IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., FIKIRINI, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 475 OF 2020

PETRO SULE ..... 1ST APPELLANT

SULYU S/O JINASA ..... 2ND APPELLANT

MWANDU S/O HOTELI ..... 3RD APPELLANT

BODE S/O HAMISI @ MAGUSHI ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mwanza)

(Ismail, J.)

dated the 3rd day of August, 2020
in
Criminal Session No. 44 of 2019

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JUDGMENT OF THE COURT

10th July, 2023 & 25th October, 2023

LILA, J.A.:

Petro Sule, Sulyu Jinasa, Mwandu Hotel and Bode Hamis @ Magushi (Henceforth the 1st, 2nd, 3rd and 4th appellants) were jointly charged and convicted by the High Court, Mwanza Registry, (the trial court) with the offence of murder contrary to sections 196 and 197 of the Penal Code. Consequently, they were sentenced to suffer death. The charge levelled against them was that on 5th day of November, 2012 at Shirima Village within Kwimba District in the City and Region of Mwanza, they murdered one Kulwa D/o Makalwe (the deceased).

Following the appellants' denying the charge, the prosecution paraded eight (8) witnesses in a bid to establish their guilt. The witnesses sought to establish, briefly, that the 1st appellant hired the 2nd, 3rd and 4th appellants to execute an unlawful act of killing the deceased for a reason that she bewitched his son leading to his death to which each of the appellants confessed to being a party to the killing of the deceased. According to PW1 who had two wives, the incident occurred on 5/11/2012 at around 19.30hrs when two people went to his house and found him seated outside with the deceased waiting for dinner and that, with the aid of moonlight, he managed to see and identify them as being the 2nd and 3rd appellants who were not strangers to him as they stayed in the same village. That, the former held a panga with which he cut the deceased and had put on a black jacket and a black cap and the other was dressed in long sleeved green shirt. That, after the attack, he ran to his neighbour one Mussa Chenya (PW2) to whom he named the two appellants as the ones who had invaded them. It was their testimony that when they went back to the crime scene, they found the deceased had fallen unconscious. That they took the deceased to hospital but she died shortly. PW1, thereafter, reported the matter to the police on 6/11/2012 and recorded his statement. He further said, after a week, the two appellants called him at an auction place and told him not to blame them for killing his wife because they were hired by his

brother, the 1st appellant, accusing her to be a witch and they warned him not to disclose them or else they would kill him.

When cross-examined by Mr. Sangana, learned advocate for the appellants, PW1 stated that he saw the two persons as they were walking towards him and it was the 2nd appellant who cut the deceased ones. Explaining further when asked by the 1st assessor, he said he got worried when the panga was unleashed and that of the four accused persons in court, two of them were not at the crime scene, that is the 1st and 4th appellants. Mussa Chenya (PW2) confirmed that PW1, his other wife and a daughter visiting his place at night and reporting the incident as well as naming the 2nd and 3rd appellants as being those who invaded them.

A policeman one G 510 D/C Baraka (PW3) told the trial court that PW1 informed them of the incident on 22/12/2012 and named the suspects as being the appellants and one Butitili Malinganya who was said to be the leader of the killing squad. A team of policemen left to arrest Butitili but were unsuccessful and they went to Shirima Village where they arrested the 2nd and 3rd appellants at their respective homesteads at past 21.00hrs and the operation continued until 15.00hrs on 23/12/2012. He said, they were later informed of the presence of the 4th appellant and they went and arrested him on 19/5/2013. They

continued searching for Butitili without success, then they went back to Ngudu Police Station on 20/5/2013.

When cross-examined by Mr. Sangana, he (PW3) said PW1 was interrogated on 5/12/2012 and named those involved to be the appellants who were in court. He also said the 1st appellant was arrested on 22/12/2012 and the 4th appellant was arrested on 19/5/2013 and conveyed to the police station on 20/5/2013.

Responding to the question by Mr. John, also advocate for the appellants, he said he was informed about the incident on 5/11/2012 but steps were taken on 22/12/2012 and that accurate information on the incident came from PW1. And on being cross-examined by Mr. Kidando, also learned advocate for the appellants, he said when they were searching for the accused, Butitili Malinganya had already been arraigned in Court on similar offences.

Doctor Suke Kubita Magembe (PW4), a Medical Officer In-charge Butiama who, in 2012, worked at Ngudu Hospital in Kwimba District, conducted a postmortem examination and established the cause of the deceased's death to be excessive bleeding due to injuries inflicted by a sharp object which diagnosis he indorsed in the autopsy report (exhibit P1).

F 56 D/SSGT Jones (PW5), recorded the 1st appellant's cautioned statement at Ngudu Police Station on 23/12/2012 but its admission as exhibit was objected on account of being recorded outside four hours in terms of section 50(1)(a) of the Criminal Procedure Act, (the CPA) but the objection was overruled and it was admitted as exhibit P2. He said the 1st appellant confessed hiring the assailants to kill the deceased for payment of TZS 1.5 million.

F 8850 D/C Leonard, wrongly referred as PW5 again, recorded the 3rd appellant's cautioned statement (exhibit P3) and, responding to a question by the second assessor, he said Sulyu Jinasa (2nd appellant) is the person who killed but the 3rd appellant was at the scene and the bandits were four at the crime scene.

The 2nd appellant's cautioned statement (exhibit P4) was recorded by F 9940 D/SGT Peter (PW6) on 23/11/2012 at Ngudu Police Station but he did not ask him when he was arrested and, in the statement, he admitted, with his colleagues, killing the deceased. He said he saw the 2nd appellant at the police station at around 03.00pm on that day, 23/11/2012.

F 758 D/CPL Mgaya (PW8) investigated the case and recorded the 4th appellant's statement on 19/5/2013 at 11.00hrs but its admission as exhibit met an objection leading to the conduct of trial-within-trial and

was, at its conclusion, admitted as exhibit P5. He said, the appellant admitted participating in the killing and was paid TZS 150,000.

When cross-examined by Mr. Nyamwelo, learned advocate for the appellants, he said all the accused had "pangas". On further cross-examination by Mr. Sangana, he said there were five assailants. Upon further cross-examination by Mr. John, he said Petro Sule saw two persons, the 2nd and 3rd appellants. Upon assessor No. 1 seeking clarification, he said four bandits were armed and that the 4th appellant is the one who cut the deceased when she was running. He, however, said he did not know how PW1 managed to see the assailants.

All the appellants, in their respective defences, denied involvement in the alleged murder each claiming was arrested at his residence. The 1st appellant (DW1) said that, on 5/12/2012 at night time he was at his house and he learnt of the deceased's death on 6/12/2012 and participated in the funeral ceremony staying there for a day but was later on 20/12/2012 arrested and taken to Ngudu Police Station where he was beaten up by police to force him confess to the killing. He admitted knowing the deceased who was his sister in-law she being a wife of PW1, his young brother, with whom he was in good terms and they respected each other. He denied having a son named Juma Petro and also hiring other appellants at TZS 1,500,000 to kill the deceased.

Like DW1, the 2nd appellant (DW2) claimed that he was, on 5/12/2012, at his house in Shirima Village and was arrested on 20/12/2012 at around 02.00pm on accusation of murder and restrained in Ngudu Police Station. He denied knowing PW1 and the rest of the appellants with whom he was charged in court, Butitili Malinganya and even the deceased although he had stayed at Shirima Village for 25 years.

The 3rd appellant (DW3) similarly disassociated himself with the deceased's death claiming that he was at his home on the fateful day with his parents after he had returned from grazing his parent's cattle. He denied knowing Butitili Malinganya or killing the deceased. He said he was arrested on 22/12/2012 taken to Hungumarwa Police Station and later at 05.00am was taken to Ngudu and was interrogated on 23/12/2012. He denied knowing the deceased and involving himself with her murder as well as knowing the rest of the appellants prior to the murder incident and denied implicating anybody in his statement.

The 4th appellant (DW4) said he lived in Kikubiji in Kwimba District and was arrested on 10/5/2013 at around 04.00 pm, taken to Ngudu Police Station where he was beaten up and his statement recorded while being forced to confess to the killing of the deceased who he did not know or heard of her death. He also denied knowing other appellants

jointly charged with prior to the case and had not moved out of the village between 5/11/2012 and 10/5/2013.

All the assessors returned a verdict of guilty to all the appellants at the conclusion of the trial. The trial court concurred with them giving these reasons. **One**; moonlight sufficiently illuminated the area hence enabled PW1 to see and identify the 2nd and 3rd appellants at the crime scene citing the case of **Kenedy Ivan vs Republic**, Criminal Appeal No. 178 of 2007 (unreported). **Two**; PW1 was credible as he exhibited impressive demeanour and composure which showed that he was honest and truthful, he was consistent and unshakable during cross-examination citing the case of **Chacha Jeremia Murimi vs Republic**, Criminal Appeal No. 551 of 2015 (unreported). **Three**; PW1 named the assailants instantly to those he first came across (at the earliest opportunity) which was an assurance of his credibility citing the cases of **Marwa Wangiti Marwa and Another vs Republic** [2002] T.L.R. 39, **Jaribu Abdallah vs Republic** [2003] TLR 271, **Minani Evarist vs Republic**, Criminal Appeal No. 124 of 2007 and **Swalehe Kalonga and Another vs Republic**, Criminal Appeal No. 45 of 2001 (Both unreported). **Four**; PW1 met the 2nd, 3rd and 4th appellants and admitted involvement in the murder and was given a stern warning not to disclose that it was the 1st appellant who had hired them to kill his wife and he

should not blame them. **Five;** PW1 explained the distance between him and the assailants as required in terms of the case of **Chacha Jeremia Murimi vs Republic**, (supra) and **Fadhili Gumbo @ Matola and 3 Others vs Republic** [2006] TLR 52**. Six;** confessional statements by the appellants (exhibits P2, P3, P4 and P5) which, in law, is the best evidence were voluntarily made and linked all the appellants with the commission of the offence citing various decisions stating that it is the best evidence, must show that the appellants voluntarily admitted to all elements of the offence charged, the positions set in the case of **Hamisi Juma Chaupepo @ Chau vs Republic**, Criminal Appeal No. 95 of 2004, **Paul Maduka and Others vs Republic**, Criminal Appeal No. 110 of 2007, **Mathias Bundala vs Republic**, Criminal Appeal No. 62 of 2004, **Juma Magori @ Patrick and 4 Others vs Republic**, Criminal Appeal No. 328 of 2014, **Emanuel Lohay and Udagene Yalooha vs Republic**, Criminal Appeal No. 278 of 2010, **Abdul Farjala and Another vs Republic**, Criminal Appeal No. 99 of 2008, **Hassan Said Nundu vs Republic**, Criminal Appeal No. 126 of 2002 (All unreported), **Kashindye Meli vs Republic** [2002] T.L.R. 374, **Tuwamoi vs Uganda** [1967] EA 84 and other persuasive decisions of **S (an infant) vs Manchester City Recorder and Others** [1969] 3 All E.R.1230, **Ikechukwu Okoh vs The State** (2014) LPER-22589 (SC).

The learned trial judge noted some discrepancies in the narrations of the appellants in their respective statements respecting, **first**; the amount paid to the 2nd, 3rd and 4th appellants some saying TZS 1.5 million and others saying TZS 1.2 million and **second**; how that amount was shared amongst the trio between TZS 150,000, TZS 300,000, TZS 200,000 and TZS 500,000, but held them to be flimsy not going to the root of the central story that they participated in killing the deceased. He, accordingly, disregarded them. As to whether the killing was intentional, for reasons that the statements show that they planned to perpetrate the killing for payment and the vulnerable parts of the deceased's body cut, he was resolute that the killing was with malice aforethought and he convicted them as charged followed with imposition of the prescribed mandatory death sentence.

The defence evidences by the appellants did not find merit to the learned trial judge as he disbelieved them for the reasons that they were general and casual denials which were highly suspect and lacking credibility hence not worth of being relied on. We shall provide the details and the learned judge's view later in this judgment when, this being a first appellate court, we shall subject the evidence by both sides to our own thorough examination and evaluation.

The conviction and sentence aggrieved the appellants who, now, faults the trial court's findings upon three sets of memoranda of appeal which we shall not reproduce them herein following some alterations made by the appellants' respective advocates. The first memorandum was lodged by the 1st appellant on 20/10/2020 comprising six (6) grounds of appeal which was subsequently followed by a joint memorandum of appeal lodged by the 2nd, 3rd and 4th appellants on 21/10/2020 constituting seven (7) grounds of appeal. Ms. Ndege, learned advocate, representing the 4th appellant lodged a supplementary memorandum of appeal on 4/7/2023 with four (4) grounds of appeal.

All the appellants were duly represented by learned advocates when the appeal came up for hearing before us. Mr. Anthony Nasimire represented the 1st appellant, Mr. Constantine Mutalemwa represented the 2nd appellant, Mr. Fidelis Cassian Mtewele represented the 3rd appellant and Miss Rose Edward Ndege represented the 4th appellant. On the rival side, a team of learned State Attorneys constituting of Mr. Morice H. Mtoi, Mr. Mahembega Elias Mtiro, Mr. Japhet Ngussa and Mr. Evance Kaiza represented the respondent Republic. They vehemently resisted the appeal.

However, before hearing could take off, we granted Mr. Mutalemwa's unopposed prayer for leave to argue two new grounds not stated in the joint memorandum of appeal. They state: -

> *"1. That 2nd appellant's conviction wrongly relied on the confessional statements of the 1st appellant which was recorded under section 53 of the CPA hence was not worth a confession.*
>
> *2. That, the 2nd appellant was convicted relying on cautioned statements of other appellants which contravened the provisions of sections 50, 57 and 58 of the CPA."*

However, at a later stage of his arguments, he dropped ground one remaining with the second ground which challenged the validity of the cautioned statements.

For his part, Mr. Nasimire opted to argue the grounds of appeal as were lodged in the joint memorandum of appeal. Such was also the position taken by Mr. Mtewele. Miss Ndege confined herself to a four (4) point supplementary memorandum of appeal and she opted to abandon all the grounds contained in the joint memorandum of appeal.

Comprehensively examined, central issues raised in the grounds of appeal are, **one**; identification evidence by PW1 of the 2nd and 3rd appellants at the crime scene was insufficient, **two**; cautioned

statements were invalid for being taken in contravention of the law, **three**, the prosecution evidence is tainted with unresolved contradictions and inconsistences hence unreliable, **four**; failure to call crucial witnesses entitled the court to draw an adverse inference on the prosecution case, **five**; delayed arrest and arraignment of the 1st appellant from 5/11/2012 when the incident was first reported by PW1 to 23/12/2012 when the appellants were arrested casted doubt on the prosecution case and, **six**; that the appellants' conviction was wrongly grounded on the weakness of the defence. We shall, therefore, consider and determine the appeal based on the parties' arguments through their respective advocates on those issues.

We propose to, first, consider the complaint that identification evidence by PW1 of the 2nd and 3rd appellants at the crime scene was insufficient. Mr. Mutalemwa was first to address the Court and argued that the offence was committed at night and the sole identifying witness was PW1. It was his arguments that although the learned trial judge cited the case of **Chacha Jeremia Mrimi vs Republic** (supra) which expounded the factors to be considered in issues of visual identification so as to enable the court to satisfy itself that it is watertight and is free from the possibilities of mistaken identity, he did not subject PW1's evidence to those thresholds hence wrongly concluded that the visual

identification evidence was watertight. He outlined the factors to be source and intensity of light, distance at which a witness had observation of the culprits, the time the incident took, any impediments to such observation and whether the culprits were not strangers. He stressed that PW1's evidence did not meet all these factors. As for the fact that PW1 was able to name the culprits to PW2 instantly which the learned trial judge adjudged as adding his credence, Mr. Mutalemwa submitted that his credibility ought to have been considered too as the Court held in **Jaribu Abdallah vs Republic** (supra). Mr. Mtewele fully subscribed himself to the arguments by Mr. Mutalemwa. For the respondent, Mr. Mtoi did not share views with Mr. Mutalemwa and Mr. Mtewele arguing that identification evidence was watertight. He banked on three pieces of evidence. **One**, that light was enough at the crime scene that is why PW1 was able to tell the attires the two appellants had put on, **two**; he named them to PW2 instantly and that the two called him and disclosed to him that they killed the deceased upon being hired by the 1st appellant and they warned him not to disclose such information.

We entirely agree with Mr. Mutalemwa and Mr. Nasimire and it was uncontroverted that the incident occurred at 19.30hrs hence at night and the sole witness at the crime scene and hence the sole

identifying witness was PW1. It is also clear that the trial judge relied on, among other evidence, visual identification by recognition made by PW1. The two learned counsel have, in substance, invited this Court as a first appellate court, to exercise its mandate to revisit the evidence and come up with own findings of fact. The Court has often cautioned courts on the danger of relying on visual identification evidence to convict an accused that it is most unreliable and directed that it could be so relied only after being satisfied that the conditions for identification favoured a proper and unmistaken identification (see **Waziri Amani vs Republic**, [1980] TLR 250). In the present case, the incident happened at night hence it was dark suggesting that the conditions for identification were unfavourable unless the area is well illuminated. PW1 simply stated that he was aided by moonlight which was bright enough to enable him see and identify the 2nd and 3rd appellants. Was this sufficient? is the issue to be determined here. We do not think. Obviously, he was able to tell the attires put on but is that enough to conclude that they were the appellants and not any other persons? In our view, there ought to have been evidence that no other person had such clothes in that village hence the appellants could be distinguished from other villagers. Otherwise, such clothes are common and could be put on by any other person. There was need to provide descriptions of the assailants on top of the attires put on as we stated in **Waziri Amani vs Republic**

(supra). Unfortunately, PW1 was not forthcoming on, not only the intensity of light that enabled him properly see and identify the two appellants and their respective attires, but also the descriptions of the assailants. The need to explain the strength of light has time without number been insisted by the Court so as eliminate chances of a mistaken identity. In **Richard Athanas vs Republic**, Criminal Appeal No. 115 of 2002 (Unreported), the Court aptly called upon the prosecutors to lead witnesses on that crucial issue stating that: -

> *"...He could have asked the witness to explain what the source of the light was, how strong it was and whether the light [was] shone on the intruder in order to give the court an assurance that the witness actually saw and identified the intruder. Instead, the prosecutor did not ask the witness any question in re-examination. With respect, it cannot be enough in evidence of identification during night time for a witness to simply say-*
>
> ***"I identified you. There was light"*** (emphasis added)

The present case suffered from the above lacuna such that it cannot, with certainty, be said that there was enough light at the crime scene for the trial court to agree with PW1 that he properly identified the two appellants. The mere fact that PW1 knew the two appellants prior to the incident is no guarantee as this Court has insistently held

that even recognizing witnesses often make mistakes or deliberately lie (See in **Waziri Amani vs Republic** (supra), **Shamir John vs Republic**, Criminal Appeal No. 166 of 2004 (unreported) hence the need to ensure that the prosecution evidence meets the threshold set in **Waziri Amani vs Republic** (supra), and which were reiterated in the cases of **Chacha Jeremia Mrimi vs Republic** and **Jaribu Abdallah vs Republic** (both supra) rightly cited by Mr. Mutalemwa and adopted by Mr. Mtewele. Although PW1 was able to tell the distance between him and the two persons, his evidence is wanting in explanation of the time he had them in observation which is a crucial factors to be considered so as ascertain that he sufficiently observed them and could not have mistaken the 2nd and 3rd appellants with any other persons who might have put on such attires. From the evidence by PW1, it is obvious that the incident did not take too long. This is what he told the trial court: -

> *"... There was moonlight that lit the place and it was still early in the evening. The moonlight was bright enough to see and identify a person... we tried to scamper for safety but I fell. Then they attacked my wife and injured her on her head and cut off her ear. I ran to the neighbour called Mussa Chenya..."*

From these clear words by PW1, it can fairly be inferred not only that the attack was sudden and abrupt but also it caused horror and havoc which normally temporarily denies a person courage and an opportunity to concentrate in observing the attacker. PW1 was also clear that he got worried when one of the culprits unleashed a 'panga'. The more so, such words suggest that the incident did not allow time for PW1 to calm down as he struggled to save his life and immediately ran to Mussa Chenya (PW2). It is therefore very unsafe to hold that he ably saw and properly identified the attackers.

Besides, the credibility and reliability of the identifying witness is an essential matter to be considered by a trial court. As stated above, PW1 was the sole eye-witness of the murder incident and PW1 was categorical at page 33 of the record of appeal that PW1 was the only eye-witness and was the source of all information. His naming of the 2nd and 3rd appellants to PW2 would carry weight had he been consistent in naming them to other witnesses. PW3, who said was informed of the incident by PW1 at page 31 of the record, said there were five suspects of the murder incident including one Butitili Malinganya, PW6 at page 47 of the record said there were four suspects at the scene and PW7 at page 47 said there were five (5) people and PW7 at page 71 said all four persons were armed. But, PW1 had said, in his testimony, that there

were only two persons and it was only the 2nd appellant who had a "panga". Since all these witnesses received such information from PW1, it was expected that he (PW1) would be consistent on the information he revealed to various witnesses. The inconsistences in the witnesses' evidence above is a reflection of different information PW1 revealed to them on the same event. This impacts adversely on his (PW1's) credibility on the certainty on who and how many persons invaded and killed the deceased. Much as we acknowledge that determination of credibility of a witness by demeanour is the exclusive province of the trial court, these were material matters the learned trial judge ought to have considered in gauging PW1's evidence against other witnesses when considering and determining PW1's credibility before concluding that he was so. It is trite law that credibility of a witness may also be determined by an appellate court by looking at the consistence of the witness's own evidence or coherence and consistence of it with other material witnesses as the Court held in **Shaban Daudi v Republic**, Criminal Appeal No. 28 of 2000 (unreported) : -

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the*

testimony of that witness. ***Two, when the testimony of that witness is considered in relation with the evidence of other witnesses*** *including that of the accused person. In those two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court. Our concern here is the coherence of the evidence of PW1."* (Emphasis added)

What comes out clearly from the prosecution evidence, in the present case, is that the evidence of PW1 was inconsistent with the evidence of PW3, PW6 and PW7 which necessarily reduces his credibility as an eye-witness. The inconsistence casts doubt on whether there was enough light for him to properly see and correctly identify the culprits.

There is evidence by PW1 that the 2nd and 3rd appellants called him and disclosed to him that they killed the deceased after being hired by the 1st appellant and the prosecution relied on this as a confession. The learned trial judge, as set out above, agreed with them. But we hold a different view. Had he considered PW1's credibility as above, he would have not been so moved. Besides, PW1 did not tell under what circumstances the two appellants allegedly called him and the words used from which the trial court could gauge whether or not they

constituted a confession to the killing of the deceased. These deficiencies raise doubt hence his allegation, he being unreliable, is also doubtful. That said, we hold that the identification evidence by PW1 was insufficient to place the 2nd and 3rd appellants at the crime scene and therefore the trial court wrongly relied on visual identification evidence by PW1 to convict the 1st and 2nd appellants.

We shall next deliberate on the two issues which we consider them to be intertwined. They relate to cautioned statements of the appellants which were allegedly recorded outside the prescribed four hours' time and that the prosecution evidence is tainted with unresolved contradictions and inconsistences hence unreliable.

Mr. Nasimire was first to challenge the validity of the cautioned statements arguing that the 1st appellant's statement (exhibit P2) was recorded by PW5 on 23/12/2012 from 18.57hrs to 19.50hrs after he was arrested on 22/12/2012 at 21.00hrs according to PW3 which was beyond four hours prescribed under section 50(1)(a) of the CPA and there was no extension of time to do so sought and granted under section 51(1) of the CPA. He challenged the learned trial judge's finding that exhibit P2 was timeously recorded reconning the time from when the 1st appellant was taken to Ngudu Police Station for the reason that the appellant was on transit to Ngudu Police Station as there is no such

evidence on record. Mr. Mtoi had no qualms with the date and time of arrest and recording of the statement but still maintained that the statement was taken within four hours. He argued, while referring to page 31 of the record of appeal, that after his arrest on 22/12/2012 at 21.00hrs the operation continued until on 23/12/2012 at 15.00hrs.

We, first take note of the learned trial judge's acknowledgement of the law and principles underlying essence, validity and evidential value attached to cautioned statements and we subscribe with the legal positions expounded in the cited cases. One basic principle is to the effect that they constitute the best evidence by a suspect on which a conviction may be grounded but we must add that they must have been taken according to law. We entirely agree with Mr. Mtoi that going by his argument and that of the learned trial judge, exhibit P2 will fall within the requisite time for recording it, but as rightly argued by Mr. Nasimire, the record is not at their favour for a reason that it does not show that the search team continued with the operation while with the 1st appellant which time should be excluded in terms of section 50(2) of the CPA which permits exclusion of time when the appellant is on transit or is in the process of investigation. That evidence is missing as PW3 did not state so and to hold that the 1st appellant was involved or was with the police throughout the operation is to add words in the record of

appeal and hence engage in speculation. That must have been made clear by the prosecution. In criminal jurisprudence, that gap benefits the appellant and, with no exclusion of time, exhibit P2 was obviously taken outside four hours. We consequently hold that exhibit P2 was invalid and could not be the bases of a valid conviction.

Mr. Mutalemwa attacked all the cautioned statements as having been not complied with the requirements of section 57 of the CPA. For a reason that we have already held exhibit P2 invalid, we shall not deal with it again. While referring to the requirements of section 57(2)(e) of the CPA, he submitted that the 2nd and 4th appellants did not append their respective signatures at the end of their respective cautioned statements (exhibits P2 and P4) so as to certify them. To him signing by words "uhakikisho" is insufficient in terms of section 57(4)(e) of the CPA. Mr. Mtoi seriously opposed Mr. Mutalemwa's arguments. He submitted that such is not a legal requirement. Two issues call for our deliberation here. One, whether certification by the maker of the statement is a legal requirement or not and, two; whether there was non-compliance.

Mr. Mutalemwa cited to us section 57(4)(e) of the CPA. But for a reason to be told hereunder, we shall recite the whole of section 57(4) of the CPA which provides: -

"(4) Where the person who is interviewed by a police officer is unable to read the record of the interview or refuses to read, or appears to the police officer not to read the record when it is shown to him in accordance with subsection (3) ***the police officer shall-***

(a) Read the record to him, or cause the record to be read to him;

(b) Ask him whether he would like to correct or add anything to the record;

(c) Permit him to correct, alter or add to the record. Or make any corrections, alterations or additions to the record that he requests the police officer to make;

(d) Ask him to sign the certificate at the end of the record; ***and***

(e) Certify under his hand, at the end of the record, what he has done in pursuance of this subsection.

These provisions invite no any ambiguity that they impose a duty on the police officer recording the interview to imperatively comply with the requirements set out in subsections (a) to (e) cumulatively at the end of recording a statement as the word used to link them all is '**and**'. We have examined all the cautioned statements (exhibits P2, P3, P4) and we are satisfied that in neither of them the recording police officers complied with all the above requirements. Therefore, while we fully

agree with Mr. Mtoi that an accused has nothing to do so as to comply with section 57(4) of the CPA, the police officers who recorded the statements did not discharge their legal duty as stipulated above. For clarity, we let the record speak it all by quoting the last two paragraphs at the end of each appellant's cautioned statement thus: -

Beginning with the 1st appellant: -

> *"**UTHIBITISHO**: U/S 53 CPA [R.E. 2002] mimi Petro s/o Sule nathibitisha kuandikiwa maelezo yangu kwa usahihi na uaminifu kama nilivyoyatoa*
>
> *(SGND) RTP OF PETRO S/O SULE*
>
> *R/O F 56 D/SSGT JONES*
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> ***UTHIBITISHO**: U/S 53 CPA [R.E. 2002] F 60 D/SSGT JONES Anathibitisha kuandika maelezo ya PETRO S/O SULE kwa usahihi na uaminifu.*
>
> *R/O F 60 D/SSGT JONES."*

For the 2nd appellant: -

> **"UHAKIKISHO:**__*Mimi SULYU S/O JINASA nimesomewa maelezo yangu na yale yaliyoandikwa ni yale niliyoyatamka kwa hiari yangu*
>
> *(SGND) RTP*

***UTHIBITISHO**: Mimi askari F 9940 D/SGT Peter nathibitisha kuandika maeiezo haya kwa usahihi na uaminifu chini ya K/F 58 CPA R. E. 2002*

R/O F 9940 D/SGT Peter."

In respect of the 3rd appellant's cautioned statement: -

*"**UHAKIKISHO**: Mimi MWANDU S/O HOTEL nimesomewa maelezo yangu nimehakikisha ni sahihi leo 23.12.2012 saa 1655 Hrs.*

(SGND) RTP of MWANDU S/O HOTEL.

R/O F 8850 D/C Leonard

***UTHIBITISHO**: Miml askari No. F 8850 D/C Leonard nimeandika maelezo ya MWANDU S/O HOTEL kama aiivyoeleza leo 23.12.2012 saa 1655 Hrs K/F 57(3) CPA 1985 CAP 20 R.E. 2002)*

R/O F 8850 D/C Leonard."

And, for the 4th appellant's statement: -

"...hayo ndiyo maelezo yangu kwa kadri ya ufahamu wangu ni sahihi nilivyoeleza, sina maelezo mengine kwa sasa nimesomewa ni sahihi kama nilivyoeleza. RTP of BODE S/O HAMISI @ MAGUSHI

R/O F 758 D/CPL MGAYA

***UTHIBITISHO**: Mimi askari No. F 758 D/CPL Mgaya nathibitisha kuandika maelezo ya DOBE S/O HAMISI @ MAGUSHI kwa usahihi na uaminlfu kama*

alivyoeleza yeye mwentewe chini ya K/F 58(2) CPA 1985 (R. E. 2002).

(SGND) R/O F758 D/CPL MGAYA."

On the face of these quoted portions of the appellants' statements, it is clear that all the statements were written by police officers quite in line with the evidence on record. But, at the foot of the statements, they show that they were taken by police officers under different provisions of the law. The 1st appellant's statement was recorded under section 53 of the CPA, the 2nd appellant's statement was recorded under section 58 of the CPA, the 3rd appellant's statement was taken under section 57(3) of the CPA and that of the 4th appellant was recorded in terms of section 58(2) of the CPA. These provisions apply under different circumstances and imposes different mandatory obligations to the police officer recording the statement and avail certain rights to suspects which were clearly not observed. It is only the 2nd appellant's cautioned statement (exhibit P4) which shows his level of education to be STD VII. Section 53 of the CPA outlines the rights of an accused which should be known to him before he is subjected to any enquiry or being asked to do anything like writing a statement in respect of the accusations during investigation. Section 57 of the CPA is about recording of interview and the procedure of recording a confession of a person who can read or not by a police officer. As opposed to that,

section 58 of the CPA provides for the rights of a person who is under restraint but knows how to read and write and wishes to personally write the statement. Under these circumstances, it is incumbent upon the police officer interviewing a person who is under restraint to first ascertain from him whether or not he knows how to read and write and wishes to write the statement himself before invoking any of the above provisions. Unfortunately, this was not done as there are no such words in the certificate in the instant case as a result of which the police officers recorded the statements without observing their obligations and the appellants' rights. Since, all these provisions are imperatively couched, their violations are fatal and vitiated the statements. In an akin situation, in the case of **Christina Damiano vs Republic,** Criminal Appeal No. 178 of 2012 (unreported) cited in **Juma Omary vs Republic**, Criminal Appeal No. 568 of 2020 (unreported), the Court held that non-compliance with the mandatory provisions of section 57 vitiates the cautioned statement hence subject to being expunged. [See also **Mereji Logon vs Republic,** Criminal Appeal No.273 of 2011 (unreported).

In line with our earlier decisions, we have no other options but expunge all the appellants' cautioned statements as we hereby do. Given that visual identification by PW1 was insufficient and having

expunged all the cautioned statements, there remains no other evidence upon which the appellants' convictions could be grounded. That said, the need to consider other issues becomes superfluous and we refrain from considering them.

All said and done, we allow the appeal, quash the convictions and set aside the sentences and we order all the appellants be set free unless there are other lawful causes holding them in prison.

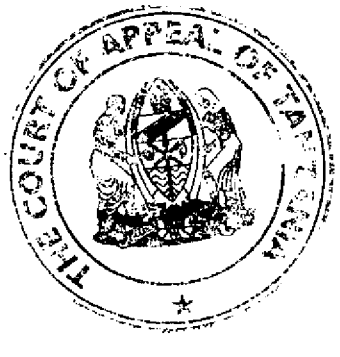
DATED at **DAR ES SALAAM** this 23rd day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 25th day of October, 2023 in the presence of the appellants in person via video link from Butimba Prison and Mr. John Saimon Joss, learned State Attorney for the respondent Republic, via video link from High Court Mwanza is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL