IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 547 OF 2020

ADAM SALEHE@ RAMADHANI...APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Siyani, J.)

dated the 20th day of October, 2020
in
Criminal Sessions Case No. 134 of 2016

JUDGMENT OF THE COURT

25th April, & 2nd May, 2022

LEVIRA, J.A.:

On 20th October 2020, the High Court of Tanzania (Siyani, J.- Now JK) sitting at Dodoma (the trial court) convicted the appellant, Adam Salehe @ Ramadhani of the offence of murder contrary to section 196 of the Penal Code Cap 16 RE 2002, and sentenced him to death. Aggrieved, he has come to this Court to protest his innocence.

The information laid before the trial court alleged that on the 11th day of August, 2014 at Bubutole Village, within Kondoa District in Dodoma Region the appellant murdered one Dogan Lupondeja (the

deceased). As the appellant pleaded not guilty, the prosecution had to prove its case.

Briefly, the prosecution case was that on the evening of 11th August, 2014 at around 18:00 hours, the deceased and his fellow one Tumbe Waya (PW2) were at a bar owned by Peter Jackson drinking beer. While there, the appellant accompanied by another person (not a party to this case) armed with bows and arrows invaded and ordered those who were at the bar to sit down. They asked why Wasukuma were brought there. Then the deceased stood and asked the appellant and his fellow on what they have done. Suddenly, the appellant threw his arrow to the deceased which hit him at the left side of the chest and he died.

The body of the deceased was sent to Kwa Mtoro Hospital where the post mortem examination was conducted in presence of Rd. D/C Jeremia (PW3) and the report was prepared. According to PW3, the doctor who conducted the examination of the deceased's body managed to remove the arrows from the body and the examination revealed that haemorrhage caused his death. PW3 visited the scene of crime and drew a sketch map.

On 31st March, 2015 the appellant was arrested by civilians, taken to Kwa Mtoro Police Station and later was sent to Kondoa Police Station. He was interrogated by PW3 and his statement was recorded, that was on 1st April, 2015. In his investigation, PW3 discovered that there was land conflict between Sandawe and Sukuma people. Furthermore, that on 2nd April, 2015 the appellant was sent before the justice of peace one Mwajabu Mohamed Mvungi (PW1) to record his extra judicial statement. He confessed to have killed the deceased by stabbing him with an arrow. He was later arraigned before the trial court facing murder charge. However, the appellant distanced himself from the crime.

In his defence, the appellant (DW1) told the trial court that on the fateful day he was drunk and while at the bar (scene of crime) taking some alcohol commonly known as viroba, a fight arose between Sandawe and Sukuma people who were there over land disputes. Having exchanged harsh words, the appellant being Sandawe decided to scare Sukuma people by throwing an arrow without any intention to kill anyone.

The trial court having heard that body of evidence, it was satisfied that the prosecution case had been proved beyond reasonable doubt, hence, the appellant's conviction and sentence.

Aggrieved by both, the conviction and sentence, the appellant has come to this Court to protest his innocence as intimated above. Earlier, the appellant filed a memorandum of appeal containing six (6) grounds to challenge the conviction and sentence. However, advocate (Ezekiel Amon Mwakapeje) who was assigned to represent him filed a supplementary memorandum of appeal containing the following four (4) grounds: -

1. *That, the trial judge misled himself by relying on the Exhibit P3 to convict and sentence the appellant while the said exhibit was not listed during committal proceedings.*

2. *That, the learned trial judge erred both in law and facts for failure to note that the defence of intoxication made by the appellant corroborated by PW2 renders the offence of manslaughter.*

3. *That, the trial judge misdirected in convicting and sentencing the appellant without analysing properly the evidence adduced*

by the prosecution before concluding that the prosecution case was proved beyond reasonable doubt.

4. *That, the whole proceedings of the trial court were marred with procedural irregularities as the Exhibit P1 and Exhibit P2 were not tendered by competent persons and were not read out after admission.*

At the hearing of the appeal, Mr. Ezekiel Amon Mwakapeje, learned advocate appeared for the appellant. He dropped the third ground of appeal and combined the first and fourth grounds of appeal. He completely abandoned the six grounds of appeal which had been raised by the appellant in the original Memorandum of Appeal. Mr. Ahmed Hatibu, learned State Attorney, represented the respondent Republic and he opposed the appeal.

Arguing the first and fourth grounds of appeal, Mr. Mwakapeje submitted that the learned trial judge erred in relying on the extra judicial statement of the appellant (Exhibit P3) to convict and sentence the appellant while the said document was not listed as one of exhibits to be relied upon by the prosecution; and thus, contravened section 246(2) of the Criminal Procedure Act, Cap 20 RE 2019 (the CPA) which

requires witnesses' statements and other documents to be listed and read out during committal. The learned counsel referred us to the specific pages (137-139) of the record of appeal where the said statement was relied upon by the trial judge to ground the appellant's conviction. In the circumstances, he argued, it was not proper for the same to be relied upon to ground the appellant's conviction. He thus prayed the said exhibit to be expunged from the record while making reference to the decision of the Court in **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported).

Mr. Mwakapeje submitted further that, PW1 who tendered Exhibit P3 was as well not listed as one of the prosecution witnesses. However, he referred us to page 40 of the record of appeal where the prosecution's notice to call additional witness (PW1) is found. The same was preferred under section 289(1) of the CPA with a view of enabling PW1 to tender the appellant's extra judicial statement. He went on to state that subsection (3) of section 289 of the CPA requires the court to determine the notice but that was not done and the said notice was not served to the appellant for him to know the substance of the evidence intended additional witness. Therefore, he also prayed for the evidence of PW1 to be expunged from the record because it was flawed by

procedural irregularities. In cementing his prayer, he added that since the essence of PW1's evidence was to explain about Exhibit P3 which deserves to be expunged from the record, PW1's evidence is baseless in the absence of the said exhibit.

When he turned to argue the fourth ground of appeal, Mr. Mwakapeje dropped Exhibit P1 and continued to argue in relation to the Post Mortem Examination Report (Exhibit P2). The learned counsel referred us to page 44 of the record of appeal where the learned State Attorney wrongly prayed to tender Exhibit P2 as he was not sworn as a witness to tender the said exhibit. He insisted that the law requires a witness to tender an exhibit and not a prosecutor. In addition, Mr. Mwakapeje submitted that apart from exhibit P2 being tendered by incompetent person, it was not read after its admission. He thus prayed for the Court to expunge it from the record and cited the case of **Sospeter Charles v. Republic**, Criminal Appeal No. 555 of 2016) [2020] TZCA 1720 (13 August 2020).

Responding to the submissions in respect of the first and fourth grounds of appeal, Mr. Hatibu concurred with the submission by the counsel for the appellant. In essence, he agreed that Exhibit P3 was not

among the exhibits which the prosecution had intended to tender during trial. However, the same was tendered by PW1 who was as well, not listed among prosecution witnesses and eventually relied upon by the trial court to ground the appellant's conviction contrary to the law. Following his support to these grounds of appeal, he as well prayed for the said exhibits to be expunged from the record and also the evidence of PW1 to be discarded. However, Mr. Hatibu submitted that even if Exhibits P2, P3 and PW1's evidence are disregarded, still there is sufficient evidence on record to prove that the appellant committed the offence he was charged with. He cited the case of **Mwita Kigumbe Mwita and Another v. Republic**; Criminal Appeal No. 63 of 2015 (unreported).

We have thoroughly gone through submissions by counsel for the parties, the two grounds of appeal and the record of appeal. Basically, the appellant is challenging the decision of the trial court for being grounded on un-procedurally tendered exhibits by incompetent witnesses. Whether the contention by the appellant is correct, that is what this Court is enjoined to determine.

As intimated above, counsel for the parties were at one that procedures were not followed before and after tendering of Exhibits P2, P3 and in allowing PW1 to testify as an additional witness during trial. The law is well settled as far as prosecution of homicide cases is concerned. The procedure to be followed prior commencement of a trial is well articulated under section 246 of the CPA. An accused person must be committed by the subordinate court upon receipt of the copy of information and notice for trial by the High Court. For the purpose of this decision, we shall reproduce what is provided under section 246(2) of the CPA; it reads:

> *"Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him* ***as well as the statements or documents containing the substance of the evidence of witnesses whom the director of Public Prosecution intends to call at the trial."***
>
> [Emphasis added]

The obligation imposed on the subordinate court during committal proceedings is to read and explain or cause to be read to the accused person the statements or documents containing the substance of

intended prosecution evidence against the accused. This entails listing of the documents and witnesses whose statements are to be tendered. The aim of so doing is to make the accused aware of the case he is going to face during trial for him to prepare his defence as stated in **Remina Omary Abdul** (supra) cited to us by the counsel for the appellant.

In the present case, the list of exhibits intended to be produced by the prosecution which were read over to the appellant is found at page 23 of the record of appeal. It mentions the following exhibits; **one,** sketch map of the scene of crime; **two**, post mortem examination report; **three,** PF3 of the accused person; and **four**, the cautioned statement of the accused.

As correctly submitted by the counsel for the appellant, the said list does not include Exhibit P3. However, during preliminary hearing at page 35 of the record of appeal, the learned State Attorney one J. J. Mwakyusa prayed to tender it. The then advocate for the appellant one Mselingwa objected to that prayer. The presiding Judge declined and ordered the said exhibit to be tendered during trial. The second attempt to tender the said statement was made during trial and it was successful

despite the objection from the counsel for the appellant as regards its voluntariness. Having conducted a trial within trial, the trial Judge was satisfied that the said statement was made voluntarily and thus admitted it as Exhibit P3, subject of the first ground of the current appeal.

We agree with counsel for the parties that since Exhibit P3 contravened section 246 (2) of the CPA not listed as one of the exhibits which the prosecution intended to rely on against the appellant at the trial, the same could not be relied upon to ground the appellant's conviction. Nevertheless, the record of appeal is so clear from page 137 to 139 that the trial Judge relied on the said statement to convict the appellant. Part of the trial Court's decision reads: -

> *".... In this case there is an extra judicial statement of the accused person in which he confessed to kill. Such a confession was retracted by the accused person on the reason that he was forced to make the same by a police investigation .... In the instance case, the accused person confessed before a justice of peace and gave a clear account of what happened on the material day .... Through his confession, the accused person told the justice of peace that the assault which led to the killing of Doga Lupondeja who was a Sukuma by tribe, was a retaliation against*

Sukuma people who were allocated the Sandawe's land at Bubutole Village. ***I believe what the accused person confessed before a justice of peace was a true account.****"*

[Emphasis added]

We also note that Exhibit P3 was tendered by PW1 who was not among the prosecution witnesses listed during committal proceedings. We further note that the prosecution side attempted to follow the procedure of calling her as an additional witness stipulated under section 289(1) of the CPA, in vain. The said provision provides as follows: -

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

[Emphasis added]

We had opportunity to go through the prosecution's notice to call additional witness found at page 40 of the record of appeal. The same indicated that, the prosecution intended to call PW1 as an additional witness at the hearing of the case. It went further to explain the

substance of her evidence, that is, to tender extra judicial statement of the accused person (the appellant herein), with no indication whatsoever, that the same was intended to be served on the said accused person. Apart from that omission, the counsel for the appellant had uncontroverted submission that neither the appellant nor his advocate was served with such notice contrary to the dictates of the law referred herein above.

As regards exhibit P2, the deceased's post mortem examination report, we do not think that it needs to consume much of our time. The record of appeal at page 44 is very clear that the said document was tendered by the learned prosecuting State Attorney instead of the witness. We as well agree with the counsel for both parties that since the said State Attorney was not sworn as a witness as per the requirement of section 198(1) of the CPA, she was incompetent to tender it - see: **Godi Kasenegale v. Republic**, Criminal Appeal No. 10 of 2008; **Salum Said Kandoro v. Republic**, Criminal Appeal No. 122 of 2018; **Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017; and, **Simon Shauri Awaki @ Dawi v. Republic**, Criminal Appeal No. 62 of 2020 (all unreported).

In totality, we agree with the counsel for both parties that exhibits P2, P3 and PW1's evidence deserve to be expunged from the record of appeal, as we accordingly do. Having done so, the question that follows is whether the remaining evidence on the record is sufficient to sustain the appellant's conviction and sentence. Notwithstanding that the Post Mortem Report has been expunged, the fact of death of the deceased was testified by PW2 and PW3. At page 72 of the record of appeal PW2 testified to the effect that, he saw the appellant hitting the deceased with an arrow at the left side of the chest; and at page 75 of the record, PW3 who was an investigator testified to have witnessed the doctor removing arrows from the deceased's body. It is glaring that the deceased died due to unnatural cause. The follow up question is who killed the deceased and whether did so by malice aforethought. Apparently, the appellant is not denying to have terminated the deceased's life. However, he claims the killing to be accidental because he was intoxicated. This issue takes us to the second ground of appeal where the appellant raised a defence of intoxication which, according to him, it warranted conviction on a lesser offence of manslaughter instead of murder.

Submitting in support of the second ground of appeal, Mr. Mwakapeje argued that the trial Judge ought to have considered the appellant's defence of intoxication which he said, was corroborated by the evidence of PW2. He went on to state that the trial Judge ought to have found that intoxication rendered the appellant incapable of making rational decisions. He referred us to page 73 of the record of appeal where PW2 stated that he saw the appellant and his fellow not being normal but he did not know whether they were drunk. He urged the Court to find that PW2 corroborated the appellant's defence found at page 82 of the record of appeal that he had drunk alcohol commonly known as Viroba before a fight over land ensued between Sandawe and Sukuma people which resulted into unintended death of the deceased.

It was the argument of the counsel for the appellant that since PW2's statement that the appellant and his fellow were not normal and they were looking as if they were drunk was not challenged through cross examination, such factual situation should have been considered by the trial court, but that was not the case.

Mr. Mwakapeje submitted that the appellant being in the state of drunkenness was incapable of forming the intent to kill. He added that

even the appellant admitted to have thrown the arrow but he did not intend to kill. Thus, he was entitled to the defence of intoxication. According to him, had it been that the said defence was considered, the appellant would have been convicted of manslaughter instead of murder as malice aforethought was not established. He thus prayed for the appeal to be allowed, conviction and death sentence be set aside and the appellant be convicted of lesser offence of manslaughter. It was also his prayer that upon conviction, the appellant be released because he has spent not less than seven (7) years in prison, a punishment which he thought is enough.

In reply, Mr. Hatibu submitted that since the appellant did not deny the fact that he threw the arrow which killed the deceased, the issue for determination is whether he was intoxicated and that he killed unintentionally. He referred us to page 133 of the record of appeal where the trial Judge restated the position of the law under section 14(1) to (4) of the Penal Code that generally, intoxication is not a defence in any of the criminal charges unless there is evidential proof that the person charged did not understand what he was doing and the state of the alleged intoxication was caused without his consent by the malicious or negligent act of another person or the person charged was

by reason of intoxication thereof insane, temporarily or otherwise at the time of such act or omission.

The learned counsel went on to state that at page 73 of the record of appeal PW2 stated that he did not know whether the appellant was drunk. Thus, it is not correct to conclude that PW2 corroborated the evidence of the appellant, that he was drunk, more so because at page 83 to 84 of the record of appeal, the appellant stated that though he was drunk he had a clear mind and that after stabbing the deceased, he ran away. According to the learned State Attorney, such conduct of running away after the incident shows that he knew what he did let alone the arrogant words he uttered before and after the incident that he was a saviour of Wasandawe. According to him, this proves that he was not drunk to the extent of becoming insane. He cited the case of **Bakari Yusuph Harid@ Mkoko v. R,** Criminal Appeal No. 290 of 2021 (unreported).

Mr. Hatibu submitted further that it is clear on record that the appellant intended to kill the deceased because he used an arrow, a dangerous weapon which he used to hunt animals. Thus, he knew for

sure that by using that weapon, would cause death having hit the deceased on the chest, which is one of volatile parts of the human body.

Finally, the learned State Attorney urged the Court to consider his submission in opposition of the appeal and dismiss it.

In rejoinder, Mr. Mwakapeje stated that the weapon used by the appellant to hit the deceased was not prepared for that purpose, instead, the appellant was having it on a hunting mission and while at the bar before the incident. Regarding the argument that the arrow was directed to the chest of the deceased, it was his argument that there was no proof that death of the deceased was caused by the arrow thrown by him because there were other arrows were retrieved from his body.

Mr. Mwakapeja argued in relation to the words uttered by the appellant before and after the incident to the effect that, the record does not support the claim that the appellant uttered the same after the incident.

He insisted that the evidence of PW2 corroborated the appellant's defence that he was intoxicated. He added that the procedure of proving insanity under section 14(3) of the Penal Code could not be

invoked in the current case because the appellant was temporarily insane. He referred the case of **Nicco Peter Alias Rasta v. Republic** [2006] TLR 84 and argued that, the prosecution was duty bound to prove that intoxication was not the cause of the appellant's action of throwing the arrow to the deceased. According to him, the respondent should not be allowed to shift the burden of proof to the appellant arguing that the case of **Ally Bakari @ Mkoko** (supra) referred by the counsel for the respondent is distinguishable from this case.

Regarding the appellant's statement that they were drunk but still had clear mind, Mr. Mwakapeje submitted that the said statement was made at 16:00 hours while the incident took place two hours later at 18:00 hours. As far as the conduct of the appellant is concerned, the learned advocate argued that it is not indicated in the record of appeal that the appellant ran away after the incident. He thus prayed for the appellant's conviction of murder and death sentence to be set aside and in lieu thereof, be substituted with conviction of manslaughter and the appellant be released from prison.

We have given thoughtful consideration to the submission by counsel for both parties in respect of the second ground of appeal which

in essence raises a defence of intoxication; and, we have as well perused the record of appeal. The issue for our determination is whether intoxication as a defence can stand in the circumstances of the current case.

It is settled law as stated earlier that, intoxication is not a defence to any criminal charge including murder unless the person charged at the time of act complained of did not understand what he was doing and that the said intoxication was caused without his consent or he was temporarily insane at the time of such act. This position of the law is provided under section 14 of the Penal Code which reads: -

"14(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of he did not understand what he was doing and –

(a) The state of ***intoxication was caused without his consent*** *by the malicious or negligent act of another person; or*

*(b) The person charged was **by reason of intoxication insane**, temporarily or otherwise, at the time of such act or omission."*

In the current case, the appellant was charged with murder as stated earlier. In proving its case against him, the prosecution called three witnesses, including PW2 who was with the deceased at the material day and time. He witnessed when the deceased was stabbed to death with an arrow from the appellant. However, he did not testify to the effect that the appellant was intoxicated on that day. The only part of his evidence which remotely suggests that he (the appellant) might have taken alcohol is found at page 73 of the record of appeal where he stated during cross examination as follows: -

> *"Adamu and Tamba **were not normal**. I do not know if they were drunk. **But they were looking as is they were drunk.**" [Emphasis added]*

The counsel for the appellant capitalized on the above quoted piece of PW2's evidence to argue that the same corroborated the appellant's defence of intoxication. We shall let part of the appellant's

evidence in relation to that defence speak for itself hereunder with a view of examining whether it met the verge: -

> *"On 11/8/2014, I was at home and later,* ***I went to drink alcohol****. I drank from morning to 16: 00 hours and after two hours we returned to the village. We went to another bar where they were selling beer and other types of European drink.* ***We ordered alcohol which was commonly known as viroba****. We drunk viroba for some time..."*

When cross examined by the State Attorney, he stated: -

> *"We started by drinking local brew called udo.* ***We were drunk by 16:00 hours but we still had our mind*** *.... I stabbed Dogan with an arrow .... Having seen that I ran away. I never expected to kill. I was drunk."*

As it can be observed from the above excerpt, there is nothing to suggest the appellant being maliciously or negligently intoxicated without his consent. It is so apparent that on the material day, with full consciousness, he decided to go to the bar to take alcohol and he took it. He told the trial court that he was with his friend (not a party to this case) at the bar with no more. In other words, mere presence of that

other person at the bar with whom they took alcohol together could not be associated with any influence or negligence. Short of that, in our considered view, the fact that the appellant was in company with another person added no value to his defence. Therefore, the appellant's defence fails in the first criteria which requires intoxication to be caused by another person without consent.

Another crucial element to be considered in the defence of intoxication is whether by reason of intoxication the appellant became insane temporarily or otherwise at the time of commission of the offence. Counsel for the parties parted ways in respect of this issue. While the counsel for the appellant insisted that the appellant was drunk to the extent that he failed to make a rational decision, hence insane; the counsel for the respondent opposed that assertion on the account that the appellant's own words found at page 83 of the record of appeal suggesting that he was sober having said; *"we were drunk by 16:00 hours but we still had our mind."*

The counsel for the respondent argued that, those words are a clear indication that the appellant was not insane at the time of commission of the offence and that is why he ran away after the incident. According to him, even the words uttered by the appellant

before the incident that he was a Sandawe's saviour and the act of disappearing after the incident clearly indicated that he had malice aforethought. We partly agree with the argument by the counsel for the appellant that those words were uttered by the appellant two hours before the incident and therefore cannot be associated with what transpired at the time of commission of the offence on one hand. On the other hand, the conduct of the appellant immediately after the incident cannot leave him safe. We agree with the counsel for the respondent that had it not been that the appellant was capable of understanding what he did, he could not have vanished immediately after stabbing the deceased.

The claim by the counsel for the appellant that the appellant was insane at the time of commission of the crime is not supported with the record. In the same vein, with respect, we do not think that the assertion by the counsel for the appellant that the evidence of PW2 corroborated the appellant's defence of intoxication can hold water in the circumstances of this case. We say so because the said evidence was premised under an assumption as PW2 was not certain whether the appellant was drunk on the material day. Even if was so drunk, for the sake of argument, still the defence of intoxication could not stand

because it is not all about being drunk, but the law requires the above discussed elements to be proved; which is not the case herein. For more insight regarding the defence of intoxication, see for instance, **Mwale Mwansanu v. Director of Public Prosecutions**, Criminal Appeal No. 105 of 2018 (unreported).

We agree with the finding of the trial Judge in respect of the appellant's defence of intoxication. The trial court pronounced itself at page 140 of the record in the following terms: -

> *"I am satisfied that **the accused person was not influenced by an induced intoxication and neither was he un aware of what he was doing** when shooting he late Dogan with his arrow. He therefore ought to know that stabbing a human being in around the chest, death or serious bodily harm, would be a probable result.... Again, having inflicted the injury, **the accused person escaped from the scene and disappeared until his arrest** at seven months later." [Emphases added]*

Having considered the record of appeal and our discussion above, we are satisfied just as the trial court that the defence of intoxication raised by the appellant did not meet the verge. In the circumstances therefore, we decline the invitation advanced by the counsel for the

appellant that we should consider the appellant's defence and convict him of manslaughter. In this regard, on account of the record before us, the prosecution did prove beyond reasonable doubt that it is the appellant who killed the deceased with malice aforethought.

In the upshot, we find the appeal without merits and we hereby dismiss it.

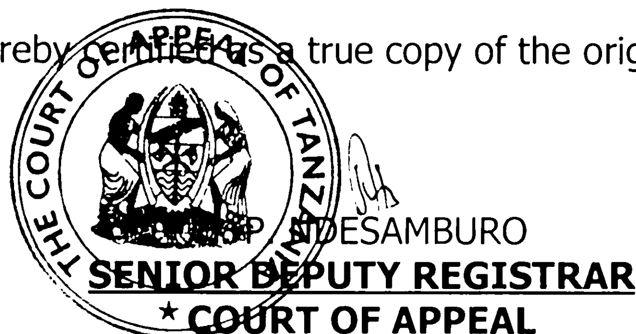
DATED at **DODOMA** this 30th day of April, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of May, 2022 in the presence of Mr. Ezekiel Amon Mwakapeje, learned counsel for the Appellant and Ms. Benadetha Thomas, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL