IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: RAMADHANI, J. A.; MROSO, J. A. And KAJI, J. A.)
CRIMINAL APPEAL NO. 7 OF 2003
BETWEEN
SEKO SAMWEL ... APPELLANT
AND
THE REPUBLIC ... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)
(Ihema, J.)
dated the 6th day of April, 1999
in
Criminal Sessions Case No. 9 of 1999
.....
JUDGMENT OF THE COURT

RAMADHANI, J. A.:

The appellant, Seko Samwel, and her husband, Muninga Lugwisha, were living at Mwamashimba Village, Igunga District, Tabora Region, with their four children. Their first born, Pole Mwininga, the deceased, was mentally retarded and he often went astray to return home after a day or two and was involved in destroying other people's maize fields.

On 20th April, 1993, some pupils of Mwanshimba Primary School saw some strange thing thrown in their pit latrine. They reported the matter to their teacher, Paschal Peter (PW 1), who in turn alerted the relevant officials. Eventually the strange object was retrieved and was recognized to be the dead body of the deceased. That triggered off investigations which led to the prosecution of the appellant, her

conviction by the High Court of Tanzania (IHEMA, J.) and ultimately this appeal.

There were two pieces of evidence at the trial which formed the basis of conviction of the appellant. There was the testimony of the eye-witness, as it were, a younger brother of the deceased, Kali Mwininga (PW 2), and a retracted/repudiated confession of the appellant before Inspector Mashauri (PW 3).

PW 2, a child of tender years, gave evidence after the learned trial judge was satisfied that he possessed sufficient intelligence to know the duty to speak the truth. PW 2 in his evidence said that the appellant strangled the deceased with a rope in front of him and his other brothers and that she then put the dead body in a sack which the deceased used to sleep on and took it away to the school's latrine as PW 2 later came to know. He said that the appellant left him and his other brothers in the house. PW 2 said that he never told any body that incident not even his paternal grandfather and uncle.

In the cautioned Police statement, Exhibit P3, the appellant is recorded to have said that she killed the deceased by strangling him with a piece of *kitenge* cloth. She explained that she did that because of the problems she had concerning the deceased's condition and the complaints she got daily from fellow villagers regarding his mischief. She also said that she was left all alone to take care of the deceased. All others avoided the deceased.

At the trial the learned defence advocate, Mr. Kayaga, objected to the admission of the statement on the grounds that the provisions of section 58(1) of the Criminal Procedure Act (CPA) were not complied with and that:

> Secondly, it is the version of the accused that she made her statement under duress.

So, a trial within a trial was conducted and at the end of it the learned judge admitted the statement as having been given freely and that PW 3 complied with the provisions of section 58(1) read together with section 10(3) of the CPA.

The appellant made a sworn defence in which she denied killing the deceased and reiterated that she was forced by PW 3 to confess to the killing in the cautioned statement, Exh. P3. She also said that PW 2 told lies in court.

IHEMA, J. in his judgment said, in relevant parts:

> ... the court is satisfied that the evidence of PW 2 clearly corroborates the repudiated confession as such it can be acted upon as was held by the Court of Appeal in the case of Ali Salehe Msutu v. R. [1980] TLR 1. Not only that, it is the further view of the court that the cautioned statement of the accused is such that it cannot but be true ... I find nothing unusual to fault the testimony of PW 2, who indeed is an eye witness as well as a witness of truth in this case.

The court thus convicted the appellant on the basis of those two pieces of evidence and found that the retracted cautioned statement found corroboration from the evidence of PW 2, a child of tender years.

Mr. Mutalemwa, learned advocate, appeared on behalf of the appellant with a three-ground memorandum of appeal. First, he said that the learned trial judge did not conduct a *voire dire* test to establish that PW 2 had sufficient intelligence to know the duty of telling the truth. The complaint of the learned advocate was that the learned judge did not record the questions he had put to PW 2 and the answers PW 2 gave.

Mr. Masala, learned State Attorney, for the respondent/Republic conceded that the learned judge did not record the question-answer session nevertheless from the conclusion the learned judge came to, it is obvious that the *voire dire* took place.

The learned judge said:

> Witness does not understand the meaning of oath and will give evidence not on oath. He is possessed of sufficient intelligence to understand the need of telling the truth.

We agree with Mr. Masala, and it is abundantly clear to us, that the learned judge must have put questions to PW 2 and that from his answers the learned judge came to that conclusion. Besides, Mr. Mutalemwa has misconstrued section 127(2) of the Evidence Act, 1967, which provides:

> Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, **if in the opinion of the court, to be recorded in the proceedings,** he is possessed of sufficient intelligence to justify the reception of his evidence, and understand the duty of speaking the truth. (emphasis is ours)

So, what is required to be recorded by that section is the opinion of the court, not the questions and answers. We are not aware of any authority that a judge should record the questions and answers. Admittedly, it is a healthy practice to be recommended for the lower courts as it would assist appellate courts to determine whether or not the evidence was properly admitted.

However, we have some doubts on the age of PW 2 at the time of the death of the deceased. The appellant in her evidence in court said that the deceased was 7 years old. The appellant said in the extra-judicial statement, Exh. D 1, that the deceased was ten years old. We are not going to use Exh. D 1 as it has a crop of its own problems which we shall talk about later. It is not in dispute that the deceased was the first born. If the deceased was 7, and if PW 2 was the second born, then PW 2 would have been about 5 years at the time of the incident. The age of PW 2 at the time of trial was not disclosed. We are not sure whether six years later PW 2 would remember in such details what he saw when he was of the age of 5 years.

The learned judge regarded the lucidity of PW 2 as the illustration of his credibility:

> And not only that [PW 2] gave an impressive narrative of what transpired on the fateful night.

But the appellant in her evidence in court questioned the credibility of PW 2 when she said: "if it was true [PW 2] would have said so on the same day". And PW 2 himself on cross-examination answered:

> I made a statement to the Police after the death of Pole and the statement reflects what I have said here in court ... What I have said here in court is not what I told the Police. I did not just say these facts to the Police.

We do not have the statement PW 2 gave to the Police after the incident but going by his own reply, it is obvious that what he said in court, six years later, was more detailed than what was contained in the statement he gave immediately after the event! We cannot help wondering with Mr. Mutalemwa why PW 2 was more lucid six years after the event than immediately after the event.

The second ground of appeal was that the learned judge erred in holding that the evidence of PW 2 could corroborate the retracted confession. Mr. Masala submitted that if it is found that the evidence of PW 2, a child of tender years, was properly admitted under section 127(2) of the Evidence Act, then under the provisions of sub-section (4) of that section, that evidence has corroborative value.

That should be so but we have expressed our doubts on the credibility of PW 2 and as such we do not think that that evidence has any corroborative value. So, this ground succeeds but for different reasons.

The last ground of appeal was that the learned judge erred to have convicted the appellant on a repudiated confession. Mr. Mutalemwa argued that the learned judge ought to have warned himself of the dangers of convicting relying on repudiated confession alone and he referred us to Ali Salehe Msutu v. R. [1980] TLR 1. Mr. Masala submitted that a warning is required only if the repudiated confession was the sole evidence relied upon and he pointed out that this was not the case here.

What Mr. Masala said is true and Mr. Mutalemwa himself conceded as much. However, our doubts regarding PW 2's evidence have not been cleared. So, actually what remains is the cautioned statement only. Mr. Masala submitted, and rightly so, that the conduct of the accused person (appellant) could be used to corroborate. There are a number of authorities to that effect like Pascal Kitigwa v. R. [1994] TLR 65. The learned State Attorney pointed out a number of instances of the conduct of the appellant which could corroborate. However, we do not think this matter need detain us as we shall demonstrate.

During the trial within a trial one Robert Mkoma Shillah, a Senior Primary Court Magistrate, who recorded the extra-judicial statement of the appellant, gave evidence as PW 2. He produced that statement and at the application of the defence the learned judge admitted it as Exh. D 2. With all due respect that was strange because the trial within trial was to determine the admissibility of the cautioned statement and not of the extra-judicial statement, and so, the latter should not have been produced and admitted at that stage. However, though it was admitted the learned judge did not bring it to the notice of the assessors who were excluded at the time of trial within a trial.

The extra judicial statement was recorded on 10th May, 1993, eight days after the cautioned statement was recorded, on 2nd May, 1993. In the extra-judicial statement the appellant did not say anything about being involved in the death of the deceased. This raises a doubt on whether or not the cautioned statement was really freely given. We do not know what the assessors' opinion would have been had they become seized of this diametrically opposite statement made within a week of the other. Not only so but the learned judge himself did not use it completely.

In addition Exhibit P 3, the cautioned statement, has another problem. PW 3 recorded it by putting questions to the appellant who then answered them instead of leaving her to tell her story without being led. So, in fact what has all along been taken as a cautioned

statement, that is, a statement under section 58 of the CPA, is in fact a record of an interview under section 57. The initiative in a cautioned statement under section 58 comes from the suspect and then there is a requirement for the recording officer to ensure that the suspect has been cautioned as required under section 53(1)(c) of the CPA.

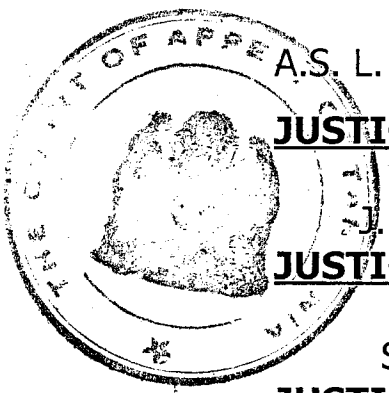
This is why Mr. Kayaga at the trial said that the cautioned statement did not comply with section 58(1) of the CPA which provides:

> When a person under restraint informs a police officer that he wishes to write out a statement, the police officer-
>
> (a) shall cause him to be furnished with any writing materials he requires for writing out the statement; and
>
> (b) shall ask him, if he has been cautioned as required by paragraph (c) of subsection (1) of section 53, to set out the commencement of the statement the terms of the caution given to him, so far as he recalls them.

A cautioned statement under section 58 is supposed to be written without the writer being led by being asked questions. That is the import of section 58. On the other hand, a record of an interview under section 57 is required to be recorded in question and answer model. This comes about when a police officer is interviewing a person to ascertain whether he/she has committed an offence and if that person makes a confession. So, in effect the provisions of section 58 were not complied with in respect to Exh. P3.

All in all we are convinced that both pieces of evidence relied upon by the learned judge are no free of doubts. As such we quash the conviction of murder and set aside the sentence of death and order that the appellant be released immediately unless her further incarceration is lawful. The appeal is allowed.

DATED at MWANZA this 11th day of March, 2005.



A.S. L. RAMADHANI
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR