IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWARIJA, J.A., KENTE, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 333 OF 2020

FRANK RICHARD SHAYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Mwenempazi, J.)

dated the 26th day of June, 2020

in

Criminal Session No. 65 of 2018

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JUDGMENT OF THE COURT

18th & 22nd March, 2024

MGONYA, J.A.:

The appellant Frank Richard Shayo was convicted and sentenced to death for the offence of Murder contrary to section 196 of the Penal Code, Cap. 16 R. E. 2002 (the Penal Code) in the High Court of Tanzania sitting at Moshi in Criminal Session Case No. 65 of 2018. Being aggrieved, he has come before us on appeal with ten grounds; six from the memorandum of appeal and four grounds vide the supplementary memorandum of appeal.

The facts of the case briefly show that, on 11/4/2017 at around 20:00 – 21:00 hours at Sanya Juu bus station, an unknown passenger

went to the motorcyclists popularly known as bodaboda rider's point to ask for the whereabouts of one Mromboo, whose official name was Peter Godfrey Urio, a bodaboda rider, the deceased in this case. By that time, the deceased was not around as he was hired to take a passenger to the place known as "Kwa Saria" one kilometer distance from Sanya Juu bus stand. When Peter Godfrey Urio returned, he was informed of the person who went looking for him.

Some few minutes later, the person who went asking for the deceased appeared and hired him where together they headed for Kwa Saria. The deceased did not return up to 23:00 hours where other bodaboda riders, including PW1 who first received the said passenger looking for the deceased while he was not at the stand, became worried and started searching for the deceased's whereabouts. From his father and his wife, they were informed that he was yet to return from work.

An emergency meeting for all bodaboda riders at the area was convened and the deceased's search was mounted. The next morning at around 10:00 hours, information was received that the body of Peter Godfrey Urio had been found in maize farm at Sanya Hoye Village and taken to hospital.

The matter was reported to Sanya Juu police station whereby the police visited the scene of crime and drew a sketch map. The autopsy of

the deceased's body was conducted and the result showed that deceased's death was due to strangulation of the neck, bleeding of nose and head injury.

After four days, the appellant with other two people were arrested and arraigned before the court charged with the offence of murder contrary to section 196 of the Penal Code. Before the trial court, the 1st accused was Christopher Lorivi Loseria who was found in possession of the alleged deceased's mobile phone, the 2nd accused was Frank Richard Shayo, the appellant herein while the 3rd accused was Emmanuel Daud Makala.

Following a full trial, the 1st and 3rd accused persons were acquitted. The appellant was found guilty, convicted and sentenced to death by hanging.

When the appeal was called for hearing, the appellant appeared in Court and he was represented by Mr. David Shilatu, learned advocate; whereas the respondent, the Republic was represented by Ms. Jenipher Massue, learned Principal State Attorney assisted by Ms. Veronica Moshi, the learned State Attorney.

At the outset, the appellant's counsel informed the Court that the appellant was dropping the entire grounds in the supplementary

memorandum of appeal and proceeding with only four grounds of the memorandum of appeal, but dropping the 3rd and 4th grounds therein.

Basically, the complaint against the decision of the trial court (Mwenempazi, J.) in the four grounds of appeal before the Court are on issue as to whether the prosecution case was sufficiently proved. Ancillary to that, is whether there was sufficient evidence of identification of the appellant, proving that he was the one who killed the deceased. Further, whether it was proper for the trial judge to use Exhibit P5 (appellant's cautioned statement) as a basis of conviction without cautioning himself that the same was recorded by PW5 who was the arresting officer and investigator of the case. Finally, is whether it was right for the trial judge to convict the appellant basing on Exhibit P3 (the deceased's phone) which was allegedly found in the possession of the appellant's co-accused who was acquitted.

In his submission, Mr. Shilatu started with the 2nd ground of appeal on identification of the appellant. Addressing this ground, the learned advocate argued that, in view of the adduced evidence, identification of the appellant to be the one who hired the deceased on the material date and finally killed him, was not watertight. He pointed out PW1's testimony before the trial court at page 44 of record that he identifying the person who went to look for the deceased and later hired him to be a one-eyed

man "jicho chongo". From that testimony, it was the learned counsel's argument that, the one who was identified by PW1 was the 1st accused, one Christopher Lorivi Loseria and not the 2nd accused who was the appellant. In addition, it was Mr. Shilatu's submission that the appellant, as can be seen before the Court, is a man with two eyes contrary to PW1's identification.

From the above evidence, the learned counsel insisted that the appellant was not identified by any of the prosecution witnesses, hence his conviction was based on flimsy evidence.

Responding to the 2nd ground, Ms. Massue conceded that indeed the appellant was not identified by PW1 before the trial court. In the event, the learned Principal State Attorney agreed with this ground of appeal.

In determining this ground of appeal on identification, we have seen it worthy to state the settled principle regarding the evidence of visual identification. It is trite that, evidence of visual identification is the weakest kind and most unreliable and should not be acted upon unless all the possibilities of mistaken identity have been eliminated. See our decision in the famous case of **Waziri Amani v. Republic** [1980] TLR 250; where we stated that:

"Evidence of virtual identification is not only of the weakest kind, but it is also most unreliable and a court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that, the evidence before it is absolutely watertight."

See also our decisions in **Renatus Exaver Mwinuka v. Republic**, Criminal Appeal No. 326 of 2018; **Julius Charles @ Sharabaro and Others v. Republic**, Criminal Appeal No. 167 of 2017 and; **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (all unreported).

In the present case, the perpetrator's identification was made by PW1 as can be seen on page 44 of the record; where he testified that the passenger who hired the deceased on the material date, was wearing a blue cap, shirt with draft and he was one eyed man "Jicho Chongo", pointing to the 1st accused at the dock.

From the record, PW1 told the court that he was able to identify that person with the assistance of the electricity lights from the nearby shops. Moreover, that person was facing him during their conversation where he had the opportunity to observe him for almost four minutes.

In this case, it is admitted that there is no eye witness who testified to have seen the person who took the life of the deceased. Therefore, the prosecution case was built from circumstantial evidence. As the deceased

was hired by an unknown person and later his body was found in the maize farm on the next day, then it was presumed that the person who hired him for the last time before he went missing is the one who killed him. In that case, PW1 identified that person before the court to be the 1st accused having a specific mark of one eye.

It is undisputed fact that, the appellant before the trial court was the 2nd accused and not the 1st accused who was identified by PW1. The identification of the 1st accused was reiterated by PW1 when he was cross examined at page 47 of the record where he said:

> *"I recognized the person, who was tall average, one eye missing, face not wide."*

It is trite law that, every witness is entitled to credence and the court is expected to believe his evidence as a credible witness. That is what was well stated in the case of **Goodluck Kyando v. Republic**, [2006] TLR 363, where it we held:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted, unless there are good and cogent reasons for not believing a witness."*

That being the case, PW1's testimony appears to have exonerated the appellant who was said to be the last person who hired the deceased

before his death. In the event therefore, we are in agreement with both Mr. Shilatu and Ms. Massue that the appellant was not identified as being the last person seen with the deceased before he was found dead. Hence this ground has merit and we accordingly allow it.

Addressing the 5th ground on the validity and competence of Exhibit P5 (the appellant's cautioned statement) for the reason that, the same was recorded by PW5 who was the arresting officer and investigator, Mr. Shilatu submitted that, the cautioned statement was procured contrary to the law. His reasons were based on the fact that, since the investigator is the person who is in his position to know a lot of findings and facts of the case, it is undesirable for him to also record the suspect's confessional statement.

Responding to this ground, Ms. Massue admitted that the appellant's caution statement was recorded by PW5 who was also the investigator of the case. However, it was her stance that the cautioned statement was recorded in accordance with the law. In the event, she prayed the Court to dismiss the 5th ground of appeal.

On our part, this ground should not detain us much. The law is clear as to who can record the cautioned statement of a criminal suspect. Following the amendment of Criminal Procedure Act vide Written Laws (Miscellaneous Amendment) Act No. 3 of 2011, whereby the law amended

section 58 of the Act by adding subsection 4 which by its wording, allowed a police officer investigating an offence may as well record the accused's cautioned statement. For clarity, the section provides:

> *"(4) Subject to the Provision of paragraph (c) of section 53, a police officer investigating an offence for the purposes of ascertaining whether the person under restraint has committed an offence may record a statement of that person ..... "*

With the above position of the law, we are satisfied that, PW5 was a qualified officer to record the appellant's cautioned statement. See the cases of **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2007 and **Ngasa Sita @ Mabundu v. Republic**, Criminal Appeal No. 254 of 2017 (both unreported). On these premises, we find the ground devoid of merit.

In the 6th ground the appellant complained that the trial judge erred in convicting him basing on Exhibit P3 (phone Samsung Galaxy) alleged to be the deceased's property, while the IMEI number indicated in Exhibit P2 (Phone Tracking Report) is different from the IMEI in Exhibit P4 (Seizure Certificate). On this ground, Mr. Shilatu submitted that the contradictions on the IMEI number from the above exhibits and IMEI number in the deceased's phone needs explanation and further clarification. Failure to that, PW3's testimony should not have been relied

upon as during his testimony he declared that there is only one IMEI number for every phone contrary to what is indicated in the certificate of seizure (Exhibit P4) which contains two IMEI numbers in relation to a single phone (Exhibit P3). Hence, it was his stance that the prosecution was supposed to call a service provider to clarify on those contradictions. Failure to that, the prosecution evidence is insufficient hence it was improper to be relied upon.

When responding to this ground, Ms. Massue prayed the Court to dismiss the same as PW3 was an expert and his testimony was reliable. To bolster her contention, she cited the case of **Kija Nestory @ Jinyamu v. Republic,** Criminal Appeal No. 455 of 2007, where it was stated that:

> *"The law is settled. The trial court findings on the credibility of witnesses is binding in an appeal court unless there are circumstances on record which call for re-assessment of the credibility."*

It was Ms. Massue's stance that, PW3 was a credible and reliable witness and thus the errors appearing on the prosecution's exhibits when recording IMEI numbers were just human errors.

On our part, having heard the rival submissions made by both counsel and going through the record of this appeal, we agree with Mr. Shilatu that, indeed the testimony of PW3 the cyber expert who mounted

an investigation on tracking of the deceased's cell phone was a bit confusing especially on IMEI numbers in exhibit P3. In his testimony at page 58 of the record, PW3 testified before the court that, always a phone has one IMEI number with 15 digits and its peculiarity is such as human DNA. However, his testimony is contrary to the Exhibit P4 seizure certificate which had two IMEI numbers being; 3542020716013667/01 and 354203071601365/01. Upon being asked by the court as to how comes Exhibit P4 had two IMEI numbers, PW3 had nothing useful to testify, instead he told the court that the second IMEI number was from the service provider. This explanation however, contradicts his earlier testimony that the phone has only one IMEI number. From this contradiction, it is our observation that, PW3's testimony was not reliable as it leaves holes in the prosecution case. Under those circumstances, there was a need for the prosecution to find answers by summoning the service provider to clear these unattended doubts.

Basing on the above findings, we find that the appellant's conviction relying on Exhibit P3 was unjustifiable. Hence this ground has merit and we accordingly sustain it.

The last ground is to the effect that, the prosecution case was not proved beyond reasonable doubt to support the appellant's conviction. It is settled law that, the burden of proof in criminal cases lies on the

prosecution side and it never shifts while the degree of proof is beyond reasonable doubt. See the case of **John Makolebela, Kulwa Makolebela and Tuma Elias Tanganyika v. Republic** [2002] TLR 296, cited in the case of **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017.

The appellant in this case was charged with Murder contrary to section 196 of the Penal Code. It is undisputed that the deceased was murdered and his death was proved via Exhibit P1 the postmortem report tendered by the doctor, PW2. Further, according to her report, the deceased's death was unnatural as he was strangled to death and that he was also found with head injury cause by a blunt object.

From the above facts, the issue was on who killed the deceased. To prove that the appellant killed the deceased, the prosecution called six witnesses. However, there was no witness among them who testified to have seen the appellant committing the offence. Therefore, it is common ground that the case against the appellant was entirely based on circumstantial evidence. It is a settled principle that, in any criminal case, which is purely based on circumstantial evidence, for the court to found conviction, such evidence must be irresistibly pointing to the guilt of the accused in exclusion of any other person. See the case of **Shaban**

Mpunzu @ Elisha Mpunzu v. Republic (Criminal Appeal No. 12 of 2002) [2004] TZCA 3 (28/6/2004).

As we have indicated earlier, in the instant appeal, the conviction of the appellant by the trial court based on the retrieved deceased's cell phone which was found in a possession of Christopher Lorivi Loseria, the appellant's co-accused (DW1). Upon being arrested by PW3, the case investigator, and interrogated as to where he got the deceased's cell phone, DW1 mentioned DW2, the appellant herein to be the one who sold it to him for TZS 50,000.00. These facts led to the arrest of the appellant and his connection to the deceased's murder. It is also evidenced from the trial court's impugned judgment that the appellant's conviction was based on his cautioned statement. However, during trial, the said cautioned statement was retracted.

On the retracted cautioned statement, the law is settled that it is always desirable to look for corroboration in support of a confession which has been retracted or repudiated before acting on it to the detriment of the accused. See **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 192 of 2007.

Turning back to the case at hand, since during trial, the appellant retracted the cautioned statement, there was a need for prosecution to corroborate the retracted confession with another piece of evidence.

Looking at the prosecution's case before the trial court, we find that there was no any evidence to corroborate the retracted confession by the appellant despite the trial within trial being conducted. From the above, it is our view that, the appellant's cautioned statement needed corroboration to sustain conviction. It is as well our firm view that, had the learned trial judge considered the evidence from this point, he could have not come to the conclusion that, the circumstantial evidence before him was sufficient to sustain a conviction against the appellant.

Further to that, as we have pointed out above, in view of the confusion pertaining to the IMEI number of the deceased's cell phone, there was a need for the prosecution to summon an expert from the service provider in this case Vodacom, to clarify all the issues on contradictory IMEI numbers so as to establish that the same real belonged to the deceased. This was important since the arrest and connection of the appellant to the offence of murder was a result of being mentioned by his co-accused DW1 to be the one who sold him the tracked cell phone. Moreover, the law under section 33(1) and (2) of the Evidence Act, Cap. 6 R. E. 2002 requires confession of the co -accused to be corroborated. The said section provides:

> *"33 (1) When two or more persons are being tried jointly for the same offence or for different*

offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.

(2) Notwithstanding subsection (1), ***a conviction of an accused person shall not be based solely on a confession by a co-accused."***
(emphasize supplied)

The above provision has been reiterated by this Court in its numerous decisions to mention but a few: **Pascal Kitingwa v. Republic** [1994] TLR 65, and **Charles Issa @ Chile v. Republic**, Criminal Appeal No. 97 of 2019 (unreported). In the latter case, we stated that:

"The import of the evidence of a co-accused is settled that, such evidence must be treated with circumspection and thus requires corroboration".

Being guided by the above provision, we also find that the testimony of DW1 was not corroborated to sustain the appellant's conviction.

As we have noted that, PW3 whose evidence led to the appellant's arrest through the cyber expertism vide the IMEI number of the deceased's phone, of which we came to the conclusion that his evidence had a lot of contradictions, it is our firm view that, the conviction by the

trial court basing on PW3's testimony and exhibits from his investigation that is Exhibit P3 and P4 was unsafe and erroneous.

In addition to that, at the trial court, the appellant was not identified as we have discussed in the 2nd ground, that it was DW1 who was identified and not DW2 the appellant herein. It is settled law that, in a murder trial, the prosecution must not only prove the elements of murder but also the identity of the accused as the murderer of which is the most important element to prove one's commission of the offence. Therefore, the prosecution bears a duty to negate any reasonable probabilities of misidentification. See our decision in the case of **Philimon Jumanne Agala @ J4 v. Republic**, Criminal Appeal No. 187 of 2015, (unreported).

From the above evidence, we find that prosecution has failed to identify the real perpetrator of the murder of Peter Godfrey Urio. Therefore, in the event where identification of the accused failed, further in the circumstances where the appellant's cautioned statement was not corroborated and where there emerged major contradictions towards exhibit P3 which were not clarified, we are satisfied that the prosecution has failed to prove the case to the standard set by law. In the event therefore, the 1st ground of appeal has merit.

Having found that, there is no credible evidence linking the appellant with the offence of murder, his guilt remains unestablished. On that

premises, we are satisfied that, the prosecution's case against the appellant was not proved beyond reasonable doubt. Accordingly, we allow the appeal, quash the appellant's conviction and set aside the sentence meted upon him. Consequently, we order for the immediate release of the appellant from prison unless otherwise lawfully held.

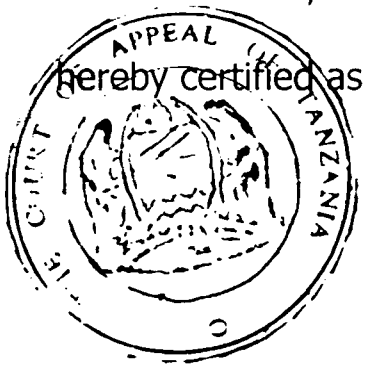
DATED at **MOSHI** this 22nd day of March, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of Mr. David Shilatu, learned counsel for the Appellant and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL