IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., MFALILA, J.A., And LUBUVA, J.A.)

CRIMINAL APPEAL NO. 53 OF 1994

BETWEEN

1. THADEI MLOMO
2. CHARLES NYIMBO
3. BEN SANGA

. . . . . APPELLANTS

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Mbeya)

(Mchome, J.)

dated the 11th day of September, 1993

in

Criminal Sessions Case No. 102 of 1990

JUDGMENT OF THE COURT

RAMADHANI, J.A.:

On 3rd August, 1988, Martin Mhenga, deceased, was on duty guarding a bridge on the Uhuru Railway, at Mgololo, Mufindi District in Iringa Region. His company included Abdallah Selemani, PW.7. They were attacked and robbed their two Semi-Machine Guns (SMG) each with a magazine containing thirty rounds of ammunition. The deceased got killed in the process while PW.7 was left seriously wounded.

Four people were charged with the murder of the deceased. Three of them, the appellants here, Thadei Mlomo, Charles Nyimbo and Ben Sanga, were convicted by the High Court of Tanzania at Mbeya (MCHOME, J.).

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The learned judge was satisfied with the evidence before him. Somehow, Charles Nyimbo, Appellant 2, was arrested at Makambako on 3/10/88 and that information was sent to the police in Iringa. A.S.P. Kisika (PW.1) in the company of SSgt. Zakayo (PW.2) went to Makambako to interrogate him. He admitted having participated in a number of robberies including this one of the two SMGs which caused the death of the deceased. His camaraderie spirit brokedown and mentioned his co-participants. Appellant 2 said that he slashed PW.7 with a panga and got hold of his gun. As the deceased emerged to give assistance to PW.7, he was shot by Thadei Mlomo, Appellant 1, and they took deceased's gun, too.

PW.1 travelled to Dar es Salaam with Appellant 2 who pointed out the houses of Ben Sanga, Appellant 3, and that of Appellant 1. Only Appellant 3 was arrested in his house but Appellant 1 was not found in the indicated house. After that, PW.1 returned to Iringa with Appellants 2 and 3.

The team of investigators, apart from PW.1 and PW.2, included SSgt. Semu (PW.3), Inspector Gregory (PW.4) and D/Sgt Jonathan (PW.5).

Appellant 3 in interrogation disclosed another participant at Matanana, Mufindi. PW.1 failed to arrest that other person but he was told of a guest of that person from Dar es Salaam who happened to be Appellant 1. So, he was arrested. Appellant 1 led the investigators to the place where he had buried his gun and it was recovered.

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Appellant 3 failed to locate the place he had buried his gun. However, Appellant 1 pointed out that place, which was very close to where he had hid his, and Appellant 3 owned the unearthed gun. Both Appellants 1 and 2 recorded extra-judicial statements, Exh. P5 and Exh. P6, respectively, before Stephen Mbungu (PW.6), a Primary Court Magistrate. Appellant 2, also, recorded a police caution statement, Exh. P4. All the three statements narrated the events as summarised above. Appellant 3, however, did not record any statement.

These statements were repudiated and the learned judge held a trial-within-a-trial. The Appellants alleged to have been tortured into making them. The learned judge relied on Section 29 of the Evidence Act, 1967 and admitted them.

In their defence the Appellants flatly denied everything, even knowing one another. Appellant 1 said he only knew Appellant 2 because they were both in the business of selling maize.

The appeal was argued by Mr. Mkumbe, learned advocate. He had four grounds of appeal. In the first ground the Appellants complained that the learned trial judge erred in admitting the statements of Appellants 1 and 2 since they were not voluntarily made. Grounds two, three and four objected the admission of a copy of a judgment of this Court as evidence against the Appellants.

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We shall deal first with the last three grounds. A judgment of this Court (Exh. P8) was used to secure the conviction of the appellants. In that judgment we consolidated a number of appeals and we upheld the District Court of Iringa which convicted the Appellants and other persons on their own pleas of guilty to certain charges of robberies. Mr. Mkumbe submitted that it was not proper to do so while Mr. Mbise, learned Senior State Attorney, contended that it was proper.

It is our considered opinion that we do not have to resolve that issue. There is sufficient evidence to support the conviction even without Exh. P8. So, we leave that matter to be determined one way or the other in an appropriate appeal.

The first ground of appeal challenges the statements which were produced at the trial. Admittedly, and as pointed out by Mr. Mkumbe, Appellants 1 and 2 repudiated their confessions at the trial. The learned trial judge found that the confessions might have been obtained involuntarily. Nevertheless, he admitted them under Section 29 of the Evidence Act, 1967. However, we agree with Mr. Mbise that that was proper.

May be we start with Section 27 of that Act which provides:

> "27. - (1) A confession voluntarily made to a Police Officer by a person accused of an offence may be proved as against that person.

> (2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.
>
> (3) A confession shall be held to be involuntary if the Court believes that it was made or induced by any threat, promise or other prejudice held out by the Police Officer to whom it was made or by any member of the Police Force or by any other person in authority".

This section provides for the admission of a voluntary confession against the maker in a trial. It also prescribes when a confession is and when it is not voluntary. The onus of proving voluntariness is on the prosecution.

However, an involuntary confession is also admissable if the Court believes it to be true. That is under Section 29 which provides:

> "29. No confession which is tendered in evidence shall be rejected on the ground that a promise of threat has been held out to the person confessing unless the Court is of the opinion that the inducement was made in such circumstances and was on such nature as was likely to cause an untrue admission of guilt to be made".

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It is doubtful that the legislator intended it to be "a promise of threat" and not "a promise or threat". We think it is the latter and that the former is a typographical error. This section appears to us to encapsulate the principle enunciated in the Tuwamoi's case, [1967] EA 84. This is the section which MCHOME, J. used to admit the confessions of Appellants 1 and 2.

Under S. 27 once a confession has been proved to be voluntarily made then, it would appear, a Court will accept it as the truth. However, if a confession was involuntary, then it will be accepted under S. 29 if the Court is of the opinion that the confession constitutes the truth. So, in the former section the truth of the confession is presumed by the Court while in the latter the truth has to be conceived by the Court. We may point out that this holding is not in conflict with our previous decision in Marcus Kisukuli v. R, Criminal Appeal No. 146/93 (unreported). There we said that S. 29 cannot be used where there is actual torture. Here there was no proof of torture but only threats.

The question for us is to determine whether the inducement was such as "to cause an untrue admission of guilt". We have to determine whether the confession is true or not. First of all, what is contained in the statements as to what happened that fatefull night at the bridge at Mgololo, tallies with the evidence of PW.7, the guard who survived the onslaught. Secondly, Appellant 1 led the investigators to the discovery of the two guns which were robbed from the deceased and PW.7. The serial numbers

of those guns (Exh. P1 and Exh. P2) are the same as the guns which were issued to the deceased and PW.7 per the armoury register (Exh. P3). So, the confessions of Appellants 1 and 2 must be true.

Mr. Mkumbe pointed out that Appellant 3 did not make a statement so he should not be convicted solely on the confessions of co-accused persons. We concede that. In such a case, the law requires corroboration. However, we say that there is corroboration. Though Appellant 3 failed to pin-point where he had buried his gun, he led the investigators to the same area where Appellant 1 had buried his and where, later, Appellant 1 unearthed the gun which had been in the possession of Appellant 3. That cannot be coincidental. He actually possessed the gun, hid it and knew the location of hiding. Either genuinely or by pretence he failed to point out the exact spot he had buried it. When it was unearthed, Appellant 3 owned it. He denied to have done that, but the learned trial judge believed the investigators. We have absolutely no reason to differ with him.

So, we dismiss the appeal in its entirety.

DATED AT MBEYA THIS 16TH DAY OF JUNE, 1995.

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A.S.L. RAMADHANI
JUSTICE OF APPEAL

L.M. MFALILA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR