

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT SUMBAWANGA
CRIMINAL JURISDICTION
CRIMINAL SESSION CASE NO. 26 OF 2018**

REPUBLIC

VERSUS

- 1. MACHIYA s/o LENARD**
- 2. NYENGE s/o KIJA @ KOMBE**

Date of last Order: 10/11/2020

Date of Judgment: 18/11/2020

JUDGMENT

C.P. MKEHA, J

The two accused persons namely Michiya s/o Lenard and Nyenge s/o Kija @ Kombe were together with one other person who passed away before commencement of trial arraigned in connection with an offence of murder it being alleged that, on the 31st day of January, 2017 at Mnazi Mmoja village within Sumbawanga District in Rukwa Region, the accused persons murdered one Mbuke d/o Chola. When the charges were read over to the accused persons, they protested their innocence.

Brief facts reading to the present case can be explained as follows. On 31/01/2017 at about 20.00hrs two persons visited the deceased's homestead. The two persons found the deceased and her family members outside their

house having their supper. It was a dark night. The two persons were welcomed but refused to take seats. As the deceased and her family members tried to entertain the two visitors, suddenly the two persons attacked the deceased using machetes. Seeing that, the family members raised an alarm to seek for aid from neighbours. When the neighbours gathered, the deceased's assailants were nowhere to be seen.

As a result of the attack to the deceased, she died instantly before being taken to the hospital. It was established and consequently proved during preliminary hearing that, the deceased's death was unnatural. The Report on Post Mortem Examination that was admitted as Exhibit P1 without any objection indicates that, the deceased died due to extensive scalp cut wound leading to severe bleeding. The only remaining question is who killed the deceased.

Mr. Mwandoloma and Ms. Mwabeza learned State Attorneys represented the Republic. Ms. Neema learned advocate represented the first accused. Mr. Chambi learned advocate represented the second accused.

The two eye witnesses to the event, PW1 (Mlapa Nkuba) and PW2 (Martha Ndakama) merely testified on the happening of the event as indicated in the brief facts hereinabove. Neither of the two witnesses implicated any of the accused persons. According to them, they did not identify any of the accused persons at the event as it was during a dark night. The prosecution's case

depends on extra judicial statements allegedly made by the two accused persons before justices of the peace. Two justices of the peace appeared to testify for the prosecution.

Mr. Rosta Emmanuel Mofuga testified as PW3. The witness could recall having recorded the second accused's extra judicial statement on 27/03/2017. According to the witness, Nyenge Kija (the second accused) confessed to have hired those who killed the deceased. When the witness sought leave of the court to tender the second accused's extra judicial statement, Mr. Chambi learned advocate rose to object. One of the grounds for the said objection was that, the justice of the peace, having noted injuries at the suspect's waist, did not proceed to ask the suspect as to how he sustained the injuries. As a matter of fact, the guide to justices of the peace instructs that, the record should state whether any marks, bruises or cuts are noted. The witness had done that and he recorded that he noted burnt injuries at the suspect's waist. The justice of the peace has also to record whether the noted marks, bruises or cuts appear to be old or recently caused. For a reason that the learned advocate's objection was not premised on those aspects, but on causes of the injuries, the court overruled the learned advocate's objection and admitted the second accused's extra judicial statement made before PW3 as exhibit P3. The same indicates that, when the second accused appeared before PW3, he had burnt injuries on his waist. PW3 told the court that by

recording that he saw "MAJERAHA YA KUUNGUA MAENEO YA KIUNO" he meant that, all what he saw on the second accused's waist were scars.

The first's accused's extra judicial statement before PW4 (Mudi Jafari Mkinga) was admitted without any objection on part of the first accused's advocate. The same was marked as exhibit P4. The said exhibit indicates that, upon inspecting the suspect's body the justice of the peace found that, the suspect had a swelling on his right leg and that, the suspect told the justice of the peace that the swelling was due to being hit by the police, through the use of a club. The relevant part of exhibit P4 reads:

"Mshtakiwa anao uvimbe katika mguu wa kulia na anasema kuwa uvimbe huo umetokana na kupigwa kwa rungu la polisi."

Notwithstanding the fact that Exhibit P4 was admitted without any objection on part of the first accused, the same was severely attacked during cross examination. PW4 insisted during cross examination that the first accused told him that the swelling on his right leg was due to the fact that the police hit him on the said leg. The witness could not agree that the suspect's confession was because of police torture.

Exhibit P4 indicates that the first accused confessed before PW4 that, while with one person known as Sengerema (the accused who passed away before commencement of trial), they killed the deceased. And that, they had been hired by one Nyenge s/o Kija (the second accused).

During his defence, Machiya Lenard (DW1) testified on affirmation that the present case had been planted to him. The witness could recall that on 23/03/2017, he was interrogated by the police at Sumbawanga Police Station and that as interrogation was going on, he was tortured by the police. The witness testified that, the police were forcing him to confess that he really killed the deceased. According to DW1, he never confessed.

The witness further testified that on 24/03/2017 he was joined with two other suspects whom he found at the police station and that, torturing persisted up to 25/03/2017. The witness went on to testify that, on 26/03/2017 he was taken before a justice of the peace for recording his statement. The witness added that, the first justice of the peace refused recording his statement when he saw that, almost every part of the suspect's body was swollen. The justice of the peace instructed that the suspect be taken to the hospital. Despite such instructions, the police never took him to the hospital. The suspect was again taken before another justice of the peace on 27/03/2017 who recorded his statement in the presence of the police who escorted him to the justice of the peace. DW1 renounced having confessed before the justice of the peace.

DW2, (Nyenge Kija @ Kombe) testified on oath that, he was arrested on 23/03/2017 by a group of militiamen and "Sungusungu". According to DW2, on arrest, the allegation was that he had failed participating in defence activities within his village hence he had to be fined to the tune of TZS

300,000/=. Later on, while at Muze Police Station, he was informed that he was responsible of killing one Mbuke d/o Chola. According to the second accused, from that moment torturing began.

The witness went on to testify that, the same day he was transferred to Sumbawanga Police Station whereby torturing persisted. The witness told the court that as a result of police torture, he lost one of his nails. And that, at Sumbawanga Police Station, one of the Police Officers burnt his waist. According to the witness despite the said torture, he never confessed to have killed the deceased.

DW2 could recall that, it was until 27/03/2017 when he was taken before a justice of the peace who noted that he (DW1) had some burnt injuries on his waist. The witness insisted that, all what he could not dispute from Exhibit P3 was the fact that, when the justice of peace inspected his body, he found him with burnt injuries. He otherwise renounced having confessed before the justice of the peace.

During final submissions Mr. Mwandoloma learned State Attorney insisted that, the accused's extra judicial statements were of such a nature that, conviction can be based upon them. Ms. Neema learned advocate for the first accused submitted that for failure to comply with the Chief Justice's Guide to justices of the peace, Exhibit P4 should not be relied upon. Mr. Chambi learned advocate was either of the view that, because of substantial breach of

the Chief Justice's Guide in the course of recording Exhibit P3, the same ought to be disregarded.

When I summed up the case to the Gentlemen and Lady Assessors I notified them of the fact that the prosecution's case depends on extra judicial statements of the accused persons which had been retracted by the respective accused persons through objecting their admission, cross examination and defence. I told them of the legal position that the court has to act on a retracted or repudiated confession only when it is fully satisfied in all the circumstances of the case that the confession is true. Otherwise, the court will act on a retracted or repudiated confession only when the same is corroborated.

The first assessor opined that, basing on their extra judicial statements, both accused persons ought to be found guilty. The other two assessors concurred with the first assessor in opining that, both accused persons be found guilty and convicted.

The present case, as demonstrated hereinabove is pegged on the accused persons' extra judicial statements. The first accused's extra judicial statement was admitted without objection. The same was however later on retracted by the first accused person through cross examination and in his respective defence. The second accused's extra judicial statement was objected to when it was about to be tendered in court. Subsequent retraction of the same

continued during cross examination and when the second accused was making his defence.

The learned State Attorneys submitted that, the accused persons' confessions are of such a nature that conviction can be safely based upon them. On the contrary view, the learned advocates for the accused persons submitted that, the purported extra judicial statements are deficient to the extent that, no conviction can be based upon them.

An important question that has to be answered is **whether, the purported confessional statements of the accused persons are of such a nature that, conviction can be based upon them without corroboration.**

I will start with the first accused person. It is true that in terms of the decision in **ZAKAYO SHUNGWA MWASHILINDU AND TWO OTHERS Vs. REPUBLIC, CRIMINAL APPEAL NO. 78 OF 2007** it was too late for the first accused to challenge admissibility of Exhibit P4 after the same had been admitted without objection. The delay however, did not deprive the first accused of his right to retract Exhibit P4 through defence. That is what the first accused chose to do. And, upon evaluating Exhibit P4 for what it contains, there are facts indicating that, upon inspecting the first accused, PW4 found a swelling on the first accused's right leg. PW4 recorded on the said exhibit: "mshtakiwa anao uvimbe katika mguu wa kulia na anasema kuwa uvimbe huo umetokana na kupigwa kwa rungu la polisi."

The above quoted words can simply be translated to mean, the accused has a swelling on his right leg which is associated with being hit by the police through the use of a club.

It is important to note that, whereas the first accused was arrested on 23/03/2017, it was until the 27th day of March, 2017 when his extra judicial statement was recorded before a justice of the peace. The delay is consistent with the accused's view that, possibly, he did not confess voluntarily. Exhibit P4 renders support to the first accused's defence that he had been tortured by the police before appearing before the justice of the peace (PW4).

The second accused, through Mr. Chambi learned advocate objected admission of Exhibit P3. Despite the fact that PW3 testified to have seen scars on the second accused's waist the actual exhibit reads that, upon inspecting the second accused's body, the justice of the peace saw: **"MAJERAHA YA KUUNGUA MAENEO YA KIUNO"**. Simply, the justice of the peace saw burnt injuries on the suspect's waist.

The second accused testified by informing the court the way he was tortured by the police between 23/03/2017 and 27/03/2017. The way he lost one of his nails as a result of police torture and the way he was burnt onto his waist by one of the police officers. Again, Exhibit P3 renders support to the 2nd accused's defence. PW3's testimony that he saw some scars on the suspect's waist is inconsistent with his own writing on Exhibit P3 which vividly indicates

that all what he saw were burnt injuries. This is inconsistent with the prosecution's view that the 2nd accused's confession if any, had been voluntarily made. Equally, while the 2nd accused was arrested on 23/03/2017, it was until the 27th day of March, 2017 when he was produced before the justice of peace. The delay in recording the purported statement, is not consistent with a view that, the confession, if any was voluntary.

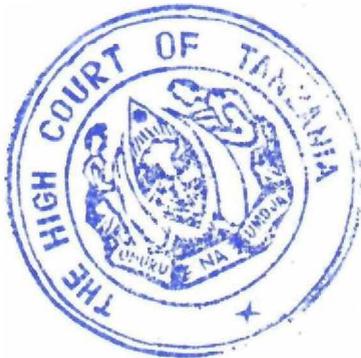
The accused persons, having retracted their confessions, in practice, they require corroboration. And, neither of the confessions can corroborate the other. See: **(JOHN CHEREHANI & ANOTHER Vs. REPUBLIC, CRIMINAL APPEAL No. 189 of 1989 (UNREPORTED)** and **MKUBWA SAID OMAR Vs. MZ (1992) TLR. 365.**

In the present case the accused persons' claims that they had been tortured by the police before being taken to justices of the peace are backed up by the prosecution's exhibits, that is, exhibits P3 and P4 respectively. That snatches from the prosecution, whatever weight deserved to be accorded by the court, to the said exhibits. This follow the decision in **STEPHEN JASON & OTHERS Vs. REPUBLIC, Criminal Appeal No. 79 of 1999 (Unreported)**, in which the court of Appeal held 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 not, no weight at all."

In similar vein, I accord little weight to exhibits P3 and P4. That being the case, as I earlier hinted, I hold that Exhibits P3 and P4 required corroboration before being acted upon. The same is missing. That is the reason for differing with all the assessors. That leads me into holding that the prosecution has not managed to prove its case beyond reasonable doubt against any of the accused persons. Both accused persons are hereby acquitted of the offence of murder under section 312 (3) of the Criminal Procedure Act. I proceed to order immediate release of both accused persons from custody unless they are held therein for other lawful cause.

Dated at **SUMBAWANGA** this **18th** day of **November, 2020**




C.P. MKEHA

JUDGE

18/11/2020

Court: Judgment is delivered in the presence of Mr. Mwashubila learned Senior State Attorney for the Republic, accused persons, Ms. Neema learned advocate for the first accused, who also holds brief of Mr. Chambi learned advocate for the second accused.



C.P. MKEHA
C.P. MKEHA

JUDGE

18/11/2020

Court: Right of Appeal to the Court of Appeal of Tanzania fully explained



C.P. MKEHA
C.P. MKEHA

JUDGE

18/11/2020

Addresses of accused persons under S. 312 (4) of the Criminal Procedure Act.

1. Machiya Lenard:
At Mwipai village, Namtumbo District, in Ruvuma Region.
2. Nyenge Kija :
At Mnazi Mmoja village, Sumbawanga District, in Rukwa Region.