appeal can be stated as hereunder: The deceased was a businessman engaged in motorcycle riding for hire commonly known as "boda boda" at Mbogo village in Turiani Division. On 29/10/2019 at about 19:00 hours the deceased was with his brother, Mohamed Shabani (PW2), It was testified by PW2 that at around that time the deceased asked for fuel for his motorcycle and he then heard him talking to unknown person over his cell phone then he left to unknown place. In the following day, he learnt that the deceased never returned home and that is when he informed his uncle Awadhi Hamis (PW1) and other relatives. They commenced efforts to trace him but could not get him and on 20/11/2019 they were informed that he was dead. PW1 testified that on 30/10/2019, he was informed that his nephew was missing and he together with other relatives started searching for him. That, they reported at Mkindo Police Post but their efforts to search him ended in vain. SP Albert Kitundu (PW6), who was the RCO in Morogoro by then, was informed by a secret informant about the suspected murderers of the 2 deceased. He was also given a clue of where one of the suspects was. PW6 assigned F. 6142 D/CpI Faraji (PW3)

to attend the informer and on 6/11/2019 he permitted him (PW3) and D/C Avit to go to Dodoma so as to arrest one of suspects. The team managed to arrest the suspect (the former 2nd accused and now 1st appellant) on 7/11/2019 and at about 06:00 they arrived in Morogoro. As the arrested suspect had to lead the arresting team to where other suspects were, they had to travel on the same date to Dar es Salaam. They also managed to arrest the 1st accused (2nd appellant) and on 8/11/2019 morning arrived at Morogoro Central Police Station. PW6 testified further that after appellants' admission to the killing of the deceased and their willingness to show where the deceased's body was, he commanded the OC-CID of Mvomero District to trace the relatives of the deceased who were found on 20/11/2019. PW6 and other police officers being led by the appellants went to the place where the deceased body was and recovered it. The relatives identified the deceased's body and the Doctor who conducted autopsy revealed that the deceased's neck was broken and had signs that he was poisoned. F.6142 D/Cpl Faraji (PW3), testified on how on 3/11/2019 was assigned to interview a secret informant who had clues about the suspected 3 murderers of the deceased. He told the trial court that on 6/11/2019 together with D/C Avit and the informer went to Dodoma where they managed to arrest the 1st accused (now 2nd appellant) on 7/11/2019. PW3 testified further that upon confiding that he cooperated with another suspect who by then was in Dar es Salaam, they headed there via Morogoro and they managed to arrest the 2nd accused (now 1st appellant) on 8/11/2019 at about 00:20 hours (midnight). Then they transported the suspects to Morogoro Central Police Station where they arrived at about 08:00hrs. G. 3413 D/Cpl Zaharani (PW5) testified to the effect that on 8/11/2019 he interrogated the 1st appellant and recorded his cautioned statement in which he confessed killing the deceased and buried him at Dunduma area within Mvomero District. The cautioned statement was admitted as Exh. PE3 after trial within trial had been conducted. PW5 also testified to have recorded the 1st appellant's additional cautioned statement which was admitted as Exh. PE4 without any objection. On the same date 8/11/2019 No. H. 284 D/Cpl Manoni (PW7) interrogated and recorded the cautioned statement of the 1st accused (2nd appellant) and recorded his additional cautioned statement on 20/11/2019. 4 The 2nd appellants' cautioned statements were admitted as Exh. PE 5, collectively, Sarah Salvatory Mbuya (PW4) was a Resident Magistrate stationed at Kingoluwira Primary Court and also a justice of peace. She testified that on 15/11/2019 she recorded extra judicial statements of the 1st accused (2nd appellant) and 2nd accused (1st appellant) and the same were admitted without objection as Exh. PE 1 and PE 2, respectively. In defence, the 1st accused (2nd appellant) testified to have been arrested at Dodoma by PW3 and the 2nd accused (1st appellant) also does not deny to have been arrested at Dar es Salaam. They also admitted to have been taken to Morogoro on 8/11/2019. However, the 2nd appellant denied to have recorded cautioned statement alleging to have been heavily tortured when interrogation was going on. He also denied to have recorded his cautioned statement alleging that it was copied and pasted from the statement of Juma Rashid whom they were taken together to SUA Police Station. He further denied to have confessed before the justice of peace (PW4). He also refuted to have led the search team to the place where the deceased body was unearthed contending that it was certain Juma Rashid who led them. 5 The 1st appellant

denied the allegations of murder against him. He said that some contents in his cautioned statement were known to PW5 who recorded it. He also denied to have confessed before the justice of peace (PW4) and also to have led the police to the place where the deceased body was unearthed alleging that it was Juma Rashid who led the police to the scene of crime. The appellants have lodged a joint memorandum of appeal containing nine (9) grounds of appeal which can be paraphrased as follows:

1. The prosecution failed to prove the case beyond reasonable doubt.
2. In the absence of a postmortem report establishing the death of the victim ; the trial court erred in holding that the appellants committed the offence.
3. The circumstantial evidence was not watertight.
4. The prosecution evidence was weak, tenuous, contradictory, inconsistent and unreliable.
5. The doctor who examined the body and prepared the postmortem report was not called as a witness.
6. The Chief Justice Guidelines was not complied with in recording the extrajudicial statements.
7. The appellants conviction was based on procedural irregularities.
8. The cautioned statements were recorded in contravention of sections 50 and 52 of the CPA Cap, 20.
9. The defence case was not considered. When the appeal was called on for hearing, Ms. Mariam Kapama learned advocate appeared representing both appellants; whereas the respondent Republic was represented by Ms. Upendo Shemkole, learned Senior State Attorney teaming up with Mses. Rosemary Mgenyi and Veronica Chacha, both learned State Attorneys. Before commencing with hearing of appeal in earnest, Ms. Kapama intimated to the Court that she would argue the appeal in the following arrangement: Ground 8 as ground No. 1, ground 7 as ground No. 2, ground 6 as ground No. 3, grounds No. 2 and 5 as ground No. 4, grounds 3 and 4 as ground No. 5 and ground 1 as ground No. 6 and ground 9 as ground No. 7. In relation to ground No. 8 (now ground 1), the appellant's complaint is on non-compliance with sections 50 and 51 of the CPA. It was Ms. Kapama's argument that the appellants' cautioned statements (Exh. P1 and P2) were recorded out of time. In elaboration, she contended that, for instance, the 1st appellant's statement was recorded on 8/11/2019 although he was arrested on 7/11/2019 at Dodoma. She explained that, after his arrest in Dodoma on 7/11/2019 morning he was taken to Morogoro Police Station as per the evidence of PW3, then went to Dar es Salaam where after having arrested the 2nd appellant on 8/11/2019, they went to Morogoro and arrived on 8/11/2019 at 08:00 hrs then started to record his statement at about 10:00 am. The learned counsel's area of complaint is that the 2nd appellant was not informed about extension of time as required by section 51(1) (a) of the CPA. Since Exhs. P1 and P2 were recorded out of time, it was wrong for the trial court to rely on

them, she argued. As for the 2nd appellant, it was argued that after his arrest at Magomeni Mwembechai in Dar es Salaam, he was taken to Mburahati Police Station. Then, they travelled to Morogoro where they reached at 8:00 hrs and his statement was taken at 10:15 hrs. She argued that, since there was no information relating to extension of time relayed to the appellant, then his cautioned statement was recorded out of time. In support of his argument, she referred us to the case of Majaliwa Ernest v. Republic, Criminal Appeal No. 465 of 2022 [2024] TZCA 313 (7 May, 2024). 8 On the other side, Ms. Mgenyi in the first place declared their stance that they resisted the appeal and supported the conviction and sentence. Responding to the appellant's arguments she countered that Exh. PI and P2 were recorded out of time. She elaborated that, though the cautioned statement may seem not to have been recorded within four hours after the appellants' restraint, there was an exception under section 50 (1) of the CPA. She explained that, PW3 who was the arresting officer explained how he arrested the 2nd appellant at Dodoma at 00:30 hours on 7/11/2019 and travelled with him to Morogoro and that as he was giving some clue of other assailants, they travelled on the same day to Dar es Salaam so as to arrest the 1st appellant. She went on submitting that, PW3 together with 2nd appellant arrested the 1st appellant on 8/11/2019 at 00:20 hrs at Magomeni Mwembechai then after passing through Mburahati Police Station, they travelled to Morogoro where they arrived at 08:00 hours and his cautioned statement was recorded starting from 10:00 hours which was within time. This, she argued, was within the ambit of section 50 (1) of the CPA allowing extension of time to interrogate a suspect. She insisted that the circumstances of the case after the arrest of the 2nd appellant falls under section 51(2) of the CPA. In the end, she urged us to find this ground unmerited and dismiss it. 9 In rejoinder, Ms. Kapama insisted that the appellants ought to be informed of the extension of time; and that the contention by the learned State Attorney that they were still under preliminary investigation is not born out of the evidence in the record of appeal more so, when taking into account that PW5 said the statement could be recorded at any police station. Basically, the period available for interviewing the suspect as per section 50 (1) (a) and 51 of the CPA is four hours commencing from the time when the suspect is placed under restraint by the police. However, according to the provision of the law the period may be extended by the relevant authority (depending on the circumstances) under section 51 (1)

- (a) and (b) of the same Act. The said provision states as follows: "51(1) Where a person is in law full custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may:
- (a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or 10
- (b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period." In this case, it is not disputed as submitted by both counsel that its investigation involved a sequence of events.

Ms. Kapama is at qualms as to why, firstly, the appellants' cautioned statements were not recorded at police stations other than Morogoro Police Station, where the appellants made some stops such as Morogoro Police Station for the 1st appellant when they stopped enroute to Dar es Salaam from Dodoma and at Mburahati Police Station after the 2nd was arrested awaiting to travel to Morogoro. Secondly, that the appellants were not informed of any extension of time for recording their cautioned statements as required by section 51 (1) (a) of the CPA. Having considered the rival arguments on the first limb of the concern, we go along Ms. Mgenyi's line of argument that this was a complicated case. There is no dispute that the offence was committed in Morogoro region and none of the witnesses saw when it was committed. It started when an informant informed the police about the murderers, one of whom was in Dodoma, and how they managed to arrest him. As the said suspect gave a hint of his accomplice being at Dar es Salaam, they had to rush there to arrest him. As it is, though the offence was committed in Morogoro but the ii appellants were arrested at Dodoma and Dar es Salaam depending on what information and when it was received by the police. In the circumstances, we do not see how the police could have been able to record the suspects' cautioned statements at Morogoro or Mburahati Police Stations while investigations were still going on. The issue of complicated investigation, was discussed in the case of *Nyerere Nyangue v. Republic*, Criminal Appeal No. 67 of 2010 [2012] TZCA 103(21 May 2012), where the Court having satisfied itself on the considerations which were taken by the trial court in admitting the cautioned statement among them being complexity in investigation, public interest and that the accused was not prejudiced, stated as follows: "It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads the exclusion of the evidence in question / ' In the matter at hand, as was submitted by both counsel, the investigation of this case was a bit complicated. In the first place, none of the witnesses saw when the offence was committed. Second, investigation started after an informant gave the clue of who might have been involved in the offence. The suspects were at long distances. The 1st appellant (the then 2nd accused) was arrested in Dodoma on 7/11/2019 at 00:30 hours. In the morning, he was taken to Morogoro Police Station and arrived at night hours; 19:00 hrs. Third, upon receiving information that the 2nd appellant (the then 1st accused) was in Dar es Salaam, they travelled to Dar es Salaam where they arrived at night hours and arrested him on 8/11/2019 at 00:20 hours. They went to Mburahati Police station and in the morning, they left for Morogoro where they reached at 08:00 hours and then their cautioned statements were taken from 09:30 to 11:42 hours and from 10:00 hours to 10:30 hours, respectively. As it is, the lead person in investigation from Morogoro was PW3. He was together with the 1st appellant since his arrest in Dodoma to Morogoro and then to Dar es Salaam and back to Morogoro again when the cautioned statements were recorded. By the nature of the offence, we think, they had to exhaust the preliminary issues in investigation relating to all the suspects in order to avoid interfere with the investigation. We are of the view that, given the circumstances, the delay in recording the cautioned statements was justified. The other limb of complaint is that the appellants were not informed about extension of time for recording their cautioned statements as required by section 51 (1) (a) of the CPA. We have carefully examined the

provisions of the law complained of. However, we have gathered that, much as the said provisions provide for a 13 requirement of informing the accused on the extension of time for recording cautioned statement, it is not couched in mandatory terms. For clarity, we take liberty to reproduce it as hereunder: "51 (1) Where a person is in iaw fui custody in respect o f an offence during the basic period avaiiabile for interview ing a person, but has not been charged with the offence, and it appears to the pooice officer in charge o f investigating the offence, for reasonabie cause, that it is necessary that the person be further interviewed\ he may -

- (a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or
- (b) ..." The manner the above quoted provision of the law is couched, it is not mandatory to inform the suspect of the extension of time. It means that, it is discretional to do so depending on the available circumstances. In view of that, there is no gainsaying that, failure to inform the appellants about the extension of time of recording the cautioned statement was not fatal and, in any case, there is no evidence that it was prejudicial to the appellants. In this regard, we find that this ground is not merited and we dismiss it. 14 In ground no 2, (former ground no. 7) the appellants' complaint is on the trial court's non-compliance with section 246 of the CPA. It is argued that Exh. PI P2, P3 and P4 and P5 were wrongly admitted since they were not listed during the committal proceedings as per section 246 (1) of the CPA. To fortify her stance, Ms. Kapama referred us to the case of Lucas Daudi Wage v. Republic, Criminal Appeal No. 555 of 2021 [2024] TZCA 398 (5th June 2024). She thus urged the Court to expunge them from record. In response Ms. Mgenyi maintained that both cautioned statements and additional statements were together in the sense that even the additional cautioned statement was listed in the umbrella of the substantive statements. She argued further that the appellants did not object their being tendered in court and referred us to the case of Lucas Daudi Wage (supra), where it was stated that: "Failure to object exhibit during tendering cannot be objected a t appeals as it w ill be an afterthought/' In her view bringing this kind of complaint at this stage is an afterthought. Section 246 (2) of the CPA requires the committal court upon an information being filed and explained to the accused, to read out or cause to 15 be read the contents of the statements or documents intended to be relied upon during the trial. The provisions of the said section were discussed in the case of Remina Omary Abdul v. Republic, Criminal Appeal No. 189 of 2020 [2022] TZCA 118 (15 March 2022) TANZLII and the Court observed among others, that section 246 (2) of the CPA requires the committal court (court holding preliminary inquiry) to ensure that it reads the information and contents of the statements of potential witnesses or the documents containing substance of evidence and that the exercise entails listing of prosecution witnesses whose statements have been read and those of the defence, if any. The purpose of this procedure is to ensure that the accused is aware of the evidence intended to be produced in court against him. This Court had an occasion to deal with a situation where the same was not done and it ruled out that failure by the prosecution to list the intended prosecution exhibits is a fatal ommission rendering such evidence to be

expunged except if such evidence is brought under section 289 (1) of the CPA allowing the prosecution upon a reasonable notice to call such witness as an additional witness or evidence in case it was not listed or its contents read at the committal proceedings. In this case, it is not in dispute that the both appellants recorded their substantive cautioned statements on 8/11/2019 after they had arrived from 16 Dar es Salaam. They also recorded their additional cautioned statements on 20/11/2019 after the recovery of the deceased's body. While the 1st appellant's additional statement was recorded by PW5, the 2nd appellant's additional statement was recorded by PW 7 Manoni who also recorded his substantive cautioned statement which were admitted in evidence as Exh. P5 collectively. We are, therefore, in agreement with the learned Senior State Attorney that, since the appellants' additional cautioned statements were recorded as a continuation to what they had recorded in their substantive cautioned statements, such additional cautioned statement were listed in the umbrella of the substantive statements. In that case, the necessity of bringing them under section 289 (2) of the CPA did not arise. After all, as was rightly argued by Ms Mgenyi, the appellants did not object at their tendering and therefore objecting them now amounts to a mere afterthought. The third grievance is that the Chief Justice Guidelines (the Guideline) were not complied with in recording the extra judicial statement. Basically, the complaint is on item 4 of the standard form of the extrajudicial statement which requires the justice of peace to ask the suspect if he wishes to say anything in relation to the offence. It is argued that when the appellant was asked such question, he (the suspect) replied "ndiyo" literally 17 translated "yes" without crossing over either the word "nitaeleza" translated as "I will state" or "sitaeleza" translated "I will not say anything". It was the learned counsels' argument that the answer "ndiyo" or "yes" without cancelling the other option was ambiguous as it is not clear as to what he meant. The other complaint is in relation to item 5 of the extra judicial statements relating to the inspection of the suspect's body to detect fresh injuries or wounds in which the grievance is that it was not proper for a female justice of peace to inspect a male suspect. Our examination of the extra judicial statement has revealed that indeed, when the 1st accused (2nd appellant) was asked if he was willing to say/state anything as shown at page 230 of the record of appeal, he replied "ndiyo" meaning "yes" However, the justice of peace did not cross over the words "nitaeleza" or "sitaeleza" so as to show exactly what the 2nd appellant admitted whether "to say something" or "not to say anything". However, we think that such reply in that item should not be taken in isolation from other factors. It is our view that the reply "ndiyo" is inconsonant with the question that was asked which was couched thus: "mshtakiwa am ejulishwa kuwa yupo mbele ya MUnzi wa Am ani na amejulishwa au kuullzwa kama anataka kusema lolote kuhusiana na kifo cha SHABAN kilichotokea huko MBOGO 18 tarehe 29/10/2019 ...Ndiyo ...Jibu ndiyo nitaeleza/sitaeleza" Naturally, "ndiyo" would go with "nitaeleza" If he was not willing to say anything, he must have said "hapana" which tallies with the explanation "sitaeleza" But again, if he meant "ndiyo" "sitaeleza" we think, there would not have been such narration which followed thereafter. This is because, his willingness to state whatever he wanted is qualified by his statement at the bottom of that page 230 of the record of appeal where he (2nd appellant) said "Nipo tayari kutoa maelezo

yangu kwa hiari." Literally translated "I am ready to give my statement willingly" it means, therefore, that there was no ambiguity at all. With regard to the 2nd limb of complaint relating to inspection, there is no question that the justice of peace was a female person and the suspect was a male person. Item 5 of the extra judicial statement shows that the justice of peace inspected the suspect and saw that he had no fresh wound in his body. But again, we think, the justice of peace filled that item according to the manner it was couched. It states: "Nim ejaribu kumchunguza mtuhumiwa kiwiliwili chake na baada ya uchunguzi wangu nimeona."

- (a) Mtuhumiwa hana jeraha la aina yoyote. 19
- (b)
- (c) " Ideally, this connotes that the justice of peace in person inspected the suspect but in practice, a female justice of peace uses a male person to inspect a male suspect for purposes of preserving dignity and integrity of the suspect which in our view is what happened. In any case, the 2nd appellant did not complain if he was injured or wounded which leads us to conclude that his complaint at this juncture is an afterthought. In the 4th ground of appeal (grounds 2 and 5), the appellants fault the prosecution for failure to tender a postmortem examination report and to call the doctor to give his evidence. Ms. Kapama argued that section 240 (1) and (3) of the CPA provide for the admission of a medical report and the maker to be called for cross examination. However, it was argued that, though PW4, PW5 and PW6 testified to have been told by the appellants that the deceased was killed by poison and his body was examined by the doctor, neither was the postmortem examination report tendered in court nor the doctor called to testify in court and no explanation was given why that happened. The learned Senior State Attorney conceded to that complaint. However, she was quick to state that despite such anomaly, there was 20 evidence showing that the deceased was dead. His body was found buried at Kilimanjaro village in Nduduma Ward and had started decomposing as per the testimonies of PW1 and PW6 and the appellants' confessions. Apart from that, she argued, the appellants did not object or even cross examine the witnesses on that aspect. Indeed, the High Court Judge found Shabani Mwidini was dead. The evidence that the deceased died came from PW1, PW3 and PW6 and confessions by the appellants. PW1 and PW6 testified to have found the body of the deceased after being led to the scene by the appellants who also knew him. PW4, PW5 and PW7 said that the cause of the deceased's death was poison which evidence was supported by PW6 who testified to the effect that following the examination of the deceased's body, the Doctor who performed it said the cause of death was poison. Apart from that, it is evident from the record of appeal that PW5 at one stage said, the deceased's neck was broken, then he said, the deceased was poisoned and yet he said the jembe (hoe) was used to hit him. Also, PW7 said the deceased was poisoned. There is no doubt this is an indication of contradiction as to the cause of death. However, as was rightly argued by both sides, neither the Postmortem Examination Report was tendered in court nor was the Doctor who 21 conducted the postmortem examination was called to testify in court. It is

settled law that the failure to call material evidence entitles the court to draw adverse inference that perhaps if such witness was called, he/she might have given the evidence negative against the prosecution. There is plethora of cases on this aspect. [See: Aziz Abdallah v. Republic, (1990) T.L.R. 71 and Lazaro Kalonga v. Republic, Criminal Appeal No. 189 of 2020 [2022] TZCA 118 (15 March 2022) TANZLII]. In this case, despite the fact that the doctor was not called to testify in court, we find that there was sufficient evidence that proved that Shaban Mwidini is dead and that he died an unnatural death. This is so because of the evidence of PW1 who saw his body and identified it by his clothes which were black Tshirt and black trouser make jeans. But again, the appellants through their confessions admitted to know the deceased while mentioning his names and led the search party to the place, they buried him. There could be a disparity as to the cause of death whether it was poison, broken neck as per the testimonies of PW5 and PW7 or the use of a hoe. However, we think, this could happen due to human recollection being infallible taking into account that the offence was committed in 2019 and the witnesses came to testify in 2022. [see Oswald Mokiwa @ Sudi v. Republic, Criminal Appeal No. 190 of 2014 [2019] TZCA 169 (14 June 22

2019) TANZLII, Deus Josias Kilala @ Deo v. Republic, Criminal Appeal No. 191 of 2018 [2020] TZCA 1809 (8 October 2020) TANZLII and Gitabeka Giyaya v. Republic, Criminal Appeal No. 44 of 2020 [2022] TZCA 830 (28 December 2022) TANZLII]. Be it as it may, going by the evidence of PW1 and PW6 who witnessed the exhumation of the body of deceased on 20/11/2019 which was identified by PW6, the deceased's nephew, we are satisfied that Shaban Mwidini is indeed died. And that his cause of death was unnatural going by the appellant's confession to PW4 who recorded their extra judicial statements. Even if it was due to poison or broken neck, all result in unnatural death to which in, our view, was proved to the hilt. In this regard, this ground also fails. In ground No. 5 which comprises of grounds nos. 3 and 4 of the substantive memorandum of appeal, the appellants fault the trial court's reliance on circumstantial evidence which was not watertight and the contradictory evidence of the prosecution. It was Ms. Kapama's argument that in order to rely on circumstantial evidence, four factors as stated in the case of Majaliwa Ernest v. Republic, Criminal Appeal No. 465 of 2022

[2024] TZCA 313 (7th May 2024) TANZLII must be met. Such factors are to the effect that all pieces of evidence must show irresistible inference pointing to the accused commission of offence. Also, that the circumstantial evidence must not consider suspicion rather than reality however strong and that emotions are not allowed. In this case, Ms. Kapama submitted, there are contradictions in evidence, one, as to the place where the body of deceased was found, whether at Kimanjaro as testified by PW1 and PW6, or at Mbogo as stated in extra judicial statement of the 2nd appellant shown at page 230 - 234 of the record of appeal, or at Dunduma village as per PW5's testimony - (see page 97). It was her arguments that, such contradictions amounted into shaking the witness's credibility. She referred us to the case of Toyidoto Kosima v. Republic, Criminal Appeal No. 525 of 2021 [2023] T7CA 17305 (5 June

2023) TANZLII. Two, there was a contradiction on the identification of the deceased body in that, while PW1 said the appellants mentioned the deceased's name, PW6 said they replied "NDIYO" when asked if that was the deceased's body. Three, there was no connection as to how the appellants led the search team to the place where the deceased body was recovered while appellants were in the vehicle and no independent witness testified on how they led the search team. On her part, Ms. Mgenyi argued that the circumstantial evidence proved that the appellants murdered the deceased. She explained that the 24 circumstantial evidence which linked the appellants was from their confession and admission at the scene of crime. That, they admitted killing the deceased after their arrest and then agreed to lead the search party to the scene of crime. She contended further that, according to PW1 after the appellants alighted from the vehicle, they led the police and others to the scene of crime and after the exhumation of the body they admitted that "Huu ndiyo m w iii tuHofukia ndiyo m w ili wa Shabani M w idini tuiuweka hapa" literally translated "This is the body o f Shabani M w idini that we buried and kept it h e re " In her view, that confession was not doubtful at all. She referred us to the case of Bujigwa John @ Juma Kijiko v. Republic, Criminal Appeal No. 427 of 2018 [2019] TZCA 497 (10 December 2019) TANZLII. Ms Mgenyi went on submitting that there was no contradiction regarding the place where the deceased's body was recovered as between Kilimanjaro village, Dunduma or Mbogo arguing that the area was Kilimanjaro village, Dunduma ward in Mvomero District and Morogoro Region. She added that, even if there was such contradiction, it does not go to the root of the matter. As such she urged us to find that this ground is unmerited. 25 We have anxiously considered the rival arguments on this issue. In the first place, we agree with both learned counsel that this case hinged on circumstantial evidence as there was no witness who saw when the offence was committed. It is a settled law that, circumstantial evidence is as good as direct evidence provided it points irresistibly to the guilty of the accused person. In the case of Majaliwa Ernest (supra) cited by Ms. Kapama, the Court while relying on the case of Bahati Makeja v. Republic, Criminal Appeal No. 118 of 2006 [2011] TZCA 31 (28 February 2011) TANZLII, restated the factors to be considered in circumstantial evidence which are: one, the facts upon which guilty is to be affirmed, must be firmly established beyond reasonable doubt; two, the evidence should unerringly be pointing towards the guilt of the accused. Three, all the pieces of evidence should form a chain leading to only one conclusion that the crime was committed by the accused and no one else; and four, the evidence must be incapable of any explanation other than that of the guilt of the accused. We, therefore, need to determine if the circumstantial evidence available met these requirements. In the matter at hand, the circumstantial evidence which was relied upon to convict the appellants was three-fold. One, the appellants' oral confession on their involvement in killing the deceased; and two, leading 26 the search party to the place where the deceased body was buried. This evidence was corroborated by PW4 who recorded their cautioned statements (Exh P3 and P4) and extra judicial statements (Exh PI and P2); and three, PW1 and PW6 who witnessed when they showed the scene of crime and on exhumation of the deceased's body. Their cautioned statements and extra judicial statements were such detailed as to the

manner the offence was committed. Besides that, the testimonies by PW1, PW4, PW6 and PW7 on how the appellants confessed and lead the search party to the place where the body was recovered were very cogent such that the credibility was not shaken. We therefore find that this ground lacks merit and, we accordingly, dismiss it. In ground No. 7 former ground No.9, the appellants' complaint is that the defence evidence was not considered. In elaboration, the learned counsel contended that looking at the whole judgment, there is nowhere showing that the defence evidence was considered. Neither was it analysed. While referring to the case of Abel Masikiti v. Republic, Criminal Appeal No. 24 of 2015 [2015] TZCA 8 (24 August 2015) TANZLII, Ms. Kapama urged us to find that failure to consider defence evidence is a fatal irregularity. 27 On her part, Ms. Mgenyi dismissed such contention arguing that the trial court summarized the appellants' evidence at pages 273 and 275 of the record respectively but he found that it did not raise any doubt. However, while referring to the case of Lucas Daudi Wage (supra), she urged the Court to step into the trial courts' shoes if we find that the defence evidence was not considered and consider it for the interest of justice. Having perused the record of appeal, particularly at pages 273 and 275, we are in agreement with the learned State Attorney that the trial court summarized the appellants' evidence. Basically, in their defence the appellants gave general denials of the offence. For instance, they alleged that whatever certain Juma Rashidi @ Dezo did while at Mashambani area in Dunduma village in showing and leading the police officers to the discovery of the dead body, they also did the same. This allegation was outrightly rejected by the trial court for being an afterthought because it tries to exonerate themselves from guiltiness while their confessions were very clear on the manner they planned, organized and conspired to murder the deceased, and actually eventually murdered him. If we may add, it is our view that, looking at the nature of their entire evidence which was also admission, we think, even if it was considered it would not have changed the position. We say so because, the 2nd appellant 28 (DW1) admitted on several facts such as: being arrested at Dodoma, Nzuguni area; knowing the deceased even before; being taken to Morogoro Region; communicating with 1st appellant; travelling to Dar es salaam where the 1st appellant was arrested 8/11/2019. He also admitted recording his caution statement to PW7 and extra judicial statements to PW4 and how on 20/11/2019 they went to Turiani Kilimanjaro village at Dunduma suburbs, mashambani area where the deceased's body was buried and identified the body after exhumation. In cross examination, he admitted to lead the police officers to the crime scene where the dead body was buried and his admission to have narrated the stories in connection with this offence which were recorded by PW7 and PW4. As regard 1st appellant (former DW2), among others, he admitted on how he communicated with 2nd appellant so as to meet him at Magomeni Mwembechai where he was arrested on 7/11/2019 in connection with this offence. He narrated as 2nd appellant on how on 8/11/2019 they went to Morogoro and recorded their cautioned and extra judicial statements and signed them; how on 20/11/2019 they went to Kilimanjaro village with 2nd appellant but also in company with Juma Rashid @ Dezo, who according to him, on going to the place where the deceased body was buried, it was 29 Juma Rashid @ Dezo who showed the police officers

and he also did the same. Otherwise, the 1st appellant did not deny to have been arrested at Dar es salaam and that he knew the 2nd appellant while in Turiani. He admitted to record his cautioned statement to PW5 and his extra judicial statement to PW4 in which he gave details in connection with the offence. In our view, even if the trial Judge might not have analyzed the defence evidence, given the nature of their entire evidence, which was mostly admission, if it was analysed it would not have changed the position as, in fact, it did not shake the prosecution evidence or rather it did not raise any doubt to the prosecution evidence. As such, this ground equally lacks merit and we dismiss it. The appellants' complaint in ground 6 is that the prosecution failed to prove the case beyond reasonable doubt. Ms. Kapama argued that, none of the prosecution witnesses testified that the appellants committed the offence of murder. That, the prosecution evidence was marred with doubt, contradictions and too weak to mount a conviction against the appellants. She, firstly, assailed the identification of the deceased as being contradictory and that in the absence of a postmortem examination there is no proof that a person who died was Shaban Mwidini. In other words, the 30 prosecution failed to prove that Shaban Mwidini was dead and more so, when taking into account that there was no independent witness from the village who testified in respect of exhumation of the deceased's body. Two, the confessions relied on were wrongly admitted as they ought to be expunged. Three, PW1 and PW6 cannot be said to have corroborated the confessions by appellants leading to discovery of the deceased's body since they were irregular. In reply, Ms. Mgenyi maintained that the case was proved beyond reasonable doubt. She, in the first place, argued that there was no dispute that Shabani Mwidini was dead as the appellants themselves also admitted so. Secondly, the deceased body was identified by PW1, the deceased's relative. Thirdly, in their confessions, the appellants admitted that Shaban Mwidini was dead and buried him there. Ms. Mgenyi went on submitting that, the deceased's death was unnatural looking at the circumstances his body was buried in the valley. That, the appellants confessed killing by poisoning him through the juice they gave him. She added that, the said confessions were admitted without objection. The learned State Attorney equally argued that there was sufficient evidence proving that the appellants were involved in killing the deceased. She thus, urged the Court to find that the offence was proved beyond reasonable doubt and dismiss the appeal. 31 On our part, having considered the entire evidence available in this case, we are in agreement with the learned State Attorney that the prosecution managed to prove the case against the appellants beyond reasonable doubts. In view of what we have discussed in ground no. 4 regarding the proof of death and cause of death, we think, we need not repeat what we have said there because we were satisfied that Shaban Mwidini was dead and that his death was unnatural. Perhaps we should add here that, the circumstances under which the deceased's body was found, buried in the gully in the bush indicates that his death was not normal because had he died a natural death that would not have happened. Besides that, there is ample evidence from the appellants confession on how the deceased met his death. Regarding the contradictions on the cause of death, we said, they are minor as in whatever the case the deceased died. As to who caused the deceased's death, we are of a

settled view that, it is answered by the unobjected confessions of the appellants themselves which was corroborated by PW1 and PW6 who witnessed the appellants leading the search party to the place they had buried him and, indeed, found to be him after exhumation. All in all, given the circumstances of the case, we are satisfied that the prosecution managed to prove the offence of murder against the appellants 32 beyond reasonable doubt. We see no cogent ground to fault the trial courts' findings. Hence, this appeal is devoid of merit and we, accordingly, dismiss it in its entirety. Order accordingly. DATED at MOROGORO this 30th day of June, 2024. R. K. MKUYE JUSTICE OF APPEAL L. G. KAIRO JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Judgment delivered this 3rd day of September, 2024 in the presence of the Appellants both appeared in person vide video link from Ukonga and Ms. Daria Sanga learned State Attorney for the Respondent/Republic vide video link from High Court Morogoro, is hereby certified as a true copy of the original.

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