

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL SESSION NO 180 OF 2022

REPUBLIC

VERSUS

EDWARD JACKSON NYAGAWA

RULING

Date of last order: 22nd February 2024

Date of Ruling: 22nd February 2024

MTEMBWA, J.:

The accused herein stands arraigned for the offence of Murder contrary to **Section 196 and 197 of the Penal code Cap 16 RE 2019 (now RE 2022)**. It was alleged that on 21st May 2020, at Kibiki Village within Bagamoyo District in Coastal region did murder one **JOHNSON GODFREY MTUI**.

The accused pleaded not guilty to the charge. Consequently, the Republic had to adduce evidence in support of the charge. But however, when PW6 sought to tender **Extra Judicial Statement** recorded by him, two objections were taken by the defense counsel on behalf of the

accused. Having determined the objections, this Court thought it wise that a **trial within a trial** be conducted to ascertain the accused's voluntariness to confess before the Justice of the peace (PW6).

During hearing on trial within a trial, prosecution brought **HASHIMU BUGALA DAUDI** (TWTPW1) who testified as follows. That he is a Primary Court Magistrate at Chalinze Primary Court since 2016 and that, dutifully, he is mandated to hear and decide cases brought before him. He added also that, by reason of the law, he is a justice of the peace within the area of operation. He said, when a suspect needs to confess, then, he is brought before him for that purpose. That before taking his confession, he informs him of his rights. And other matters associated thereto. That, in the discharge of such duties, he is guided by section 58 and 59 of the ***Magistrate Courts Act, Cap 11 RE 2019*** and Chief Justice guidelines.

TWTPW1 continued to note that, on 9th June 2020, around 13:00 hours in the afternoon, while at his duty station, a police officer known as Willy Siwale came with the accused, one Edward Jackson Nyagawa. That Willy Siwale informed him that the accused is there purposely to confess on the killing of Johnson Lumumba Mtui, the deceased. He told Willy to leave his Chamber, as such, he remained

with the accused. He noted further that his chamber had only office furniture like chairs, tables, bench, cupboard etc.

Having cooled down the accused, he introduced himself as justice of the peace. The accused informed him that he was not compelled to come there to confess nor was he promised anything in return. He agreed to know and speak concise Kiswahili Language. He informed the accused that, his confession may be used as evidence in Court which he agreed. He went further to tell the Court that, before taking his confession, he inspected the accused's body and found one old scar on his face. The accused also informed TWTPW1 that he was coming directly from Chalinze police station where he was remanded having been arrested on 3rd June 2020 at Masa Village.

Thereafter, that, the accused told his story on how he executed the death of Johnson Lumumba Mtui. That he was recording each and everything stated by the accused. Further, that, in the end, the accused signed on every page of the Extra Judicial Statement. Having recorded the confession, he then handled the accused and the sealed envelope with extra judicial statement in it, to Willy Siwale. That, by that time, the accused was in good health condition. He tendered the extra judicial statement that was admitted as **Exhibit TWTP1.**

Crosse examined by the defense counsel, TWTPW1 submitted that he informed the accused of his rights before he recorded his statement. Cross examined further he noted that in the statement, he narrated that the accused had little or small scar on his upper side of the left eye but that did not originate from a torture in respect to this case. Having rejoined, the prosecution on the trial within a trial case was closed.

The Defense brought **Edward Jackson Nyagawa (TWTDW1)**, the accused person. He testified that, on 3rd June 2020, while at Masa Ward, Chogola Village, outside his brother's House, suddenly there came to him unknown three persons and they arrested him. On transit heading to the village office, two persons emerged. One of them was called Sadam who handcuffed him. Thereafter, Sadam and the accused moved to Kibakwe Police Station within Mpwapwa District of Dodoma Region and arrived on the same day at night. While there, Afande Msuka and Sadam started to assault him in the room.

TWTDW1 continued to testify that, he spent his night at Kibakwe Police Station. In the morning of 4th June 2020, Sadam and Msuka, the police officers, came back to where he was remanded and

started a journey to Mpwapwa Police Station. Having arrived there, he was remanded in the room alone. Soon thereafter, Saddam came alone and the two started a journey to Dodoma by a public transport. Having arrived there, he was again remanded.

TWTDW1 told the Court that, while at Dodoma Central police, he was beaten enough by Saddam, Msuka and another police officer he could not recognize. They wanted him to confess to the killing because there were allegations that someone has been killed. That on 5th June 2020, together with Rahel Nyagawa and Samweli Benald Mbula travelled to Chalinze Police Station in company with Saddam. Having arrived there, they were all remanded.

That while there, within one hour, Saddam came to pick him up and was taken to back buildings within the compound. While his eyes were covered, was transferred to Kibaha Police Station where also he was again remanded. He was then taken to a room where there were maces, electric wires, hoes, pickaxe, sticks and robs. There, he was seriously beaten and tortured. He was then bleeding. On 6th June 2020, he was called and taken to investigation office. That on 7th and 8th June 2020, he was not taken anywhere.

TWTDW1 submitted further that on 9th June 2020, while at Chalinze Police Station, there came a police officer by name of Willy together with Sadam and a driver. They wanted to take him somewhere. Then, that, a journey started and arrived at the said area. That, initially, he did not recognize the area. Willy entered the House and he was left with Sadam who was, by that time holding a gun. His hands were handcuffed. He then entered the room together with Sadam and Willy. In the room, there were other two persons whom he could not recognize.

While there, TWTDW1 told the Court that he was given a chair to seat on while his hands were handcuffed. Only one person asked him about his names, age and what happened on the wound on his face. Then Willy, produced a paper that was already written on. He gave the same to the person who copied each and everything. That having completed to copy, he was required to sign but he refused. He was then intimidated by Sadam who reminded him of "Halichachi" (Beatings). He had no option but to sign the papers. Having left the room, he heard Willy thanking a person by calling him "Muheshimiwa"

When shown to TWTP1, TWTDW1 testified that the same contains averments which were not his. He insisted that he was

beaten and tortured before he was taken to the justice of the peace. He argued this Court not to trust TWTPW1 because the police officers who took him to his chamber did not testify in Court. He added that, by that time, he had fresh wound on his face as a result of beatings and torture.

On cross examination, TWTDW1 insisted that he was beaten by strokes and he was seriously injured. On further cross examination he submitted that the justice of the peace (TWTPW1) was busy copying a paper given to him by Willy. He added that what is on the Exhibit TWTP1 is not his. He also denied to have signed the extrajudicial statement by a pen. Thereafter, the defense on Trial within a trial was closed.

I have gone through the evidence adduced by both parties and I have formulated one issue that whether the confession was voluntarily made. Always, the onus of proving that it was voluntary lies to the prosecution. In addition, an extra judicial confession freely and voluntarily made may be proved as against that person. In this case, the accused (TWTDW1) alleged to have been tortured before he was taken to the justice of the peace (TWTPW1).

According to the accused, on the night of 3rd June 2020, while at Kibakwe Police Station within Mpwapwa District of Dodoma Region, Afande Msuka and Sadam started to assault him in the room. On 4th June 2020, in the morning of 4th June 2020, Sadam and Msuka, the police officers, picked him up and they travelled to Mpwapwa Police Station. That having arrived there, Sadam came alone and the two started a journey to Dodoma Central Police by a public transport. Having arrived there, he was again remanded.

While at Dodoma Central police, he was beaten enough by Sadam, Msuka and another police officer whom he could not recognize. They wanted him to confess to the killing because there were allegations that someone has been killed. That on 5th June 2020, together with Rahel Nyagawa and Samweli Benald Mbula travelled to Chalinze Police Station in company with Sadam. Having arrived there, they were all remanded.

TWTDW1 continued to note that, while at Chalinze, within an hour, Sadam came to pick him up and was taken to Kibaha Police Station while his eyes were covered. He testified that he was seriously beaten at Kibaha. He argued that he had a fresh scar on his face when he was taken to the justice of the peace. According to TWTPW1

(justice of the peace), before taking his confession, he inspected the accused's body and found one old scar on his face. TWTPW1 did not tell how old was the scar. The accused also informed TWTPW1 that he was coming directly from Chalinze police station where he was remanded having been arrested on 3rd June 2020 at Masa Village.

TWTD1 (the accused) testified that he was forced and or intimidated by Sadam before affixing his thumb. He said what was written on the paper was given to the justice of the peace by Willy. But, before being taken there, he was seriously tortured.

Having gathered the testimonies of the parties, what I have discovered is that, in fact, prosecution did not get it well. The complain was on torture before being taken to the justice of the peace. In this respect, the accused was talking about the torture at Kibake police station, Dodoma Central Police and Kibaha Police Station. What TWTPW1 (justice of peace) could have witnessed is what transpired on his chamber but not what happened before TWTDW1 was brought to him. TWTPW1 was therefore of no assistance at all because he could not testify on what happened at Kibake police station, Dodoma central police and Kibaha police station.

From the testimonies of TWTD1 the police officers by the names of Sadam and Msuka were involved in most cases. I expected to see them testifying with the view to fault the accused's allegations of torture. They were not called to testify without reasons. The said Sadam testified in the main case as PW4 and as such, he is within the reach by the prosecution. In such circumstances, drawing an inference adverse to the prosecution is inevitable. ***In Azizi Abdallah v Republic [1991] TLR 71*** the Court noted that;

the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.

TWTPW1 did not say how old was the scar found in the accused's face. While the accused maintained that it was a fresh wound, the justice of the peace did not buy the idea. He said that, the scar was old and did not result from the torture connected to this case. With respect he was supposed, approximately, to state how old was the scar to enable this Court to assess whether it as a result of torture or not. In such circumstances, it is safe to believe that it was as a result of torture. In ***Stephen Jason and Others vs Republic,***

Criminal Appeal No.79 of 1999 (unreported), the Court noted that;

Where an accused claims that he was tortured and is backed by visible marks of injuries it is incumbent upon the trial court to be more cautious in the evaluation and consideration of the cautioned statement even if its admissibility had not been objected to; and such cautioned statement should be given little if no weight at all.

Indeed, I am aware that in that case the confessional statement addressed was a cautioned statement and it was one which was not objected but I believe the principle is relevant to the instant case and especially since the extra judicial statement was retracted. (See, ***Richard Lubilo and Another vs Republic, Criminal Appeal No. 10 of 1995*** and ***Marcus Kisuku vs Republic, Criminal Appeal No. 146 of 1003 (both unreported)***).

The accused was not under duty to prove that he was tortured and or injured. It was the prosecution to adduce evidence showing that the confession was freely given. In ***Jackson Protoz Vs. Republic, Criminal Appeal No. 385 of 2020, Court of Appeal at Bukoba***, the Court said.

The trial court also erred by shifting the burden to the appellant to prove he was tortured or injured while it was the duty of the

respondent Republic to prove that the extrajudicial statement was recorded voluntarily. We are of the firm view that had the SRM Ext. J. considered the evidence on record, and the appellant's constant claims of having been tortured at the time of arrest and while in custody, she would not have admitted the extrajudicial statement.....

To that end, I am of the opinion that prosecution failed to cast any doubt on the accused's allegations of torture. In the premises, it is unsafe to hold that it was freely given or voluntary. The objection raised by the accused towards the admission of extra judicial statement is therefore sustained. It will not be admitted in evidence.

I order accordingly.

Right of appeal explained.

DATED at DAR ES SALAAM this 22nd February 2024.



H.S. MTEMBWA

JUDGE