IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 18 OF 1994

BETWEEN

1. GEORGE MICHAEL RAJABU
2. SAMWELI YASIN MWAFUTE ... APPELLANTS

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Iringa)

(Mwipopo, J.)

dated the 7th day of December, 1993

in

Criminal Sessions Case No. 36 of 1991

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The appellants George Michael Rajabu and Samweli Yasin Mwafute were convicted of the murder of Amir Khalid Chodota, a driver with the TANESCO rural electrification project at Uwemba in Njombe district. The murder was alleged to have taken place on 10/11/89 at Lyamkera village in the same district. The appellants were jointly charged and tried with another person, Raymund Simon Ngondola, who was acquitted. The case for the prosecution was that on the evening of 10/11/89, the appellants purported to hire the deceased, who was driving a pick-up Land Rover Reg. No. TX 9782, to take them to Mtwango village to collect a luggage, but they murdered him in the vicinity of the village, dumped the body in an unfinished house at Lyemkera village, and drove off in the deceased's vehicle to Tanga where they sold it. The prosecution relied

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on the first appellant's cautioned statement (Exh.P7), his extra-judicial statement (Exh.P12), the second appellant's extra-judicial statement (Exh.P16) and evidence from witnesses to which we will have occasion to refer.

In the cautioned and extra-judicial statements the appellants made full and detailed confessions to the murder. The first appellant detailed his part of striking the deceased thrice on the head with a metal instrument while the second appellant spoke of being present and assisting the first appellant to dispose of the body. Although at the trial the first appellant retracted Exh. P7, the trial judge found, after a trial within a trial, that the cautioned statement was voluntarily made; and although the first appellant then repudiated Exh.P12, the judge found that it was in fact made. Similarly, although the second appellant retracted Exh. P16, the judge found, again after a trial within a trial, that the statement was voluntarily made. Generally, he held that the statements contained the truth and were additionally corroborated. Mr. Mwangole, learned advocate, who appeared for the appellants took issue with the finding on corroboration but his submissions were resisted by Mr. Mulokozi, learned State Attorney.

Before we turn to consider Mr. Mwangole's arguments we wish to dispose of a matter which came to our attention but to which neither counsel referred. This is particularly in connection with the first appellant's cautioned statement (Exh. P7) and to some extent the second appellant's extra-judicial statement (Exh. P16). In both

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instances the existence of the statement and the defence's objction thereto were made known in the presence of the assessors. The assessors were then discharged and trials within a trial were held. In the case of Exh. P7, after the judge's ruling and the return of the assessors, PW.3 who recorded the statement was not cross-examined again on its voluntariness. He merely tendered the statement, read it over, and was allowed to give evidence on other matters. Even when at the end he was cross-examined by the defence counsel, not once was the voluntariness of Exh. P7 reverted to. In these circumstances we think the trial judge seriously misdirected himself in admitting and acting upon Exh. P7 as he failed to follow the procedure laid down in Kinyori Karuditu v. Reginam (1956), 23 EACA 480. In that case, after stating that the existence of a controverted statement should not be known to the assessors until it has been ruled admissible, their Lordships continued and said:

> The judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible the Crown witness to whom it was made will then produce it and put it in if in writing, or will testify as to what was said if it was oral. The defence will be entitled, and the judge should make sure of its right, again to cross-examine the Crown witness as to the circumstances in which the statement was made ... both in the absence and again

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> in the presence of the assessors the normal right to re-examine will arise out of any such cross-examination.

Their Lordships went on to state the principle behind this procedure thus:

> The broad principle underlying that procedure is that the accused is entitled to present, not merely to the judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the judge's ruling that it is admissible in evidence is not the end of the matter; it still remains for both judge and assessors individually ... to assess the value or weight of any admission or confession thereby disclosed and also the accused is still at liberty to try to persuade them that he has good reason to retract or repudiate the statement concerned or any part of it.

In the instant case the assessors wereddenied the opportunity to assess the value or weight of the confession disclosed in Exh. P7 and the defence was denied the opportunity to persuade them and the judge that the first appellant had good reason to retract it. We asked ourselves whether the omission to follow the procedure warranted our interference with the decision of the trial court but we arrived at a negative answer. Excluding Exh. P7 there still remains Exh.P12 in which the first appellant made a longer and more detailed statement confessing to the offence. The trial judge found as a fact that Exh. P12 was made and we have no reason to differ. Although, on the other hand, the admission of the second appellant's statement did not

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> the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

In the case before us the trial judge found the appellants' statements to contain truthful accounts by stating:

> At the end of the trial [the assessors] gave their unanimous verdict that the confessions of both the 1st accused and the 2nd accused were voluntarily made and that they contained a truthful account of what happened. I share this view ...

After considering the detailed nature of the appellants' statements, we think it was inevitable to come to that conclusion. That means the appellants could have been convicted even without corroboration to their statements. But the trial judge went further and looked for corroboration. He found corroboration in three instances: First, in the evidence of PW.7 David Ngoda, the first appellant's maternal uncle at whose home in Tanga the appellants arrived in the month of November, 1989 with Land Rover TX 9782. He assisted them to sell the vehicle to PW.8 Hasnuckh Sachania. Second, in the evidence of PW.10 Evarist Nyambulapi, the deceased's superior at the Uwemba project, who related the deceased's movements on the evening of 10/11/89, and PW.11 Gladstone Komba, the deceased's co-driver. Third, the evidence of PW.2 Dr. Simon Mbuligwe whose detection

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of three wounds on the deceased's head was consistent with the three blows related in the appellants' statements.

Mr. Mwangole combined PW.7 and PW.8 in the first instance of corroboration and observed that these witnesses were charged for the murder of the deceased along with the appellants but were discharged under S.91 of the Criminal Procedure Act. He stated, and correctly, that PW.7 had participated in the sale of the vehicle. Moreover, the trial judge was uneasy with both witnesses, for he said:

> They have interests to serve especially since PW.8 is currently facing another case of receiving the same m/v 9782 suspected to have been stolen.

Mr. Mwangole argued, in the circumstances, that the evidence of these witnesses required corroboration and, as such, it could not corroborate the appellants' statements. We agree with Mr. Mwangole that evidence requiring corroboration cannot corroborate other evidence, and it seems to us that PW.7 and PW.8 required corroboration since they appear to have been of doubtful credibility in their testimonies. For instance, their cautioned statements, Exhs. D1 and D2 respectively, indicate that they were aware that they were handling a stolen motor vehicle but they denied this in their evidence. Indeed they were serving their own interests. We think, however, that even without the evidence of PW.7 and PW.8 corroboration on the vehicle aspect was furnished in the evidence of PW.3 S/Sgt Raphael. He arrested the first appellant at PW.7's home in Tanga and recovered the vehicle, although already dismantled, at PW.8's garage.

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Regarding the second instance of corroboration, Mr. Mwangole submitted that PW.10 and PW.11 said nothing touching on the offence. We think he was correct as regards the evidence of PW.10. This witness merely said that he drove the vehicle TX 9782 to Mtera and returned it to the Uwemba TANESCO offices on 8/11/89. The position was however different with PW.11. He related that on the evening of 10/11/89 the deceased drove him from Uwemba to Njombe where he was to buy drinks for guests who had arrived at Uwemba. While he was having a drink, the deceased asked for permission to take the drinks to Uwemba, seventeen kilometres away, and return for him, but that was the last time PW.11 saw the deceased alive. In Exh.P12 the first appellant spoke of hiring the deceased at Njombe on the evening of 10/11/89 to collect a luggage at Mtwango, and going with him to Uwemba where he offloaded beers, and then driving on to Mtwango. In Exh. P16 the second appellant similarly spoke of the deceased coming to Njombe with his boss on the evening of 10/11/89 and later collecting him and the first appellant for a drive that took them to Mtwango. We are of the view that the evidence of PW.11 was corroborative in providing confirmation that the deceased was hired on the evening of 10/11/89 as stated by the appellants. It was not in dispute that the deceased was never again seen alive.

Finally, Mr. Mwangole conceded that the doctor's evidence on the deceased's wounds was consistent with the blows as narrated by the appellants. We would add another item of corroboration. The deceased's body was discovered in an unfinished house at Lyamkera village where again the appellants stated to have disposed of it.

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As stated earlier, the appellants could have been convicted on the strength of their statements without the necessity of corroboration. We are satisfied that the available corroboration further put their guilt beyond reasonable doubt. The appeal is dismissed.

DATED at MBEYA this 10th day of June, 1999.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

B.A. SANATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR