IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 628 OF 2020

FREDY JASON SHELELA @ MASOUD ..... FIRST APPELLANT

SAIMON RAPHAEL @ SAHEPA ..... SECOND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Utamwa, J.)

dated the 28th day of September, 2020

in

Criminal Sessions Case No. 88 of 2016

.....

JUDGMENT OF THE COURT

5th & 12th February, 2024

NDIKA, J.A.:

Fredy Jason Shelela alias Masoud and Saimon Raphael also known as Sahepa, respectively, the first and second appellants, were convicted of murder and sentenced to death by the High Court of Tanzania sitting at Mbeya (Utamwa, J.). They now appeal chiefly on the ground that two

recanted confessional statements attributed to them were illegal and unreliable, hence they could not sustain the convictions.

At the trial, the prosecution accused the appellants to have jointly and together murdered Maiko s/o Williad ("the deceased") on 14th October, 2013 at Malangali village within Rungwe District in Mbeya Region.

In essence, it was uncontroverted at the trial that the deceased met a violent death. Dr. William John Muller (PW4), a pathologist from the Referral Hospital at Mbeya who examined the deceased's body on 15th October, 2013 in the hospital's morgue, averred that he found the deceased's neck tightened with a belt and that the head bore a cut wound. He attributed the death to asphyxia arising from strangulation. These findings were presented in a post-mortem examination report dated 15th October, 2013, which was admitted in evidence as Exhibit P1.

Furthermore, five prosecution witnesses, claiming to have seen the deceased's body at the scene of the crime in the night of 14th October, 2013, averred in common that they found the body lying unresponsive face down and that the neck appeared strangled with a belt and the head

carrying a visible cut wound. These witnesses were: Jumanne Kitolika (PW1), the first appellant's uncle; PW2 Amon Jackson, a resident of Malangali village; PW3 Japhet Adamson Pesambili, the Malangali Village Chairman at the material time; PW7 Richard Mwashalunda Sale, also a resident of Malangali village; and Police Officer No. D.5401 Detective Sergeant Paul Manoni (PW8), the then Officer Commanding Station of Nzovwe Police Station. Overall, their testimonies are unassailed so far as the cause and incident of the death are concerned.

The bone of contention, at the trial and before this Court, is whether the appellants are the perpetrators of the deceased's death. At the outset, it is necessary to provide essential facts of the case to appreciate the context in which the issue at hand arises.

PW1 averred that the deceased came to his home early morning at 04.00 hours on 14th October, 2013 and borrowed his motorcycle, T-Better make, red in colour, to take his sick sister-in-law to hospital. The deceased did not return the motorcycle.

Around 19:00 hours that day, PW2 came to PW1's home and told him that he had spotted the motorcycle the deceased had borrowed abandoned on a roadside in a bush in the Uporoto/Ihondo forest. In response, PW1 rushed to that place, accompanied by several persons. PW2, PW3 and PW7 also went to the scene. They found the motorcycle parked in the spot as pointed out by PW2. Upon inspecting the scene using flashlight on their cell phones, they made a harrowing discovery: a human body was lying prone about fifteen metres away from the motorcycle. While PW1 was too frightened to step close to the body, PW2, PW3 and PW7 approached and viewed it. They confirmed that it was the body of the deceased whom they knew very well. It had a visible cut wound on the head and the neck appeared strangled with a belt. Being a local leader, PW7 called the police who then, led by PW8, attended the scene that night. The police collected the body and took it to the Referral Hospital at Mbeya where PW4 examined it the following day.

PW7 told the trial court that, after the deceased's body was entombed on 15th October, 2013, the village functionaries launched a

manhunt for his killers. Although the pursuit initially went unrewarded, on 18th October, 2013 the search party retrieved from the scene of the crime a pair of sandals and a t-shirt (admitted collectively as Exhibit P3). PW6 Amosi Motela Shelela, the first appellant's brother, identified the sandals as the property of the first appellant. The said items were handed over to the police.

The discovery of the above items was a crucial lead in the police investigations. Working on it, on 19th October, 2013 PW8 led a police contingent, which included PW5, a police investigator, as well as PW7, a local resident, to the first appellant's home at Ituha, arriving there around 23:00 hours. They managed to arrest the first appellant from underneath a bed inside his landlady's bedroom. On being quizzed, he allegedly owned up the killing, named the second appellant as his partner in crime and volunteered to lead the team to his confederate's home. The search party drove under the first appellant's direction to the second appellant's home at Magege where they arrested the latter. It was claimed that on being queried, the second appellant too admitted to the killing, stating that the

slaying occurred in their attempt to rob the deceased of his motorcycle, but that they had to abandon it in the bush because none of them could ride it away. He allegedly revealed further that the first appellant possessed a cell phone handset that they stole from the deceased whereupon the first appellant admitted having the handset at his home. He took the police contingent back to his home at Ituha from which an OKING make, black cell phone handset (Exhibit P2) was recovered. Around dawn, the two suspects were taken to the Central Police Station at Mbeya for custody.

Further evidence came from two detective police officers from the Central Police Station at Mbeya: No. D.8837 Detective Sergeant Leonard Boniface Lyimo (PW9) and No. E.6796 Detective Corporal Vincent Henjewele (PW10). Whereas PW9 tendered in evidence a cautioned statement (Exhibit P4) that he recorded from his interrogation of the second appellant, PW10 imputed a cautioned statement he recorded (Exhibit P5) to the first appellant. Both witnesses were insistent that the appellants confessed unreservedly to the killing.

In their sworn testimonies, the appellants denied the accusation against them. For his part, the first appellant averred that after his arrest in the night of 19th October, 2013, he was taken to the police station where he was tortured. He said he was interrogated on 22nd October, 2013, which was three days after his arrest and that on 6th November, 2013 he was coerced to thumbprint a document purporting to be his cautioned statement. He also denied being the owner of the sandals and t-shirt (Exhibit P2).

The second appellant also claimed that he was interrogated under torture and that he gave a cautioned statement on 24th October, 2013, which, however, the prosecution withheld from the trial. He repudiated the cautioned statement imputed to him dated 20th October, 2013 (Exhibit P4).

In convicting the appellants of murder, the learned trial judge sided with two assessors who returned verdicts of guilty. The other assessor entered a not guilty verdict. While cognizant that the prosecution case partly hinged on circumstantial evidence, the learned trial judge, at first,

analysed the cogency of the evidence that a pair of sandals (Exhibit P2), allegedly owned by the first appellant, was retrieved from the scene of the crime and that, he was also found in possession of a cell phone handset (Exhibit P3) allegedly belonging to the deceased.

Regarding the sandals, intended to link the first appellant with the charged offence, the learned trial judge held, rightly so in our view, that PW6's claim that they belonged to the first appellant was unreliable. For, bearing in mind that sandals are industrial goods of general description, the witness failed to show any special marks on them that enabled him to identify them.

Insofar as the first appellant's alleged possession of the cell phone handset was concerned, it must be noted, at first, that the prosecution anchored on that evidence the application of the doctrine of recent possession against the first appellant. The learned trial judge, however, was unimpressed by that submission. He rightly reasoned that the testimonies of PW7 and PW8 on the retrieval of the handset from the first appellant were not supported by any evidence establishing that the

handset belonged to the deceased and that it was stolen from him at the time he was assaulted and killed.

The learned trial judge, then, turned to the cautioned statements (Exhibits P4 and P5) imputed to the appellants, on which he made the following pertinent observations and findings: one, that the statements were recorded in compliance with the law and that they were admitted at the trial without any objection from the defence. Two, that the statements contained personal and biographical details of the appellants that could not have come from any other source except the appellants. Three, that by those statements the appellants confessed unreservedly to the killing. Four, that despite being repudiated or retracted, the statements were materially corroborated by the testimonies of PW2, PW3, PW4, PW7 and PW8.

In conclusion, the learned trial judge, acting on the recanted cautioned statements as corroborated, found the appellants responsible for killing the deceased. Furthermore, considering the evidence that the deceased was strangled to death during a planned armed robbery, the

learned judge held that the killing amounted to murder. Accordingly, the trial court convicted the appellants of murder and sentenced them to death, as hinted earlier.

On behalf of the appellants, Mr. Jackson Ngonyani, learned counsel on dock brief, has impeached the convictions on two grounds, having abandoned eight other grounds originally lodged by the appellants. The two grounds are:

1. *That the trial court erred in law and fact by convicting the appellants solely relying upon illegally recorded and retracted cautioned statements (Exhibits P4 and P5).*
2. *That the trial court erred in law and fact by failing to consider the appellants' defences.*

For the respondent, Mr. Yusuph Abood, learned Senior State Attorney, who appeared along with Ms. Veronica Mtafya and Mr. Lordgud Eliamani, learned State Attorneys, vigorously opposed the appeal.

Submitting on the first ground of appeal, Mr. Ngonyani contends that the two cautioned statements were recorded after the basic period of four hours for interviewing a suspect under restraint had expired following their arrest in the night of 20th October, 2013. In elaboration, he submits that reckoning the basic period from the appellants' arrest around 01:30 hours on 20th October, 2013, the said period had expired by the time the first appellant allegedly recorded his statement (Exhibit P5) at the Central Police Station starting from 09:00 hours on that day. It was the same case with the second appellant who had his statement (Exhibit P4) reduced into writing from 08:00 hours the same day. Citing **Charles Nanati v. Republic**, Criminal Appeal No. 286 of 2017 [2020] TZCA 45 [6 March 2020; TanzLII], the learned counsel is fervent that the recording of the statements flouted the imperious provisions of sections 50 and 51 of the Criminal Procedure Act, Cap. 20 ("the CPA"), rendering the statements illegal, unreliable, and liable to be expunged from the record. Without the two statements, he concludes, the impugned convictions are unsustainable on the rest of the evidence on record.

Replying, Mr. Abood argues, at the forefront, that the appellants' complaint is rather belated, hence an afterthought, since it ought to have been raised at the trial when the statements were tendered for admission, but they were admitted without any objection. In support of his argument, he refers us to **Alex s/o Ndendya v. Republic**, Criminal Appeal No. 340 of 2017 [2020] TZCA 201 [6 May 2020; TanzLII] in which this Court cited its previous decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 [2012] TZCA 103 [21 May 2012; TanzLII] for the stance that as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the courts below to be raised on appeal.

Moreover, while Mr. Abood does not dispute the timeline within which the two appellants recorded their statements as submitted by his learned friend, he contends, based on **DPP v. James s/o Msumule @ Jembe**, Criminal Appeal No. 397 of 2018 [2020] TZCA 232 [15 May 2020; TanzLII], that in reckoning the four basic hours period for interrogation, the time spent for conducting investigations after the arrest of the

appellants until they were conveyed to the Central Police Station at Mbeya ought to be excluded from computation in terms of section 50 (2) of the CPA.

We find it instructive to extract, at the outset, the provisions of section 50 of the CPA enacting the periods available for interviewing a suspect under police restraint:

> ***"50****.-(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*
>
> *(2) In calculating a period available for interviewing a person who is under restraint*

in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of-

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any

person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph (b); or

(d) while the person under restraint is consulting with a lawyer."

The above provisions prescribe four hours as the basic period for interviewing a suspect under police restraint commencing from the moment he is arrested. However, section 51 permits extension of such interview for a period of eight hours where circumstances reasonably demand it. More pertinently to this matter, subsection (2) of section 50 above excludes certain periods from the computation of the basic period.

These include the period the suspect is being conveyed to a police station or other place for any purpose connected with the investigation. It is settled that non-compliance with the dictates of sections 50 and 51 of the CPA is a fundamental irregularity that may render the cautioned statement in issue liable to be expunged for being obtained illegally – see, for instance, **Christopher s/o Chengula v. Republic**, Criminal Appeal No. 215 of 2010; and **Gregory David Maokola @ Mbuga v. Republic**, Criminal Appeal No. 238 of 2009 (both unreported).

In the instant case, it is in the evidence, as adduced by PW5, PW7 and PW8, that after the apprehension of the first appellant at his home in Ituha around 01:30 hours on 20th October, 2013, the police investigators drove under the first appellant's direction to the second appellant's home at Magege where they arrested the latter. Then, they drove back to the first appellant's home at Ituha from which they retrieved the cell phone handset (Exhibit P2) claimed to be the deceased's property. As to what time the appellants were finally conveyed and handed over to the Central Police Station, PW8 averred that:

"We took the accused persons to [the] Central Police Station. It was already 6:00 a.m. (saa kumi na mbili asubuhi in Kiswahili) on 20/10/2013."

On the above evidence, we agree with Mr. Abood that the whole period after the first appellant's arrest until when he and his co-accused were finally handed over and put in custody at the Central Police Station at Mbeya at 06:00 hours on 20th October, 2013 is excludable under section 50 (2) (a) of the CPA. For the time was spent for investigations and conveyance of the appellants to the Central Police Station. In the premises, we find that the recording of Exhibits P4 and P5 from 08:00 hours and 09:00 hours respectively that day was done within the four basic hours in compliance with the dictates of the law.

Before turning to the reliability of the retracted cautioned statements as the basis of the convictions, we propose to deal with the second ground of appeal.

Mr. Ngonyani contends, on the second ground, that the trial court did not fully consider the appellants' defences in its judgment and that such omission is incurable as stated in **Soud Seif v. Republic**, Criminal

Appeal No. 521 of 2016 [2020] TZCA 216 [12 May 2020; TanzLII]. With respect, we think this complaint is fully answered by Mr. Abood.

We indicated earlier that the appellants interposed the plea of general denial of liability peppered with the recantation of the cautioned statements (Exhibits P4 and P5). As correctly argued by Mr. Abood, it is vivid from the trial court's judgment that the court fully dealt with the above common defence and rejected it. To illustrate the point, we extract from the judgment the following passage from pages 211 and 212 of the record of appeal:

> *"In my view, the retraction of the two statements by both accused in their respective defences was an afterthought that could not help them. This is because, when they were tendered in evidence before this court, there was no any objection from the defence side. [...] Had they objected to the same on [the] ground of involuntariness, the court would [have conducted] a trial within trial as required by the law [with the view to] determining the voluntariness of the two accused persons in making their respective statements."*

The trial court reasoned further, as revealed at page 212 of the record, that:

> *"The defence side did not also object [to] the tendering in evidence of the two statements under section 169 of the CPA on the ground that they were illegally obtained. Had it done so, the court would [have determined] their legality accordingly. The law further guides that a confessional statement received in evidence without any objection by the defence side is presumed [to have been] made voluntarily and the accused cannot challenge it later: see [the] decision of the Court of Appeal of Tanzania (CAT) in* ***Sabas Kalua @ Majaliwa v. DPP****, Criminal Appeal No. 183 of 2017, CAT at Mbeya (unreported)."*

Based on the foregoing, we are satisfied that the trial court duly considered the appellants' common defence and rejected it. The second ground of appeal fails.

Finally, we advert to the cogency and reliability of the recanted cautioned statements as the basis of the impugned convictions.

In determining the question at hand as the first appellate court, we are enjoined, at first, to inquire into whether the two cautioned statements amounted to confessions.

In our view, the narrative of the facts and events by the appellants in their respective statements is quite similar. In essence, they both said that they met for the first at a certain traditional healer's home and struck a friendship, since they shared the same social standing. Later, they conspired to eke out a living by robbing motorcycles. The deceased, who happened to be the first appellant's relative, became their immediate target. It was the first appellant who duped the deceased to ferry them on a motorcycle from Mbeya to Malangali. At that time, the first appellant already had a wire in his pockets whereas the second appellant hid a piece of iron bar in his clothing. Unsuspectingly, the deceased took his two passengers and headed to Malangali.

The statements indicate further that in the middle of the Uporoto/Ikondo forest, the deceased stopped the motorcycle at the request of the second appellant who wanted to relieve himself. Having

done so, the second appellant swiftly approached the deceased and held him firmly on his neck, felling him off the motorcycle. The first appellant joined the fray and held the deceased's legs as they dragged him into the deep forest. At some point, the second appellant hit the deceased on the head with the piece of iron bar. He, then, removed his waist belt from his trousers and tied the deceased's neck with it. They both tightened the belt until the deceased fell unconscious and was suffocated to death. While still in the bush, they heard a motorcycle roaring towards their direction whereupon they turned tail and ran away towards Mwasanga area where they parted company.

The statements also contain a chronicle on how the appellants were arrested one after the other at night on 20th October, 2013. They also state that the first appellant named the second appellant as his accomplice leading to the latter's arrest. In addition, the statements show that the second appellant made a revelation that led to the retrieval of the supposedly deceased's cell phone handset from the first appellant.

Having read the statements, we entertain no doubt that they amounted to confessions in terms of section 3 (1) (a) of the Evidence Act, Cap. 6. For an inference may reasonably be drawn from the words contained therein that the appellants jointly killed the deceased on the fateful day as alleged by the prosecution.

In this case, the learned trial judge was also alert that, even though the confessional statements were admitted in evidence without any objection from the defence, they were repudiated or retracted by the appellants during their defence evidence. To be sure, while the first appellant retracted the statement imputed to him, the second appellant too repudiated the statement claimed to have been made by him. Relying on this Court's decision in **Amiri Ramadhani v. Republic**, Criminal Appeal No. 228 of 2005 (unreported), the learned judge rightly held that, in the circumstances, it was unsafe to convict the appellants solely on the two statements without corroboration. The rationale for this position is to prevent a conviction being based on an untrue confession. Following his

analysis of the evidence on record the learned trial judge concluded that the confessions were sufficiently substantiated. Was he right?

We understand that when corroboration of a confession is required, independent proof must confirm, validate, and strengthen the force of the confession in its material details. It is trite that the corroborating evidence does not necessarily need to confirm or validate all the details and particulars in the confession.

Having reviewed the evidence on record, we are satisfied that the confessions were materially corroborated by the evidence adduced by PW1, PW2, PW3, PW4, PW5, PW7 and PW8. First, PW1, PW2, PW3, PW5, PW7 and PW8 said that the deceased's lifeless body was found in the Uporoto/Ihondo forest with a wound on the head and a waist belt tightened around the neck. This strand of evidence matches the appellants' own version. Secondly, the appellants' revelation that they strangled the deceased to death is consistent with the findings by the medic (PW4) that the death was due to asphyxia – that the deceased was suffocated to death. Thirdly, the detail given by the appellants on the

manner of their arrest and retrieval of the supposedly deceased's cell phone handset from the first appellant is validated by the testimonies of PW5, PW7 and PW8.

We are, therefore, satisfied that, on the strength of the confessional statements and the corroborating evidence as summarised above, the trial court was entitled to find that the appellants were the perpetrators of the killing of the deceased.

As to whether the killing was committed with malice aforethought for it to amount to murder contrary to section 196 of the Penal Code, Cap. 16, without any hesitation we uphold the trial court's affirmative finding on that aspect. There is no doubt that the appellants intended to kill the deceased to rob him of the motorcycle. They planned their scheme and armed themselves with a wire and an iron bar, ready to pounce on the unsuspecting deceased. They tricked him to transport them to Malangali and on the way they hit him on the head, a most vulnerable part of the body, with an iron bar before strangling him to death using a waist belt. By any measure, it was a premeditated act of killing in cold blood.

In the final analysis, we find no merit in the appeal, which we hereby dismiss in its entirety.

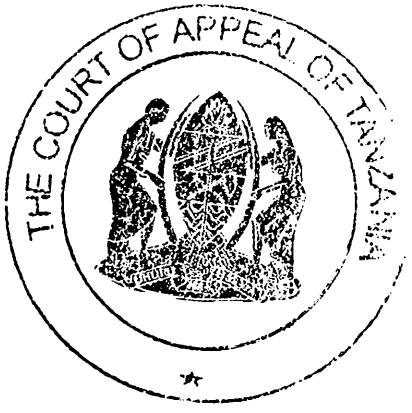
DATED at **MBEYA** this 10th day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 12th day of February, 2024 in the presence of the Appellants in person and Ms. Lilian Chagula, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



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