IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 36 OF 2018

HAMIS CHUMA @ HANDO MHOJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kibella, J.)

Dated the 9th day of June, 2019

In

Criminal Sessions Case No. 32 of 2016

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JUDGMENT OF THE COURT

10th & 23rd August, 2021

WAMBALI, J.A.:

Hamisi Chuma @ Hando Mhoja, the appellant, together with Manyeri Kuya, not a party to this appeal, appeared before the High Court of Tanzania where they were jointly arraigned upon the information for murder contrary to section 196 of the Penal Code [R.E. 2002] [now R.E. 2019] (the Penal Code). The allegation which they faced was to the effect that on 4th January, 2012 at Mpera Village within Kahama District in Shinyanga Region, the appellant and Manyeri Kuya murdered Shabani Bundala. Both denied the allegation and thus, the trial commenced before the High Court (Mgonya, J.) at Tabora Registry

in Criminal Sessions Case No. 134 of 2012. At the end of the trial, after considering the testimonies of both the prosecution and the defence, the appellant and Manyeri Kuya were convicted and sentenced to death by hanging.

It is in the record of appeal that both lodged an appeal to this Court which was unfortunately not decided on merit due to the noted irregularity on the testimony of witnesses. In the result, the Court ordered a retrial which commenced at the High Court Shinyanga Registry, before Kibella, J. (as he then was).

Basically, the prosecution side relied on seven witnesses to prove its case. These are; Mheziwa Malale (PW1), Clement Paul (PW2), Malale Mhoja (PW3), Fimbo Thomas (PW4), Jumanne Amos (PW5), Dismas Magafu Mshola (PW6) and E. 2141 D/CPL Godfrey (PW7). Moreover, six exhibits were tendered and admitted, namely; the Postmortem Report (P1), Extra Judicial Statement of the appellant (P2), Sketch Plan (P3), the piece of stick and the machete (P4), Inventory Report (P5) and the Cautioned Statement of the appellant (P7). Essentially, the substance of the prosecution evidence was to the effect that the appellant confessed to have committed the offence orally before PW1, PW2, PW3 and PW5 and also in his written cautioned and extra judicial statements. It was

also contended that the appellant's testimony in his defence supported the case of the prosecution as he admitted to have caused the death of the deceased.

On the adversary side, the appellant who testified as DW1 summoned Pili Shija (DW2). Moreover, Dr. Abdallah Simba (DW2) who was summoned by the appellant during a trial within trial in support of his allegation that he was tortured and tendered the PF3 which was admitted as exhibit D1. The said exhibit intended to show that the appellant sustained remarkable bruises and wounds before he was interrogated by "sungusungu" and PW7. On his part, Manyeri Kuya defended himself and did not summon any witness, but strongly denied the allegation. On the contrary, the appellant admitted in his defence to have caused the death of the deceased, but contended that he was seriously provoked by the beating on his back which was inflicted on him by the deceased using a stick and thus he had to retaliate.

Noteworthy, at the end of the retrial, Kibella, J. found that the prosecution proved the case against the appellant beyond reasonable doubt, but failed to meet the same standard in respect of Manyeri Kuya. He, therefore, convicted the appellant and sentenced him to death by hanging and acquitted Manyeri Kuya of the offence of murder. In

essence, he disbelieved the defence of the appellant that he killed the deceased in a heat of passion after he was provoked.

The appellant is aggrieved and asks the Court to upset the findings of the trial court on his conviction and set aside the sentence of death by hanging. It is not insignificant to point out that initially the appellant lodged the memorandum of appeal comprising eight grounds of appeal. However, Mr. Jacob Mayala Somi, learned counsel who was assigned to represent him and duly appeared at the hearing, in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 lodged a substituted memorandum of appeal containing the following grounds of appeal: -

1. *That, the honourable trial judge erred in law and fact convicting the appellant basing on the weak circumstantial evidence.*

2. *That, the honourable trial judge erred in law and fact convicting the appellant basing on the uncorroborated cautioned and extra judicial statements.*

3. *That, the honourable trial judge erred in law and fact in his total failure to give weight of the accused's defence to the effect that at the time of the incidence he acted on the heat of passion.*

4. That, the honourable trial judge erred in law and fact by his total disregard of the appellant's age at the time of committing the offence."

Mr. Jukael Reuben Jairo assisted by Ms. Caroline Mushi, both learned State Attorneys who represented the respondent Republic at the hearing strongly resisted the appeal.

In support of the first ground of appeal, Mr. Somi submitted that it is not in dispute that no eye witness testified at the trial to have witnessed the appellant committing the offence of murder. In this regard, he argued that the prosecution evidence was purely circumstantial as even PW1, PW2 and PW3 became aware of the incident on the following day after the appellant was arrested and sent before "Sungusungu" by PW3. He thus contended that there was need for corroboration of independent witness evidence since the trial court primarily relied on the oral confession, the cautioned statement and extra judicial statement. Indeed, he submitted that the alleged oral confession was obtained after the appellant was seriously tortured by "Sungusungu" and thus, the said confession is inadmissible and could not be relied to ground the conviction of the appellant.

Responding to the appellant's counsel submission in respect of the first ground of appeal, Mr. Jairo submitted that though there was no eye witness to the incident, the prosecution proved that the appellant was responsible for the death of the deceased. He argued that firstly, the appellant's oral confession was made on 6th January, 2012 in the presence of PW1, PW2, PW3, and PW5 after he was interrogated by "Sungusungu". He added that on the particular day, the appellant was found in possession of the goats that belonged to the deceased which he had wanted to sell to PW4. However, he explained, though PW4 agreed to buy the said goats he sought confirmation from PW3, the brother of the appellant, who denied to have any knowledge of the transaction on the ground that the appellant had no goats to sell.

Secondly, the learned State Attorney submitted that the said confession culminated in the recording of the cautioned statement (exhibit P7) before PW7 on the same day. He added that the information given by the appellant led to the discovery of the body of the deceased after he led the witnesses to the place where the body was thrown after the murder incident. In his submission, though the appellant alleged that the said confession was obtained after he was tortured by "Sungusungu" the trial court conducted a trial within a trial and came to

the conclusion that it was voluntarily obtained and that there was no evidence of torture. In support of his submission, he referred the Court to the decision in **John Shini v. The Republic,** Criminal Appeal No. 573 of 2016 (unreported).

Thirdly, Mr. Jairo submitted that the appellant's defence supported the prosecution case as he testified in detail on what happened in the fateful day, including the fact that he used a stick which he had on his hand to hit the deceased on the head. More importantly, he submitted that after the appellant discovered that the deceased had died when he fell down, he drugged the body into the stream of water used for irrigation of farms and left the said place immediately. He further emphasized that the appellant also took the deceased's goats which before he was arrested had agreed with PW4 to sell the same to him. The learned State Attorney, therefore, urged us to dismiss the first ground of appeal on the contention that the prosecution evidence was sufficient to prove the allegation against the appellant.

Having heard the submissions of learned counsel for the parties on the first ground, we wish to reserve our deliberation and determination until we resolve the second ground of appeal.

With regard to the second ground of appeal, Mr. Somi argued that the trial court wrongly admitted the cautioned statement which was rejected by the appellant on the ground that he was tortured by "Sungusungu" before the same was recorded by PW7. He added that the reliance by the trial court on the extra judicial statement to ground conviction was also wrong as the appellant was still in the aftermath of torture which was inflicted by "Sungusungu" and that the said fact was confirmed by the Justice of the Peace (PW6). He submitted that PW6 indicated in the said statement and also testified at the trial that before he recorded the statement he checked and found the appellant with bruises on his hands and buttocks. In his testimony, that was a sign that he sustained the wounds/injuries before he appeared before him and that the wounds were inflicted some few days after the incident. He further argued that the doctor (DW2) who examined the appellant and tendered the PF3 which was admitted as exhibit D1 during a trial within a trial, indicated that he found the appellant with bruises and swollen buttock and bruises in the hands and legs. In the premises, Mr. Somi contended that the cautioned statement and extra judicial statement were not properly admitted and relied upon by the trial court to ground

conviction of the appellant as there was no dispute as per the record that they were obtained through torture.

In reply, Mr. Jairo submitted that though the cautioned statement was rejected by the appellant on allegation of torture, the trial court ruled that it was voluntarily recorded after a trial within a trial was conducted. Moreover, he emphasized that the said confession led to the discovery of the body of the deceased and thus, even if it was allegedly obtained through torture, which was not established, it was properly relied upon to ground conviction of the appellant. To support his contention, he reiterated his earlier submission in respect of the first ground of appeal on what was stated by the Court in **John Shini v. The Republic** (supra).

On the other hand, the learned State Attorney submitted that exhibits P2 and P7 were sufficiently corroborated by the evidence of PW1, PW2, PW3, PW5 and PW7. Besides, he added, the appellant's defence in which he admitted to have killed the deceased after he hit him on the head using a stick advanced and supported the prosecution case.

In the circumstances, he concluded that the complaint of the appellant that he recorded the cautioned and extra judicial statements after he was tortured by "sungusungu" is unfounded.

Having heard the counsel for the parties' submissions with regard to the first and second grounds of appeal, we deem it appropriate to start our deliberation concerning the allegation that the oral and written confessions of the appellant was obtained through torture.

We have given anxious thought to the issue of torture and we think the answer as to whether or not the appellant was tortured can be obtained upon close scrutiny of the evidence in the record of appeal. Indeed, as the first appellate court in this appeal, we are entitled to re-evaluate the evidence and come to our conclusion (see **Juma Kilimo v. The Republic,** Criminal Appeal No. 70 of 2012 (unreported).

It is apparent in the record of appeal that the cautioned statement of the appellant which was recorded and tendered by PW7 was admitted in evidence and marked as exhibit P7 after a trial within a trial was conducted and the trial judge came to the conclusion that the alleged torture inflicted by the beatings from "Sungusungu" was not proved. Particularly, the trial judge stated as follows: -

"Therefore, from the above reason, and what I have endeavored to state I believe that such beatings if any as alleged, which I believe there none, could have not resulted to admission of guilty by the 1st accused person. I find the 1st accused person made the cautioned statement freely and voluntarily before PW1. The raised objection is therefore hereby overruled. The said cautioned statement has to be admitted."

However, in our considered opinion, the holding of the trial judge that the appellant was not tortured by being beaten by "Sungusungu", with respect, was unfortunate as it is not supported by the evidence in the record of appeal. It is noteworthy that in his testimony during a trial within a trial PW1 (PW7) acknowledged as reflected at page 54 of the record of appeal that before he recorded the appellant's cautioned statement, he observed that he had wounds on his buttocks and hands. Nevertheless, PW1 contended that he observed that the said wounds/ injuries were not serious to make the appellant fail to talk. Indeed, the trial judge acknowledged the said testimony, but concluded that nothing happened in respect of torture.

We note that the torture of the appellant which led to the existence of the said wounds on the buttocks, hands and legs was not

only supported by PW1, but also by DW2, a doctor who examined him and filled the PF3 which was tendered and admitted during a trial within a trial as exhibit D1. Specifically, DW2 testified that:-

> *"... I examined him and found that he was with bruises on his buttock and on his hands and on his legs. Also had swollen buttocks. My Lord, his health condition was not serious so that could be admitted".*

When DW2 was cross examined by Ms. Tuka, State Attorney he stated that: -

> *"The patient told me that he was beaten but where he got such beatings we are not concerned with. He was beaten by a blunt object. In my examination those injuries were fresh but the form itself does not provide for such thing to be recorded..."*

It is significant to state here that though the trial judge acknowledged the testimony of DW2, but in the end he came to the conclusion that no torture was proved as alluded to above.

More importantly, the other testimony on the presence of the wounds on the buttocks, hands and legs of the appellant was also given by PW6, a Justice of the Peace who recorded the appellant's extra

judicial statement (exhibit P2). At this juncture, we think it is important to reproduce part of his testimony on this fact thus: -

> *"Before taking his extra judicial statement I inspected his body and discovered that he had wounds on his hands and on his buttocks. Those wounds had about two, three or four days since being inflicted".*

Further, when PW6 was cross examined by Mr. Ishengoma learned advocate for the appellant he stated as follows: -

> *"When I inspected him I found him with some wounds/injuries. And he told me how the same were inflicted by "Sungusungu" when was arrested. However, he told me that was arrested by the policemen four days back to the date was brought at my place... therefore I have experience of knowing whether a certain injury was immediately inflicted or had several days/time since was so inflicted".*

From the above reproduced sketchy parts of the evidence from both the prosecution and defence witnesses, it cannot be doubted that the appellant recorded both the cautioned and extra judicial statements on 6th and 10th January, 2012, respectively, with remarkable wounds on

his buttocks, hands and legs which he sustained after he was tortured by "Sungusungu". The appellant also stated that he was also beaten by the police officer (PW7) before he recorded exhibit P7. This evidence was not seriously controverted during cross-examination. In this regard, it cannot be concluded that the appellant was a free agent when he recorded the said statements. Indeed, it is not insignificant to point out that as the appellant was still in pain due to the wounds he sustained after the torture, the police issued a PF3 (which was admitted as exhibit D1) and sent him to hospital for treatment even after he recorded the cautioned statement (exhibit P7). This was done before he recorded exhibit P2 before PW6.

In the circumstances of the case at hand, we think it is instructive to reiterate the warning which was sounded by the Court in **Stephen Jason & Others v. The Republic**, Criminal Appeal No.79 of 1999 (unreported) that:-

> *"Where an accused claims that he was tortured and is backed by visible marks of injuries it is incumbent upon the trial court to be more cautious in the evaluation and consideration of the cautioned statement even if its admissibility had not been objected to; and such cautioned*

statement should be given little if no weight at all".

Admittedly, though the extra judicial statement (exhibit P2) was tendered and admitted without objection from the appellant, the above warning of the Court applies in the case at hand. We hold the firm view that the trial judge was enjoined to be cautious when he evaluated the evidence with regard to exhibit P2 before he relied on it to ground the conviction of the appellant.

From the foregoing, we are of the settled position that as both statements were obtained after the appellant was tortured, the alleged confession should not have been admitted into evidence and relied upon by the trial judge to ground the appellant's conviction. This was also the position in **Pascal Petro Sambala @ Kishuu and Two Others v. The Republic,** Criminal Appeal No. 112 of 2005 (unreported) in which the Court held that since the cautioned statements of the second appellant was obtained through torture, it should not have been admitted in evidence regardless of its truth. Particularly, the Court made reference to the decision in **Richard Lubilo and Another v. The Republic,** Criminal Appeal No. 10 of 1995 (unreported) in which it was stated at page 9 that: -

"Where torture is alleged, this Court has taken a more serious view and has implicitly presumed the associated confession to be vitiated and incapable of admission under section 29 (of the Evidence Act, 1967). This position is well stated in, inter alia, ***Maona & Another v. Republic,*** *Criminal Appeal No. 215 of 1992,* ***Marcus Kisukuli v. R,*** *Criminal Appeal No. 146 of 1993 (both unreported)".*

Noteworthy, in **Pascal Petro Sambala @ Kishuu and Two Others** (supra) the Court expunged the cautioned statement which was obtained through torture. Moreover, in **Thadei Mlomo and Others v. Republic** [1995] T.L.R. 187, the Court emphasized that section 29 of the Evidence Act, 1967 (currently Cap 6 R.E. 2019) in which an involuntary confession is admissible if the Court believes to be true, cannot be invoked where actual torture is proved to have been applied.

Applying the above settled position of law to the instant appeal, having found that both the cautioned and extra judicial statements were obtained after the appellant was seriously tortured, we hold that the same are inadmissible in evidence. Thus, the respective statements cannot corroborate or be corroborated by any other evidence in the record of appeal.

In the circumstances, we hold that the decision of the Court in **John Shini v. The Republic** (supra) relied upon by the learned State Attorney to support his position that the confession of the appellant is admissible because it led to the discovery of the body of the deceased is not applicable in the circumstances of this appeal, in view of the clear position of the law we have stated above. In the instant appeal, we are satisfied that the said confession was not made voluntarily but through torture. We therefore respectfully differ with the findings of the trial judge and hold to the contrary. Equally, we respectfully disagree with the submission of Mr. Jairo in support of the said findings.

In the result, we expunge exhibits P2 and P7 form the record of proceedings. Ultimately, we allow the second ground of appeal, albeit for different reasons as indicated above.

After expunging the cautioned and extra judicial statements for being obtained through torture, it is apparent that the alleged oral confession of the appellant before PW1, (the Hamlet Chairman), PW2 (the Ward Executive Officer- WEO), PW3 (the appellant's brother) and PW5 (a person who responded to the alarm – Mwano) cannot stand as it was equally obtained after the appellant was tortured by "Sungusungu". As we have intimated above, the record of appeal bears out that the

appellant was seriously tortured by "Sungusungu" to the extent of sustaining injuries on his hands, legs and buttocks after he was sent by his brother, PW3. As a result, he confessed and mentioned other persons, namely; Manyeri Kuya, who was acquitted at the end of the trial, Manase, Mabula and Maduhu who were arrested on 6th January, 2012 and released on the same day by the police and therefore they did not face the trial. Noteworthy, the appellant firmly testified both during his evidence in chief and cross-examination that he confessed out of fear before the said witnesses as he was seriously beaten by "Sungusungu" who forced him to name those he cooperated with to kill the deceased. Therefore, torture was done even before he orally confessed and recorded the cautioned and extra judicial statements as we have demonstrated above. This being the case, we equally discount the oral confession as it cannot be relied to ground conviction of the appellant.

On the other hand, having expunged the cautioned and extra judicial statements and discounted the oral confession and disbelieved the evidence of PW1, PW2, PW3 and PW5, we find that the remaining evidence in support of the prosecution case is that of PW4 and PW7. However, we are settled that the same cannot be entirely relied upon to

ground conviction of the appellant. We say so because; it is only the evidence of PW4 which can be considered along with the defence of the appellant. On the contrary, the evidence of PW7 who recorded exhibit P7 cannot be reliable in view of the fact that since we have expunged the said exhibit and there is evidence that he also tortured the appellant before he recorded exhibit P7, his credibility is questionable.

To this end, the only remaining evidence for the prosecution in the record linking the appellant with murder is that of PW4 who had agreed to buy the goats from the appellant which was taken by him after the death of the deceased. The other evidence is that of the appellant who in his defence confessed to have killed the deceased and took his goats. We are satisfied that to a great extent his evidence which was adduced almost after five years was not influenced by anybody or torture as he was a free agent before the trial court.

At this point, we think it is pertinent to make reference to the decision of the Court in **Mohamed Haruna @ Mtupeni and Another v. The Republic,** Criminal Appeal No. 259 of 2007 (unreported) where it was stated by the Court, among others that: -

> *"... if the accused person in the course of his defence gives evidence which carries the prosecution case further, the Court will be entitled to take into account such evidence of the accused, in deciding on the question of his guilt. Afterall, the very best of witness in any criminal trial is an accused person who freely confesses his guilty."*

(See also **Seleman Hassan v. The Republic**, Criminal Appeal No. 364 of 2008 and **Pauli Joseph v. The Republic**, Criminal Appeal No. 63 of 2010 (both unreported).

In the instant appeal, there is no doubt that the appellant freely admitted to have killed the deceased as in his defence he explained in details on what happened on the fateful day. Therefore, though there is no direct evidence from the prosecution in this case concerning the killing of the deceased, we equally find that the conviction of the appellant did not entirely depend on circumstantial evidence. Particularly, in view of the remaining evidence in the record of appeal, it is only PW4 who linked the appellant with being found in possession of the deceased goats. The conviction of the appellant thus can entirely be based on his own admission of guilty and that of PW4 who entered into agreement with him to buy the goats which belonged to the deceased.

Indeed, PW4 was not among those who witnessed the oral confession of the appellant which was obtained through torture by "Sungusungu".

In the result, we hold that the appellant can rightly be convicted on the basis of the evidence of PW4 and his own admission of guilty. Consequently, we dismiss the first ground of appeal.

We now turn our attention to the third ground of appeal. It was forcefully submitted for the appellant that the trial judge erred for not considering the defence of provocation which was put forward by the appellant during his defence at the trial. Mr. Somi argued that according to the record of appeal the appellant testified that at the time of the incident he retaliated by beating the deceased with a stick after he was beaten by him and that he acted on a heat of passion. In his further submission, Mr. Somi argued that the appellant was provoked because despite the fact that he found the goats in his farm and removed them, they returned again to destroy the crops and when he inquired form the owner (the deceased) he ended up being beaten by a stick on his back. He therefore argued that the appellant was seriously provoked to the extent of beating the deceased on his head using the stick he had and unfortunately, he fell down and died instantly. To support his submission on the defence of provocation, Mr. Somi referred us to the decision in

Salum Abdallah Kihonyile v. Republic [1992] T.L.R. 349 in which the conviction for murder was reduced to manslaughter when it was held that: -

> *(i) Having in mind all the background incidents, the continuous almost deliberate trespassing of their farms by the Masai cattle, the aggressive approach by the Masai and the subsequent attack on the appellant which resulted in his being injured on the forehead, convince us that at the time the appellant speared the deceased, he was still affected by this provocation;*
>
> *(ii) When the appellant speared the deceased from behind while pursuing him he was not then defending himself against anything as the deceased was no longer aggressive.*

In this regard, relying on the said decision, the learned advocate urged us to be inspired by it and hold that the act of the deceased made the appellant to be provoked, thereby, reduce the conviction of murder to manslaughter.

On his part, Mr. Jairo strongly countered the appellant's counsel submission and argued that the defence of provocation was not

available to the appellant in the circumstances of this case. He explained that the conduct of the appellant before and after the incident in which after he discovered that the deceased had died, he drugged his body and threw it in the stream negated the defence of provocation. He added that to show that he did not kill the deceased in a heat of passion; he took the goats which he planned to sell and run away. On the contrary, he argued, the appellant had planned to hit the deceased and cause his death. Besides, he submitted, considering the brief exchange of words with the deceased which was followed by the beating and retaliation, there is clear indication that the appellant had ill intention to cause the death of the deceased. In the circumstances, he submitted that the decision of the Court in **Salum Abdalla Kihonyile** (supra) is distinguishable from the circumstances of this case and therefore not applicable. In the end, he urged us to disallow the third ground of appeal.

It is apparent in the record of appeal that the defence of provocation was raised by the appellant during the trial but was rejected by the learned trial judge. Indeed, the decision in **Salum Abdallah Kihonyile** (supra) was brought to the attention of the trial judge but he held that it was distinguishable in the circumstances of the case at hand.

For purpose of our deliberation, we think it is crucial to reproduce the relevant part of the appellant's defence with regard to the incident and the defence of provocation: -

> *"On 4/1/2012, I was at my shamba at Bukooba village during the day time. I was weeding for my maize. Suddenly, I observed goats entering into my shamba. They were from the nearby forest. For that, I did not happen to see the owner and decided to chase them away as were eating my maize (crops). Thereafter, I returned at my shamba and proceeded with my work. I observed those goats at the 2nd time and when I decided chasing them away, I saw the owner of the said goats. I asked him as to why he grazed into my shamba with crops?* ***He replied that those goats had escaped him and decided to trace them.*** *That owner of those goats, I knew him was called Mwanafuli. I told him that his goats have a long-time habit of eating my crops in my shamba thus why on the side of the shamba has been greatly damaged and eaten.*
>
> *Upon telling him so,* ***the owner of goats stated that I have insuited him and he hit me with a stick on my back.*** *As I had a stick in my hands I decided hitting him on the head (at the centre of his head) and he fell down and when I went near him I*

observed him to be quite and was not even trembling. I felt calling some other people, but I as well thought that probably that the said old man (mzee) had died as was not talking. I thought calling people would kill me as well then, I refrained from calling them. At that time, we were only two, i.e. myself and the deceased.

Thereafter, I decided to drag the deceased's body and immense it into a stream of water used for irrigating the shambas. As that Mzee's body was floating, I decided to cut a branch of tree and forced it over the body so that could not continue floating. I used a machete which was owned by the deceased. For that, I decided collecting those ten (10) goats and sent them at one house at the steppe area. Before, I locked all the goats some of them escaped and remained with only six goats.

Therefore, I managed to lock in six goats so that later I could sell them and free as I feared to have been seen when I committed that offence." (Emphasis Added).

From the above excerpt of the testimony of the appellant there is no doubt that he described in very dear term on how the incident occurred on the fateful day before and after the deceased succumbed to death. A close scrutiny of the appellant's part of defence evidence does

not indicates that the exchange of words followed by the deceased attack on him could have made him to be seriously provoked to the extent that when he retaliated, he was in a heat of passion as alleged. We say so because while the deceased hit him by stick on his back, and there is no evidence in the record of appeal that he was injured, the strong retaliation by hitting the deceased on the centre of the head by a stick he had on his hand was not justified in the circumstances of this case. Notably, the hitting made the deceased to fall down and ultimately he lost his life instantly. Indeed, according to the appellant's testimony when he was cross-examined by the learned State Attorney, he acknowledged that in their village when one found goats have destroyed his crops in his farm, he had to raise an alarm, but on that particular day, he did not do it as he was familiar with Mzee Mwanafuli (the deceased) and they talked amicably before he hit him with a stick.

Moreover, according to his evidence there is no indication that there were a series of repeated invasion of his parents' farm by the same goats which was deliberately sanctioned by the deceased as was the case in **Salum Abdalla Kihonyile** (supra). Basically, in the latter case, it was found that there were incidents which were continuous and almost deliberate of trespassing of the farms by the Maasai cattle. In the

instant appeal, the appellant admitted that initially he did not know the owner of goats which destroyed the crops and that the owner stated that the said goats had escaped him before he found them at that place.

In the circumstances, as correctly stated by Mr. Jairo the trial court Judge properly distinguished the facts in **Salum Abdalla Kihonyile** (supra) with the present case before he ruled out that provocation was not proved to the required standard.

It must be emphasized that in provocation, a finding must be made as to whether the words uttered or conduct demonstrated by the deceased were provocative to an ordinary person of the community to which the accused belonged, which we hold is not the case in the instant appeal. Noteworthy, it is no wonder that even the assessors who sat with the trial judge did not suggest that the words uttered and the conduct of the deceased are provocative to an ordinary person of their community. It is in this regard that in **Georgina Venance v. The Republic** [2005] T.L.R. 84, the Court held that:-

> *(i) For a plea of provocation to succeed the insult or act complained of must be wrongfully said or done by the person assaulted in the*

presence of, and directed to the person committing the offence charged.

More importantly, the Court reproduced the provisions of section 202 of the Penal Code which defines provocation and stated as follows:-

"From the provision it is clear that for an act or insult or conduct to constitute provocation in law, at least the following conditions must be satisfied. ***First,*** *the act or insult must be wrongful, lawful act or conduct cannot provide provocation.* ***Second,*** *the person assaulted because of the provocation must be one who offered the provocative act insult or conduct.* ***Third,*** *the provocative act, insult or conduct must have been directed to the person committing the assault or a person who stands to him in the relationship as explained in the section.* ***Forth,*** *the provocative act or insult must have been done or offered in the presence of the person committing the insult.* ***Fifth,*** *the test is the ordinary person in society. This is to say, peculiar or eccentric qualities of the person committing the assault are not relevant when considering whether a person would be provoked by the act or insult.* ***Sixth,*** *the person provoked*

must have been deprived the power of self-control".

In the instant appeal, when we apply those conditions to the appellant's case, we find that as he admitted in his defence that they talked with the deceased amicably, and considering that he used force to hit the deceased in the sensitive part of the head, we hold that the words and conduct of the deceased to the appellant could not constitute provocation for the assault which he committed on the deceased. Indeed, the fact that immediately after he discovered that the deceased had died, he drug his body into the stream and took his goats and left the place, does not demonstrate that when he hit the deceased he had lost self-control to amount to the alleged provocation.

It follows that in the circumstances of the instant appeal we hold that the words uttered by the deceased followed by the assault of the appellant on his back using a stick would not make an ordinary person within the meaning of section 202 (6) of the Penal Code, to kill in the heat of passion. We are settled that the act was not caused by his loss of self-control as the learned advocate wished us to believe. Consequently, we dismiss the third ground of appeal.

Lastly, regarding the fourth ground of appeal, Mr. Somi briefly urged us to find that the trial High Court Judge erred for not accepting the evidence of DW2, the mother of the appellant who confirmed that the appellant was born in 2000 and therefore he was twelve years old when he was arrested in connection of the offence of murder and seventeen years when he testified as DW1. He strongly maintained that DW2 was better placed to know the age of the appellant and the trial judge was bound to believe her. In his submission, after the trial judge convicted the appellant he was enjoined to adhere to the requirement of section 26 (2) of the Penal Code by ordering the detention of the appellant at the Presidential Pleasure instead of sentencing him to death by hanging.

On his part, Mr. Jairo submitted that the issue of the appellant age which was raised during the defence case by DW2 was an afterthought as it was not initially raised during committal proceedings and preliminary hearing. He added that the appellant did not also disclose that particular age to the police when he was arrested and that is why in the cautioned statement, which we have expunged; his age was indicated as 18 years old. To this end, he spiritedly supported the trial judge's stance and reasoning that DW2 could not know the age of the

deceased while she herself did not know her age and she also gave unsworn testimony.

In the premises, he implored us to confirm the trial court's sentence of death by hanging as the appellant was eighteen years when he committed the offence of murder.

On our part, firstly, we note that the issue of the appellant's age was raised by himself in his evidence in chief and maintained the same position when he was strenuously cross-examined by the prosecutor.

Indeed, according to the record of appeal, his evidence with regard to age was supported by DW2, his mother. With respect, it is not correct, therefore, to state that the issue of age was raised for the first time by DW2 as observed by the trial judge and supported by the learned State Attorney in his submission before us at the hearing of the appeal. Secondly, it is settled law that the age of a child can be proved by himself or a parent, birth certificate or a doctor. In this regard, in **Edward Joseph v. The Republic**, Criminal Appeal No. 19 of 2009 (unreported), the Court observed that: -

"Evidence of a parent is better than that of a medical doctor as regards the parent's evidence on the child's age."

Moreover, in **Iddi Amani v. The Republic,** Criminal Appeal No. 184 of 2013, (unreported) the Court relied on the evidence of a father as being in a better position to prove the age of the victim who was his daughter. The decisions in **Edward Joseph and Iddi Amani (**supra) were followed by the Court in **Edson Simon Mwombeki v. The Republic,** Criminal Appeal No. 94 of 2016 (unreported).

In view of the settled position of the law stated above, we hold a firm opinion that DW2 was better placed to know the age of her son despite the fact that she acknowledged that she did not know her own age. Besides, her evidence was taken under affirmation as reflected at page 85 of the record of appeal. In the event, she cannot simply be discredited because she stated that she did not know the meaning of an oath when she was cross-examined. In the light of her testimony, we find that she was a credible witness in support of the appellant's testimony with regard to his age.

In the premises, since the trial court found, as we have found albeit for different reasons that the appellant committed the offence of

murder intentionally, it was bound to comply with the requirement of section 26 (2) of the Penal Code which provides as follows: -

> *" The sentence of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age, but in, lieu of the sentence of death, the Court shall sentence that person to be liable to be detained during the Presidential Pleasure, and if so sentenced he shall be liable to be detained in such places and under such conditions as the Minister for the time being responsible for legal affair may direct; and whilst so detained shall be deemed to be in legal custody".*

Consequently, as we have no doubt with the conviction of the appellant in view of the evaluation of evidence we have made and demonstrated above, we allow the fourth ground of appeal. Ultimately, we set aside the sentence of death by hanging. Thus, in terms of section 26 (2) of the Penal Code, we substitute thereof with a sentence resulting in the appellant's detention during the Presidential Pleasure, in a place and under conditions that may be directed by the Minister responsible for legal affair.

In the end, save for what we have held with regard to the second and fourth grounds of appeal, we uphold the appellant's conviction for the offence of murder and dismiss the appeal.

DATED at **SHINYANGA** this 21st day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 23rd day of August, 2021 in the presence of Mr. Audax Theonest Constantine, holding brief for Mr. Jacob Mayala Somi, learned counsel for the appellant and Mr. Jukael Reuben Jairo, learned State Attorney for the respondent/Republic is hereby certified the true copy original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL