IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LUBUVA, J.A., MBAROUK, J.A., And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 242 OF 2006

YUSTAS KATOMA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mrema, J.)

dated the 10th day of July, 2006
in
Criminal Sessions No. 66 of 2000

JUDGMENT OF THE COURT

30 June & 14 July 2008

LUBUVA, J.A.:

This is an appeal from the decision of the High Court (Mrema, J.) in High Court Criminal Appeal No. 66 of 2000 sitting at Sumbawanga. The facts giving rise to the appeal may briefly be stated. The appellant and the deceased were residents of Nkusi Village within Sumbawanga District, Rukwa Region. The appellant was married to the daughter of the elder brother of the deceased. On 16.3.1997, the appellant and the deceased left the house of the deceased for the nearby village of Nankanga for a local brew drink.

They both rode on the deceased's bicycle. At the pombe shop, the deceased and the appellant together with others, including PW5, partook the local drink until about 5 p.m. when PW5 left for the deceased's home leaving behind the appellant and the deceased at the pombe shop.

It was the prosecution case that some time after PW5 had left the pombe shop, the appellant in collaboration with others, way laid the deceased while on his way home. The deceased was brutally attacked, he sustained several stab wounds in the chest and stomach resulting to his death. The dead body of the deceased was left by the side path leading to the village of the deceased. Thereafter, the appellant proceeded to the house of the deceased. He handed over the bicycle to the deceased's wives, Imaculata Titi (PW3), Tatu Kazimoto and Fenia Kazibure. He told them that the deceased was on the way coming home soon. However, the deceased did not turn up at his home until the next day when the appellant and the son of the deceased (PW4) went about looking for the deceased. In the process, the body of the deceased was found some where off the

path leading to Nkusa Village. The appellant was arrested by the village militia.

In the course of investigation, the appellant was interrogated by Detective Sgt. Dionis (PW1). As a result of the interrogation, it was further alleged that the appellant made a statement (Exh.P4) in which he confessed to have killed the deceased together with others not subject of this appeal.

The prosecution case was entirely based on the alleged confession in the statement (Exh. P4) to PW1. At the trial the appellant repudiated the statement alleging that it was made under torture, it was not voluntary. After conducting a trial within a trial, the learned trial judge was satisfied that the confessional statement (Exh. P4) was voluntary and that it was truthful. Consequently, the appellant was convicted and sentenced to death. He has preferred this appeal against the decision of the High Court.

In this appeal, the appellant was represented by Mr. Mbise, learned counsel, while Mr. Mwenda, learned State Attorney, appeared for the respondent Republic. Mr. Mbise filed a memorandum of appeal comprising four grounds of appeal which in our view, in sum total amount to the following two grounds. First, that the learned trial judge erred in admitting the caution statement Exh. P4. Second, the learned judge erred in convicting the appellant on the basis of the retracted and or repudiated confession.

Dealing with the first ground of complaint that the caution statement, Exh. P4 was erroneously admitted in evidence, Mr. Mbise, learned counsel, advanced the following reasons. First, that the provisions of section 57 (2) (e) of the Criminal Procedure Act, 1985 (the CPA) were not complied with. In elaboration, Mr. Mbise stated that under the provisions of section 57 (2) (e) of the CPA a police officer who interviewed the appellant who is alleged to have made a confession relating to the charge, should have indicated in writing the time when the interview was completed. He said what was indicated in the statement is the time when the interview was commenced.

This, according to Mr. Mbise, was an irregularity which rendered the statement Exh. P4 inadmissible. The reason, he said was that the provisions of section 57 (2) (e) of the CPA are mandatory because the word "shall" has been used.

As Mr. Mbise had referred to the decision of the Court in **Seko Samwel,** Criminal Appeal No. 7 of 2003 (unreported) we think it is desirable to make a brief observation on the case. It will be recalled that in a subsequent case **Ramadhani Salum v The Republic,** Criminal Appeal No. 5 of 2004 (Mwanza Registry) (unreported) the Court had occasion to express its views on its decision in **Seko Samwel** (supra) and the import of the provisions of sections 57 and 58 of the CPA.

In **Ramadhani Salum** (supra) the Court *inter alia* stated:

> "We do not think, however, that this Court in the **Seko Samwel** case meant to lay down that a caution statement, which may also amount to a confession, could not be made under section 57 of the Criminal Procedure

> Act, 1985. In fact there is no such pronouncement in either the **Seko Samwel** or ---"

Then the Court further stated:

> "Caution statements, therefore, are not made exclusively under section 58 and Exhibit P5 in this case is not any less a caution statement merely because it was taken under section 57 and not section 58. The circumstances in which the two kinds of caution statements are taken are different. The one taken under section 57 may be as a result either of answers to questions asked by the police investigating officer or partly as answers to questions asked kind partly volunteered statements. The statement under section 58 is a result of a wholly volunteered and unsolicited statement by the suspect."

In this case, although the statement Exh. P4 apparently was made under section 57 of the CPA, nevertheless it was in effect a caution statement.

Secondly, counsel urged that the certification of the statement (Exh. P4) by the police officer (PW1) was not done in accordance with the law as set out under the provisions of sections 57 (4) (e) and 10 (3) of the C.P.A. For this reason, counsel submitted, the statement should not have been admitted in evidence. What is more, Mr. Mbise went on in his submission, the learned judge did not address these serious irregularities in the proceedings.

Mr. Mbise also dealt with another serious irregularity in relation to the caution statement Exh. P4. In his view, in terms of the provisions of section 58 of the CPA, the statement Exh. P4 is seriously flawed in that it was taken by way of questions and answers. This, he said was contrary to the spirit behind the provisions of section 58 of the CPA. In support of this submission, he referred to the decision of the Court in **Seko Samwel V Republic,** (supra). Because of this irregularity, Mr. Mbise urged that the statement (Exh. P4) should be discounted. With the evidence based on the statement discounted,

counsel maintained that there would be no cogent evidence left upon which to sustain the conviction against the appellant.

Mr. Mwenda, learned State Attorney, for the respondent Republic, who did not support conviction was generally in agreement with Mr. Mbise on these submissions with regard to the statement, Exh. P4. However, Mr. Mwenda, unlike Mr. Mbise, was of the view that the statement, Exh. P4, was properly admitted in evidence in terms of the provisions of the Law of Evidence Act, 1967. However, he was quick to point out that notwithstanding the admissibility of the statement, because of the other irregularities relating to the statement as elaborated by Mr. Mbise, its evidential value was questionable. That is that the weight to be attached to the statement is the crux of the matter particularly if it is doubtful that it was voluntary.

At this juncture we think it is desirable to deal with these submissions relating to the admissibility or otherwise of the caution statement Exh. P4 in evidence. It will be recalled that the complaint

raised in this ground is that PW1 did not indicate the time when the interview ended as provided under section 57 (2) (e) of the CPA. Failure to do so, according to Mr. Mbise, rendered the caution statement Exh. P4 of no evidential value it should not have been admitted.

With respect, we do not agree with Mr. Mbise and Mr. Mwenda on this point. It is elementary that section 57 of the CPA as a whole, sets out the procedure to be followed by police officers when recording interview with a person for the purpose of ascertaining whether the person committed the offence. We do not think that failure by the recording police officer to comply with any of the requirement (a) to (f) under section 57 (1) of the CPA necessarily rendered the statement invalid simply because the word "shall" is used under the provision of section 57 (1) (e) of the CPA as urged by Mr. Mbise.

We say so because it is common knowledge that not in every situation that the word "shall" is used that a mandatory requirement

is imposed. It is mandatory only in so far as the requirements that go to the root of the matter. In this case we do not think that failure through inadvertence on the part of PW1 to indicate the time when the interview was completed is an irregularity that goes to the root of the matter such as to affect the validity of the statement, Exh. P4. At any rate, in cross examination PW1 stated that he took one hour interviewing the appellant. That he ended the interview at 9.30 a.m. So, it is our view that the caution statement was properly admitted in evidence at the trial. We find no merit in this ground.

On the other hand, we are unable to accept Mr. Mbise's submission that the caution statement (Exh. P4) was rendered invalid on account of the fact that the certification at the end of the statement was not done in accordance with section 57 (4) (e) of the CPA. The reason is simple, namely that the provision of this section of the CPA does not apply to the instant case.

From our reading of section 57 (4) (e) of the CPA, it is plainly clear that the section applies only when the person interviewed is

unable to read the record of the interview or refuses to do so. In this case there is no evidence to show that the appellant was unable to read or refused to read the record of the interview. As a matter of fact, from the record, at page 51 it is loudly clear that the appellant was able to read and write. In that situation, Mr. Mbise's contention that the statement Exh. P4 should be discounted falls. As said before, the statement was properly admitted in evidence.

Next Mr. Mbise extensively made submissions on the ground that the trial judge erred in convicting the appellant based on a retracted and or repudiated confession Exh. P4. As the whole case was based on circumstantial evidence, it was highly unsafe to sustain the conviction based on the alleged confessional statement which was retracted and or repudiated, he stated. In this case, the appellant has consistently maintained that the caution statement was made under duress, the appellant was not a free agent, Mr. Mbise submitted. In that situation, Mr. Mbise went on in his submission, it was imperative for the learned judge to examine closely the circumstances under which the caution statement was made.

Furthermore, Mr. Mbise also submitted that once it is shown that the statement was made when the appellant was not a free agent, the trial judge should not have relied on the statement as a basis for convicting the appellant. In this case, Mr. Mbise urged, as the statement Exh. P4 was recorded by PW1 under section 57 of the CPA by way of questions and answers, it shows that it was made not on the initiative of the appellant. Rather, he further stated, it was initiated by the police (PW1) in which case, it is doubtful that the appellant was a free agent when he made the statement.

Regarding the surrounding circumstances under which the appellant made the alleged confession, Mr. Mbise wondered why the delay in interrogating the appellant from 20/3/1997 until 23/3/1997, when the statement was recorded. Prior to that Mr. Mbise said the court should not lose sight of the fact that the appellant had been under torture of the militia under whose custody he had been from 18/3/1997 until 20/3/1997, when he was handed over to the police. Such unexplained delay and the alleged torture, Mr. Mbise stressed, were sufficient factors upon which the learned judge should have

taken as indicators that the statement was not freely and voluntarily made.

Then Mr. Mbise, dealt with the legal requirement with regard to a repudiated or retracted confession. In this case, the appellant having repudiated the caution statement (Exh. P4) the learned trial judge should not have convicted the appellant on the basis of the cautioned statement without corroboration. If we understood Mr. Mbise, the thrust of his submission before us was that once the statement Exh. P4 is discounted as he urged us to do in this appeal, then there would be nothing as it were, to be corroborated. On the other hand, he said, even if the caution statement was retained, the evidence of PW1 and PW2 who did not see the appellant killing the deceased, was wrongly taken by the trial judge as corroboration to the statement.

Finally, Mr. Mbise sought to fault the learned trial judge in his summing up to the assessors. According to him, it was erroneous on the part of the learned judge to direct the assessors that the

standard of proof in a criminal case based on circumstantial evidence the standard of proof is higher than that in cases based on direct evidence. He urged the Court to allow the appeal.

Mr. Mwenda, learned State Attorney, for the respondent Republic, as was the case with the first ground, was in general agreement with Mr. Mbise. In declining to support the conviction he added saying that the evidence of PW2, the Ward Executive Officer was unreliable, it should not have been taken as evidence corroborating the caution statement (Exh. P4). The reason he said was that PW2 was merely told of what he testified in court by the appellant. Like Mr. Mbise, the State Attorney also criticized the trial judge in misdirecting the assessors in his summing up on the standard of proof in criminal cases based on circumstantial evidence.

We shall first deal with the alleged misdirection to the assessors. From a cursory glance through the record at page 96 it is at once evident that both Mr. Mbise and Mr. Mwenda are correct in their criticism against the learned trial judge's direction to the

assessors. It is on record that the learned judge directed the assessors that the standard of proof in a criminal case based on circumstantial evidence is higher than in cases based on direct evidence. With respect, this is not correct. It is common knowledge that the standard of proof in all criminal cases is to the same standard. That the burden is always on the prosecution to prove its case beyond all reasonable doubt.

However, in this regard, we wish to observe briefly as follows. It is our view that despite this misdirection, we do not think that the assessors opinion was affected. Had they been influenced by the judge's direction on this point, we are inclined to the view that the standard of proof having been stated to be higher in a case such as this, the end result would well have been an acquittal which was not the case.

The next issue which has exercised our minds considerably is whether the caution statement was voluntary as held by the trial judge. In order to ascertain that the statement (Exh. P4) was

voluntary, the learned trial judge held a trial within a trial. From the evidence adduced at the trial within a trial, the learned judge was settled in his finding that the statement was voluntary and that the appellant was a free agent.

Upon our own evaluation of the evidence of PW1, the police officer who interviewed the appellant and recorded the statement, and PW2, the Ward Executive Officer, we can find no ground to fault the trial judge in his finding that PW1 and PW2 were credible witnesses. The assertion of the appellant is that he was tortured by the militia from the time he was arrested and kept under their custody from 17/3/1997 until 20/3/1997 when he was handed over to the police. Neither does he say that he was tortured at the time he was in police custody when the statement was made nor is there any evidence suggesting torture, inducement, threat or promise held out to him. On the other hand, even if it is accepted that the appellant was subjected to torture at Nankanga Village by the militia when he was arrested on 17/3/1997, the confessional statement to PW1 was made much later on 24.3.1997 when there was no ground

for fearing the militia before PW1, a police officer. On this, the learned trial judge properly addressed his mind when *inter alia,* he stated:

> Both PW1 and PW2 said that the accused confessed to them that he killed the deceased. These confessions were made in the absence of the Village Vigilante Nankanga Village, who are alleged to have tortured or threatened the accused. Even if the alleged tortures, threats or injuries were true, there is no link between their occurrence and the subsequent confessions to PW1 and PW2.

In this light, we think the learned trial judge cannot be faulted in his finding that PW1 and PW2 were truthful and that the statement, Exh. P4 was voluntary and true as well.

Having found PW1, and PW2 as witnesses of truth and that the statement Exh. P4 was but truthful, the question arising is whether the court could convict upon the repudiated confession? This, we think the learned trial judge addressed at length. He was guided by

what we think are now settled principles of law regarding repudiated and or retracted confessions. He took guidance from the often quoted cases by the erstwhile Court of Appeal for Eastern Africa of **Tuwamoi v Uganda** (1967) EA 84 and the decision of this Court in **Hatibu Gandhi and Others v Republic** (1996) TLR 12 among others. In **Tuwamoi** (supra) it was stated:

> A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true.

The learned judge was also live to the danger of convicting on the basis of repudiated and or retracted confession as can be seen from his summing up to the assessors. The danger of acting on such confession was underscored by this Court in **Hemed Abdallah v Republic** (1995) TLR 172 when among other things the Court stated:

> Generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied that the confession must but be true.

In the instant case, although the learned judge as just observed was live to the need for warning himself of the danger of acting on uncorroborated, retracted confession, (Exh. P4) there was, as found, corroboration in the evidence of PW1 and PW2. Furthermore, the trial judge upon evaluation of the particular circumstances of the case was satisfied that the caution statement Exh. P4 was but true. It tallies with the evidence of PW2, the Ward Executive Officer to whom the appellant admitted that he participated in killing the deceased by holding the hands of the deceased while the others held the legs tightly. If the appellant had not participated, how was he able to give such details to PW2.

In that situation, we are with respect to Mr. Mbise, learned counsel for the appellant and Mr. Mwenda, learned State Attorney, for the respondent Republic, unable to go along with them that the learned judge erred in finding the appellant guilty of the offence charged.

All in all therefore, considering the entire circumstances of the case, namely, that the appellant went out to the pombe shop from the deceased's house riding the deceased's bicycle; the fact that the appellant lied about the bicycle; the appellant coming back to the deceased house reporting that the deceased was on the way back from the pombe shop; the appellant was the last person seen at the pombe shop with the deceased; the appellant's confession to PW1 and PW2 to have participated in the killing of the deceased, the confessional statement of the appellant (Exh. P4) which was found by the trial judge voluntary and true, we are satisfied that the conviction of the appellant was justified.

In the event, we find no merit in the appeal which is accordingly dismissed in its entirety.

DATED at MBEYA this 14th day of July, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR