

IN THE COURT OF APPEAL OF TANZANIA

AT KILIMANJARO

COUNCIL: NYALALI, C.J., MAKAME, J.A., and KISANGA, J.A.

CRIMINAL APPEAL NO. 57 OF 1986

CHIEF CLERK MICHAEL MABAWA & 2 OTHERS.....??....APPELLANTS

and

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High
Court of Tanzania at Mwanza) (Munyera, J.)
dated the 8th day of August, 1986

in

Criminal Sessions Case No. 55 of 1982

JUDGMENT OF THE COURT

KISANGA, J.A.:

The three appellants were jointly charged and convicted of murder contrary to section 196 of the Penal Code and were each sentenced to death by the High Court (Munyera, J.) sitting here in Mwanza. They are now appealing against both the conviction and sentence. At the hearing, we consolidated the appeals. Mr. Kahangwa appeared for the first appellant and Mr. Rutakolezibwa appeared for the second and third appellants, while Mr. Teendwa appeared for the respondent Republic.

The convictions were based on the confessional statements of the three appellants made to the justice of the peace. The said confessions were to the following effect: The first appellant, Charles Michael Mabawa, was the nephew of the deceased Benjamin Mabawa. Out of a family grudge and misunderstanding between this appellant and the deceased, the appellant decided to eliminate the deceased. Thus on the day of the incident the appellant organized his co-appellants and two others, went to the home of the deceased in the dead of the night, entered the house and shot the deceased to death after which they escaped with some items of property

belonging to the deceased. One of the missing bandits, Kuzenga Bangili, could never be traced, and the other one William Lomboko died while in remand prison. The trial therefore had proceeded in respect of the three appellants only.

In their defences at the trial the appellants repudiated their confessional statements, claiming that they were merely ordered to sign statements the contents of which they did not know. They completely denied any involvement in the offence charged. The trial judge found the confessions of all the appellants to be true. He also found that the confessions of the second and third appellants were corroborated by other independent evidence, and that those two confessions could be taken into account as against the first appellant. On the basis of that he convicted the appellants accordingly.

At the commencement of hearing this appeal, Mr. Kahangwa informed us that although he represented the first appellant only and Mr. Rutakolezibwa appeared for the second and third appellants, it was not possible in the circumstances of this case to argue the appeal of one appellant in isolation and to the exclusion of the others. So that Mr. Kahangwa sought to deal with only one aspect of the case touching on all the appellants, leaving Mr. Rutakolesibwa to deal with the rest, and we allowed him to proceed.

Mr. Kahangwa's only ground of appeal was that the person who recorded the extra-judicial statements of the appellants was not duly appointed justice of the peace. The confessions were recorded by Mr. Gervas Celestin Msimbu (P.W.10) who was then District Personnel Officer, and Mr. Kahangwa submitted that under the Decentralization of Government Administration Act 1972, the powers of a justice of the peace were vested not in District Personnel Officers but in District Development Directors. This submission, however, was only short lived. It was brought to a rapid end when Mr. Kahangwa's attention was drawn to Government Notice No. 49 of

of 1974 which appoints all District Personnel Officers justice of the peace for their respective districts.

Like Mr. Kahangwa, Mr. Rutakolezibwa raised only one issue, namely, involuntariness of the appellants' confessions. The record, however, shows that the statements were admitted at the trial without objection. All the appellants were duly represented by counsel, indeed Mr. Kahangwa being one of them. But no application was made to object to the admissibility of the confessions on the ground of their being involuntary or on any other ground, nor was the justice of the peace who recorded them cross-examined at all. Since that issue was not raised at the trial, and since no reasons have been given why it was not, we cannot see how it may properly be raised at this stage. That ground of appeal therefore, must also fail.

As stated before, the learned trial judge found that the confessions were true. That finding was quite justified. The statements contain details of information such that no one else but the makers themselves could have given them. This is true, for instance, of the account given by the first appellant about his family including his own misunderstanding with the deceased which led to his enlisting the assistance of his co-appellants to eliminate the deceased. The statements are so inter-related that they cannot possibly be a concoction of the individual appellants. For instance each appellant mentions his co-appellants and the other two persons - one who could not be traced and the other who died in remand - as the group which went to the house of the deceased in the night of the incident and witnessed the commission of the atrocities against the deceased and his property. Furthermore, in some very important respects the contents of the statements tally with the other

evidence. For example, all the appellants stated that the deceased was killed by the use of a gun, and this is born out by the medical evidence which shows that death was due to brain damage by a bullet shot with massive haemorrhage. Again the statements of the second and third appellants show that among the items looted from the deceased's house following the banditry were two radio cassettes which the appellants subsequently passed on to prosecution witnesses. The said radio cassettes were duly traced into the hands of the witnesses mentioned by the appellants and indeed in one of these radios there was a cassette bearing on it the name of Mabawa.

On the information which was before the court, we think that the learned trial judge was perfectly entitled to hold as he did that the statements of the appellants could not but be true. There can hardly be any justification for complaint against convictions based on such confessions. In the event, we are satisfied that the convictions of all the three appellants were well founded both in law and fact, and we can find no ground for disturbing them. The appeals are completely devoid of merit and they are accordingly dismissed in their entirety.

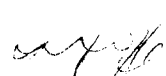
DATED at NAIROBI this 1st day of December, 1986.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUDGE OF APPEAL

C. H. KICANGA
JUDGE OF APPEAL

I certify that this is a true copy of the original


J. H. ISOFFE
DEPUTY REGISTRAR