IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL No. 318 OF 2016

NDOROSI KUDEKEI ---------- APPELLANT

VERSUS

THE REPUBLIC. ---------- RESPONDENT

(Appeal from the judgment and sentence of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 4th day of December, 2015

in

High Court Criminal Sessions No. 13 of 2015

JUDGMENT OF THE COURT

8th & 12th April, 2019

MWANGESI, J.A.:

In the High Court of Tanzania Arusha District Registry sitting at Babati, one Ndorosi s/o Kudekei, who happens to be the appellant in this appeal, was charged with the offence of murder contrary to the provisions of section 196 of the Penal Code, Cap 16 R.E 2002 (**the Code**). The particulars of the offence were to the effect that on the 18th day of January, 2007, at Landanai - Lemelebo village within the District of

Simanjiro in the Region of Manyara, the appellant murdered one Mosses s/o Massawe @ Mkenya.

The brief facts of the case as given by the prosecution during the preliminary hearing could be summarized thus; on the 18th day of January, 2007, at about 05:00 Hours, the appellant/accused, the deceased, together with one Daudi Serenda, went to Lemelalabo mountain within Simanjiro District, with a view of searching for mercury. However, during evening time of that day, the appellant returned home alone in possession of the deceased's bicycle. At about 19:00 Hours, when one Kaikingi s/o Kudekei asked the appellant about the whereabouts of the deceased and Daudi Serenda, he was answered by the appellant that he did not know. The appellant went on to narrate that, while they were at the mountain, they were attacked by a buffalo and thereby making each of them to run to his own direction to save his life.

Following the information received from the appellant, the villagers mounted a search for the missing persons. The search resulted in the discovery of the body of the deceased on the 23rd day of January, 2007 with its head chopped off. Further search enabled them to discover the

chopped off head some seventy meters from where the body was found, being placed in a sulfate bag which had been buried under the soil.

The incident was reported to the Police Station of Mererani and Police Officers visited the scene of crime and drew a sketch map. Upon the deceased's body being examined by a Doctor (PW6), the post mortem examination report revealed that the cause of death to the deceased was due to severe bleeding. The appellant was arrested for being suspected to be behind the death of the deceased and when he was interrogated by PW1, a Police Officer, he confessed to have killed the deceased with a bush knife (*sime*). The confession by the appellant of having killed the deceased, was also made by the appellant to a justice of peace where he was sent later. Consequently, the appellant was charged with the offence of murder and convicted, the conviction of which has resulted to the current appeal.

To establish the commission of the offence by the appellant, the prosecution called six witnesses namely, ASP Paulo Kimaro (PW1), PF 15982 Assistant Inspector Egfred Kaskana (PW2), Detective Corporal Wito (PW3), Jonas Leba (PW4), Suzan Ayubu (PW5) and Doctor Mrisho Sali Kibigwa (PW6). On his part in defence, the appellant relied on his own

sworn testimony without calling any other additional witness to supplement his testimony.

The evaluation of the evidence by the learned trial Judge, who was being assisted by three assessors, was to the effect that it had been satisfactorily established by circumstantial evidence that the appellant was the one who killed the deceased and therefore, guilty of the charged offence. As a result, the appellant was sentenced to death by hanging, which is the subject of this appeal.

The appellant felt aggrieved by the decision of the trial Court and therefore, on the 31st day of August, 2016, he lodged a memorandum of appeal founded on seven grounds namely:

1. *That the trial Court erred in law and fact when it convicted the appellant based on uncorroborated circumstantial evidence of the witnesses which was contradictory and unreliable.*

2. *That, the trial Court erred in law and fact when it wrongly convicted the appellant on the basis of the repudiated/retracted confession without ascertaining its reliability and or seeking corroborative evidence.*

3. *While it was alleged that the appellant had been taken to a justice of the peace, such witness was never summoned to testify in Court to corroborate the testimony of PW1.*

4. *That, the trial Court erred in law and fact when it wrongly admitted the cautioned statement of the appellant without informing the appellant of his rights in connection to the same so as to say something on its admission.*

5. *Is in essence a repetition of the fourth ground of appeal.*

6. *That, there was no judgment at all because the trial Judge did not observe the requirement of section 235 (1) of the Criminal Procedure Act, Cap 20 R.E 2002.*

7. *That, the provisions of section 312 of the Criminal Procedure Act, were contravened.*

On the 1st day of February, 2019 which was after Mr. John Materu, learned counsel, had been assigned to represent the appellant in the appeal, the learned counsel lodged two supplementary grounds of appeal reading; **first,** that the learned trial Judge, erred in law and in fact in holding that the appellant confessed to have murdered the deceased and

that, the alleged confession was nothing but the truth. **Secondly,** that the learned trial Judge erred in law and in fact, in not finding that the charge against the appellant was not proved beyond reasonable doubt.

At the hearing of the appeal before us on the 8th day of April, 2019, the appellant enjoyed the services of learned counsel Mr. John Materu, whereas, the respondent/Republic was represented by Ms Janeth Sekule learned Senior State Attorney. Upon taking the floor, Mr. Materu, informed the Court that, **one**, he was abandoning the sixth and seventh grounds of appeal which were lodged by the appellant. **Two**, that he would argue conjointly, the first and second grounds of appeal which were lodged by the appellant, together with the second ground of the supplementary memorandum of appeal which was lodged by him. Thenceforth, the same would be considered as the second ground of appeal. **Three,** that the second, fourth and fifth grounds of appeal which were lodged by the appellant, would be argued together with the first ground of the supplementary memorandum of appeal which was filed by him, and named it as the first ground of appeal.

Starting with the first ground of appeal, Mr. Materu, challenged the holding of the trial Court in believing the cautioned statement of the

appellant which was tendered in evidence as exhibit P1, and holding that the appellant confessed to have killed the deceased. The first challenge was to the effect that the alleged cautioned statement was recorded outside the time which has been prescribed by the law and thereby, infringing the provisions of section 50 (1) (a) of the Criminal Procedure Act, Cap 20 R.E 2002 hereinafter referred to as **the CPA.** This was so for the reason that, while the appellant was arrested on the 23rd January, 2007, his cautioned statement was recorded on the 24th January, 2007 at about 13:00 Hours, which was beyond the four hours stipulated under the law.

Secondly, it was the argument of the learned counsel for the appellant that, in fortifying before the trial Court that the appellant had indeed confessed to have killed the deceased, the prosecution witnesses told the Court that, the appellant had also confessed before the justice of the peace. Such averment by the witnesses, influenced the assessors in giving their opinions to the learned trial Judge. However, Mr. Materu went on to submit, the alleged confession before the justice of peace (extra–judicial statement), was never tendered in Court as exhibit, nor was the justice of the peace summoned to appear in Court and testify. In the view of the learned counsel, the failure by the prosecution to tender the extra-

judicial statement as exhibit in Court as well as not calling the justice of peace to testify in court, was deliberately made for a purpose. Either, such confession did not exist, or the contents of the extra-judicial statement was found to be prejudicial to the prosecution's case.

Still on the impugned confession of the appellant, the learned counsel argued that, the appellant complained in his testimony before the trial Court as reflected at page 52 of the record of appeal that, the Police Officer (PW1), who recorded his cautioned statement, had grudges with him after they had quarreled on business issues. Nevertheless, Mr. Materu argued, this complaint of the appellant was casually dealt with by the learned trial Judge as noted at page 115 of the record of appeal. Reference being made to the decision in the case of **Michael Peter Vs the Republic**, Criminal Appeal No. 44 of 1997 (unreported), we were urged to fault the finding of the trial Court, which was made without seriously considering the appellant's complaint.

With regard to the second ground of appeal, it was the argument of Mr. Materu that, the case against the appellant was not established to the standard required by law. As it was indicated by the learned trial Judge at page 113 of the record of appeal, the whole case against the appellant was

based on circumstantial evidence. And what in particular moved the trial Judge to hold the appellant culpable was the contention by the prosecution witnesses that, the appellant showed the head of the deceased which had been chopped off from the body and buried some meters away. The learned counsel argued that, such contention was strongly resisted by the appellant who told the Court that even though he fully cooperated in searching for the lost person, at the time when the body and the chopped off head of the deceased were being discovered at the mountain, he was not present. Referring us to exhibits D1 and D2, the learned counsel impressed on us to find that, both the body and the head of the deceased were discovered before the appellant was arrested.

Mr. Materu, further implored us to closely observe the cautioned statement of the appellant at the last sentence, wherein we would note that, there was clear indication that the last sentence which reads "*nipo tayari kwenda kuonyesha mwili wa marehemu na simu*" had not been in the original text of the document but was added at a later stage. In his view, those words were added at a later stage for a purpose, so as to paint the prosecution's cooked story that, it was the appellant who showed the body and head of the deceased, while they were discovered before his

arrest. This being the first appellate Court, Mr. Materu requested us to step into the shoes of the trial Court and re-evaluate the entire evidence which was received during trial and in particular, the evidence which was given by PW4 and PW5, which contradicted their earlier statements which they gave to the Police Officers and thereby, signifying that they were not trustworthy witnesses.

Mr. Materu did as well wonder as to why the machete (*sime*) which was alleged to have been used by the appellant in killing the deceased, which was said to have been found in possession of the appellant, was not tendered in evidence. Additionally, there were other personal effects of the deceased which were also alleged to have been found in possession of the appellant that included a phone and a bicycle and yet, were not tendered in evidence. He concluded by arguing that, all the allegations against the appellant were unfounded and that they were just aimed at implicating him with the offence which in actual fact he did not commit.

In regard to the decisions which were relied upon by the learned trial Judge in finding the appellant culpable to the charged offence, starting with the case of **Hemed Abdallah Vs Republic** [1995] TLR 172, the learned counsel for the appellant argued that it was distinguishable in that,

the confession which was used to convict the appellant was an extra–judicial statement, which was not the case in the instant appeal. And with regard to the case of **Tuwamoi Vs Uganda** [1967] 1 EA 84, he also distinguished it by arguing that in the same, there were two confessions which were tendered in evidence which was not the case here. The learned counsel for the appellant concluded his submission by strongly urging us to find that, the case against the appellant was not sufficiently established and as a result, his appeal be allowed and ultimately be set at liberty.

Responding to what was submitted by her learned friend, the learned Senior State attorney, argued that the cautioned statement of the appellant was recorded within the time prescribed by the law. According to the testimonies of PW1, PW2 and PW3, the appellant was arrested by militiamen on the 23rd January, 2007. The Police Officers arrived at the village on the same day. And after putting the appellant under their arrest, they travelled with him back to Mererani Police Station, where they arrived on the 24th January at about 10:00 Hours. Thereafter, the cautioned statement of the appellant was recorded by PW1 from 13:00 Hours, which was after the lapse of three hours only and therefore, within the period of four hours stipulated under section 50 (1) (a) of **the CPA.** She stated

further that, the period prior to then, had to be excluded in terms of the provisions of section 50 (2) (a) of **the CPA,** because it was used in conveying the appellant from the area of arrest to the Police Station.

The learned Senior State Attorney argued further, placing reliance on the holding in **Nyerere Nyague Vs Republic**, Criminal Appeal No. 67 of 2010 (unreported) that, all the other arguments which were made by his learned friend in regard to the cautioned statement, were unmaintainable on the ground that, they were never raised at the time when the exhibit was being tendered in evidence at the trial Court. The complaint being raised on appeal has to be taken as an afterthought of which, she urged the Court not to entertain it.

On the question raised by her learned friend as to why the extra-judicial statement of the appellant was not tendered in evidence as well as not summoning the justice of peace to testify in Court, Ms Sekule, argued that the same was occasioned by the fact that, all efforts by the prosecution to effect service on the justice of the peace who recorded the extra-judicial statement of the appellant, proved futile. And, when the State counsel was probed by the Court as to whether the said contention had any backing in the proceedings of the trial Court, she muted.

As regards the second ground of appeal to the effect that, the case against the appellant was not proved to the standard required in criminal cases, the learned Senior State Attorney, submitted that the contention was faulty. This was so for the reason that, there was cogent evidence from PW2, PW3, PW4, PW5 and PW6 to establish the guilt of the appellant. First, there was evidence to prove that the appellant went together with the deceased to the mountain and thereafter, the deceased was never seen alive until when his dead body was discovered with its head severed and buried at another place under the soil. There was further evidence to establish that, the discovery of the body of the deceased as well as the chopped off head was facilitated by the appellant. The appellant would not have done so if he was not behind the death of the deceased.

The learned Senior State Attorney likened the circumstances of this appeal with the circumstances in the case of **Tumaine Daud Ikera Vs Republic**, Criminal Appeal No. 158 of 2009 (unreported), where it was held by the Court that:

> *"The fact that the appellant led to the discovery of the body of the deceased, firmly grounds the conviction without a speck of doubt."*

In the light of what was held in the above cited authority, we were strongly urged to follow suit and dismiss this appeal in its entirety for want of merit.

In a brief rejoinder, Mr. Materu reiterated his submission in chief by arguing that, this being the first appellate Court, had to step into the shoes of the trial Court and reconsider the evidential value of the cautioned statement of the appellant in terms of the provisions of Rule 36 (1) of the Court of Appeal Rules, 2009 R.E 2002. In his view, the holding in **Nyerere Nyague Vs Republic** (supra), was distinguishable in that, it was a second appeal which is not the case in this appeal. On the contrary, he referred us to the holding in **Hassan Ramadhan Mndika Vs Republic**, Criminal Appeal No. 234 of 2017 (unreported).

Admittedly, there was no direct evidence in the instant appeal, to implicate the appellant to the charged offence of murder. As agreed upon by either side above, the conviction of the appellant was purely based on circumstantial evidence and his confession, complemented by his act of leading the Police Officers and other witnesses, to the place where the dead body of the deceased and its decapitate head were discovered. However, both pieces of evidence were refuted by the appellant during trial. The task for us therefore to resolve, is whether the denial by the

appellant casted a reasonable doubt to the prosecution case. We propose to discuss them in the way they were presented by Mr. Materu, starting with the cautioned statement.

The confession of the appellant to the charged offence of murder was contained in the cautioned statement. The challenge by the appellant to the cautioned statement was pegged on legal requirement that, its recording was made outside the four hours prescribed under section 50 (1) (a) of **the CPA.** Our dispassionate observation on the evidence on record, has left us with no doubt that it was recorded within the time prescribed by law. The only issue which stood to be considered, was whether its repudiation by the appellant during his defence after he had not resisted its admission, had any impact to its evidential value. While Ms Sekule invited us to disregard the repudiation basing on **Nyerere Nyague Vs Republic** (supra), Mr. Materu on the other hand, implored us to re-appraise the entire evidence of the prosecution, and come out with a finding that the alleged cautioned statement was just cooked by the prosecution to paint their case.

Indeed, the proceedings of the trial Court are clear as reflected at page 27 of the record of appeal that, when the cautioned statement was

being tendered in Court as exhibit by PW1, it was not objected to. It is however also noted from the testimony of the appellant in his defence at page 51 of the record of appeal that, he denied to have either confessed before the Police Officer that he killed the deceased, or the alleged cautioned statement of him, to have been read over to him. This being the first appellate Court, we think it would be improper to follow the holding in **Nyerere Nyague's** case (supra), to dismiss the complaint of the appellant as we were urged by Ms Sekule, for the reason that in the same, the Court rejected the challenge to the impugned cautioned statement because it was raised to the Court sitting as a second appellate Court. This could be inferred from its holding when it stated in part thus:

> *"When the prosecutor sought to produce it, the appellant did not object to its production; and so it was admitted as exhibit P2. He is now seeking to challenge its admissibility in this Court. It was never raised with the first appellate court...."*

On the contrary, this is being the first appellate Court, in terms of the provisions of Rule 36 (1) (a) of **the Rules**, it is entitled to step into the shoes of the trial Court and re-evaluate the evidence received during trial. **The provision stipulates *verbatim* that:**

"36 (1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may-

(a) Re-appraise the evidence and draw inferences of fact."

See also: **Hasan Mfaume Vs Republic** [1981] TLR 167, and **Sultan Seif Nassoro Vs Republic** [2003] TLR 231.

Upon going through the cautioned statement of the appellant in this appeal and the entire evidence on record, we have noted that, what is contained in the cautioned statement was at variance with the contents of exhibits D1 and D2, which were the statements made by PW4 and PW5 respectively to the Police Officers, as regards the time when the body of the deceased as well as its head were discovered. There was also variation between the contents of exhibit D1 and D2, and the oral testimonies which were given by PW4 and PW5 in Court during the trial of the case. While in the cautioned statement of the appellant, it is indicated that it was the appellant who showed the dead body and the severed head on the 24th January, 2007, the story in exhibits D1 and D2, divulges that, by then the dead body plus its head which had been buried separately, had already been discovered by the villagers, way back on the 23rd January, 2007 and

further that, during the discovery, the appellant was absent. Surprisingly, in their oral testimony in Court, both PW4 and PW5, told the Court that, it was the appellant who showed the dead body and its buried head on the 24th January, 2017 and not otherwise.

The question which we had to ask ourselves on the glaring contradictions above was, as to why there was a change of mind by PW4 and PW5 in their testimonies before the court, from the statements which they had earlier on made at the Police Station? For whatever reasons that might have occasioned it, the situation could not fail to let one raise eyebrows and be tempted to think that there was something sinister. Such situation did give credence to the doubt raised by Mr. Materu, in regard to the cautioned statement of the appellant that, the last sentence which reads "*nipo tayari kwenda kuonyesha mwili huo na simu*", was most probably added at a later time for a purpose. Our observation of the said statement, has convinced us to travel in the same boat with the learned counsel.

Be that as it may, what is apparent in the light of the foregoing, is the fact that, PW4 and PW5 who were staying in the same village with the appellant and hence played a key role in this case, including the arrest of

the appellant and the reporting of the incident to the police, were not credible witnesses whose testimonies could purely be believed.

And going by what is contained in exhibits D1 and D2, the appellant might have been correct in his testimony at page 51 of the record of appeal, when he told the trial court that, *I cooperated in looking for the lost person and not a deceased and that the evidence to the effect that I showed them the head is a lie and further that, I did not confess."*

In grounding conviction against the appellant basing on the repudiated cautioned statement, the learned trial Judge, indicated to have satisfactorily warned herself in line with the holding in **Hemed Abdallah Vs Republic** (supra) and **Tuwamoi Vs Uganda** (supra). On our part, for the reasons which we have attempted to highlight above, we are unable to share the feelings of the learned trial Judge. Had the learned Judge closely considered the discrepancies which have been pointed out above, undoubtedly, she would have arrived at a different conclusion.

Additionally, as it was argued by Mr. Materu, the decision in **Tuwamoi's** case was wrongly applied in the instant appeal. It was the holding in that case that where there have been two confessions or more

made by the accused/suspect, before the court moves to warn itself as to whether it should ground a conviction basing on it or not, it has to ensure that both statements of the confession have been placed before the Court. In summary, the Court stated that:

> *"A trial Court should accept any confession which has been retracted or repudiated or both the retracted and repudiated with a caution and must before founding a conviction on such a confession be fully satisfied in all circumstances of the case that, the confession is true."*

In the appeal at hand, the circumstances were different from the fact that, the appellant made two confessions that is, the first was made to PW1, while the second was made to the justice of the peace. However, what was placed before the Court in evidence, was the cautioned statement only (exhibit P1), whereas, the whereabouts of the extra–judicial statement which was made to the justice of the peace was nowhere to be seen. With the absence of the extra–judicial statement, the trial Judge was not placed in a better position of assessing as to whether the appellant had really confessed to have killed the deceased or not.

As if the foregoing anomaly was not enough, the said extra-judicial statement which was never tendered in Court as exhibit, still influenced the assessors in opining their stances to the learned trial Judge in regard to the guilt or otherwise of the appellant to the charged offence. This is reflected at pages 76 and 77 of the record of appeal, where each of the three assessors who sat with the Judge in trying the case, opined that because the appellant confessed before the justice of the peace that he killed the deceased, he was guilty of charged offence of murder.

It is common ground that, the offence of murder under which the appellant stood charged with is a serious offence carrying the capital sentence of death by hanging. In that regard, for one to be held culpable, the prosecution has to establish its commission beyond reasonable doubt. In the light of the shortfalls which we have endeavored to illustrate above, it is evident that in the instant appeal, the threshold of establishing the commission of murder by the appellant was not met. The doubts which have been expressed, have to benefit the appellant. To that end, we find merit in the appeal by the appellant by quashing the finding of the trial Court and setting aside the death sentence which was meted out to him. In

lieu thereof, we direct that he be released from prison forthwith unless he is otherwise being held for some other lawful cause.

Order accordingly.

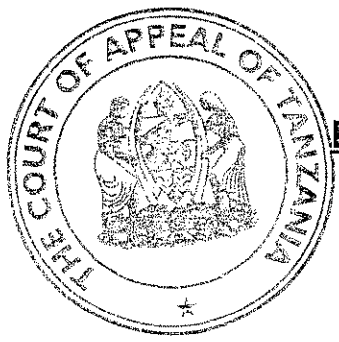
DATED at **ARUSHA** this 11th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL