IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 5 OF 2004

RAMADHANI SALUM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Tabora)

(Bubeshi, J.)

dated the 21st day of November, 2003
in
Criminal Sessions Case No. 73 of 1997

JUDGMENT OF THE COURT

27 February & 16 March 2007

MROSO, J.A.:

The appellant was convicted by the High Court, Bubeshi, J., for the murder of his grandmother and was accordingly sentenced to death. He believes, however, that he was wrongly convicted and has appealed to this Court.

According to the prosecution evidence which led to his conviction, the appellant and his father believed the deceased was a witch who had killed by witchcraft family members, including a child of the appellant. His father suggested to him that he should kill the grandmother. He did exactly that by inflicting a deep cut wound on the head of his grandmother, using an axe. A postmortem report on the deceased shows that the deceased died from brain injury and severe bleeding.

Although the offence was committed on 14th April, 1994 the appellant was arrested in a different village by a member of the militia (sungusungu) of that other village, one Said Rashid, PW4, on 18th April, 1994. On the following day, 19th April, 1994 he was handed over to the police and No. B 1936 Detective Station Sergeant Samwel – PW3 – was assigned to investigate the case.

Said Rashid (PW4) and Detective Station Sergeant Samwel (PW3) claim that the appellant admitted to them that he killed his grandmother. In a caution statement (Exh. P5) which was admitted

as evidence after a trial within a trial, he claimed that his father had directed him to kill his grandmother in the following words –

"Nakutaka mwanangu umtoe roho bibi yako,
usipomtoa roho hatutapatana mimi na wewe".

And that he should use an axe to kill the deceased. Afraid of displeasing his father, and also for fear of his life, he killed the deceased with an axe.

In his first ground of appeal the appellant criticizes the trial judge for admitting the caution statement – Exhibit P5, which he says was recorded under unfavourable conditions. In the second ground of appeal, also in relation to the caution statement, the appellant complains that the caution statement was not in any case recorded "according to required standards of the law".

Mr. Banturaki, learned advocate for the appellant, argued those two grounds together. He said that the caution statement shows it was taken by Detective Station Sergeant Samwel (PW3) in the presence of one Bernard Nkumbi, a teacher. The appellant had not asked for the said teacher to be present nor was his consent sought

and obtained before this stranger sat in when the caution statement was being taken. He submitted that the presence of that stranger offended sections 53 to 58 of the Criminal Procedure Act, 1985. A caution statement must be taken in the presence of the police officer taking the statement only. On the other hand, if another person not requested by the accused person be present, that might intimidate the maker of the statement and might affect its voluntariness, especially so where the accused as in this case, according to Mr. Banturaki, was aged only 13 years. He concluded on that point by submitting that since the caution statement as a confession was obtained as a result of intimidation, the trial court should have refused to admit it as evidence at the trial.

Mr. Banturaki also argued that Exhibit P5 – the caution statement, was recorded in a question and answer form, suggesting that it was taken under section 57 of the Criminal Procedure Act, 1985, vitiating its claimed status as a caution statement. A caution statement has to be taken under section 58 of the Criminal Procedure Act, 1985. Since this statement was not taken in the correct manner under section 58, it was not a caution statement in law and it ought

not to have been considered as such and should not have been admitted as an exhibit. He urged this Court to ignore it. He referred the Court to the case of **Seko Samwel v. The Republic,** Criminal Appeal No. 7 of 2003 (unreported). It is his view that if the evidence of the statement which was referred to wrongly as a caution statement is discounted, the remaining evidence on record from PW1 – Dr. Timothy Chisongela; PW2 – Detective Station Sergeant Vincent, PW3 – Detective Station Sergeant Samwel and PW4 – Said Rashid Sokoni was either hearsay or merely formal. That would not found a conviction. He therefore asked the Court to allow the appeal.

When the Court required him to comment on the assessors who sat in court during the trial within a trial, Mr. Banturaki said it was improper for the trial judge to allow the assessors to participate during the trial within a trial. He should have asked them to retire. He did not, however, think that his client was prejudiced because the caution statement which was the subject matter of the trial within a trial was subsequently admitted into evidence. On the other hand, if the statement were eventually found to be inadmissible then the

assessors would have heard inadmissible evidence and the appellant thereby would have been prejudiced.

The respondent Republic was represented by Mr. Rweyongeza, learned State Attorney. But Mr. Mdemu, learned State Attorney, was also in court and the Court called on him to address it on the issue it had raised about the assessors sitting in court during the trial within the trial and heard the evidence on whether or not the appellant's alleged caution statement was admissible evidence.

Mr. Mdemu noticed that, indeed, the record does not show that the assessors were asked to retire just before the trial within a trial commenced. The impression created was that the assessors heard the evidence relating to the admissibility or otherwise of the statement which was alleged to be a caution statement and containing a confession by the appellant to the offence of murder. In the event the assessors actually heard the evidence during the trial within a trial, no miscarriage of justice occurred because, luckily in this case, the statement was admitted into evidence. He said the failure by the trial court to retire the assessors was an omission

which was curable under section 388 of the Criminal Procedure Act, 1985.

Mr. Rweyongeza addressed the Court on the grounds of appeal, taking the first and second grounds together like Mr. Banturaki had done. Regarding the presence of the teacher, Bernard Nkumbi, when PW3 was taking appellant's caution statement, Mr. Rweyongeza said that the appellant did not object to the teacher sitting in. Alternatively, he argued that the presence of the teacher should have given assurance to the appellant that what was being done was normal and proper. He quoted the following words from the statement which allegedly demonstrate the assurance. They read –

> *"... nimemuweka shahidi anayejitegemea asikilize maelezo anayoyatoa Ramadhani Salum bila kulazimishwa. Jina lake ni Bernard Nkumbi".*

At any rate, he said, the recording officer had complied with section 53 (1) of the Criminal Procedure Act, 1985. When querried by the Court he agreed that the recording officer is not entitled to bring in

people of their choice to be present when recording a caution statement from a suspect.

When asked by the Court if the caution statement was made under section 58 of the Criminal Procedure Act, 1985 he said the statement was taken under section 57 and not section 58. The statement would be under section 58 if the appellant had asked to make a statement. He submitted that the caution statement amounted to a confession and the trial court was entitled to base a conviction on the confession.

Mr. Rweyongeza urged that the adduced evidence was sufficient to found a conviction after the confession was corroborated by Exhibits P1 – the postmortem report and Exhibit P4 – an axe. As for the age of the appellant, he said that according to medical opinion on Exhibit P2, a PF3 in respect of the appellant, he was found to be 18 years old. He prayed that the appeal be dismissed in its entirety.

We now wish to discuss the grounds of appeal. It is noted that when arguing the appeal Mr. Banturaki did not suggest that the appellant never made the caution statement or that the confession was false. The complaints in this appeal, as stated earlier in this judgment, are that the caution statement was recorded under unfavourable conditions and contrary to legal requirements. An instance of unfavourable conditions cited by the learned counsel was the presence of Bernard Nkumbi, the teacher, when the caution statement was being taken. With respect, we agree with Mr. Banturaki that the recording officer had no business bringing someone of his choice to be present when taking the caution statement from the appellant and the law does not allow him to do any such thing. What the law requires a police officer to do, both under section 53 (1) (c) and section 54 (1) of the Criminal Procedure Act, 1985 is to inform a person under restraint that he may communicate with a lawyer or relative or friend of his choice. Again, we agree with Mr. Banturaki that the presence of the stranger who had not been requested by the appellant during the interview and the recording of a caution statement could have an intimidating influence

on the appellant. Such practice must be deprecated and strongly discouraged. In this case, Mr. Banturaki was of the view that considering the youthful age of the appellant at the time, the voluntariness of the statement he made may have been affected. We agree that in certain cases that may be so but in this case nowhere in the evidence of the appellant did he suggest that the presence of the teacher made him say things he did not intend to say. We do not, therefore, think that that irregularity prejudiced the appellant in fact.

It seems obvious indeed that the caution statement, Exhibit P5, was taken in the form of question and answer. So, clearly, the statement was taken under the provisions of section 57 of the Criminal Procedure Act, 1985.

In **Seko Samwel v. The Republic,** Criminal Appeal No. 7 of 2003 (unreported) this Court appeared to say that a caution statement could only be made under section 58 of the Criminal Procedure Act, 1985. In discussing a caution statement which had been tendered as Exhibit P3 in the trial court the Court said –

> "In addition Exhibit P3, the cautioned statement, has another problem. PW3 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 there is a requirement for the recording officer to ensure that the suspect has been cautioned under section 53 (1) (c) of CPA."

As correctly stated in the **Seko Samwel** case cited above the initiative in a caution statement under section 58 is from the suspect. Subsection (1) of section 58 reads –

> "58 (1) Where 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, and to set out at the commencement of the statement the terms of the caution given to him, so far as he recalls them.

The **Seko Samwel** case was cited with approval in a subsequent decision of this Court – **Rashid Ally Mtiliga and 2 Others v. The Republic,** Criminal Appeal No. 240 of 2004 (unreported). In that case three exhibits – P3, P4 and P5 purported to be caution statements given under section 58 of the Criminal Procedure Act, 1985. The Court found that they were interviews under section 57 of the said Act and disregarded them. We take it that the basis for that decision was that the exhibits were not volunteered statements under section 58 as they purported to be.

We do not think, however, that this Court in the **Seko Samwel** case meant to lay down that a caution statement, which may also amount to a confession, could not be made under section 57 of the Criminal Procedure Act, 1985. In fact there is no such pronouncement in either the **Seko Samwel** or in the **Rashid Mtiliga** cases. In the **Seko Samwel** case, apparently, the caution statement, which was in the form of question and answer, purported to have been taken under "section 58 (1) read together with section 10 (3) of the CPA." This Court rightly said, considering the format used, it could not have been taken under section 58.

But a caution statement can be taken under section 57 as well. Section 57 (2) reads:-

> (2) where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make, or cause to be made, while the interview is being held

> or as soon as practicable after the interview is completed, a record in writing, setting out –
>
> ...
>
> (d) whether a caution was given to the person before he made the confession and, if so, the terms on which the caution was given, the time when it was given and any response made by the person to the caution; ..."

Caution statements, therefore, are not made exclusively under section 58 and Exhibit P5 in this case is not any less a caution statement merely because it was taken under section 57 and not section 58. The circumstances in which the two kinds of caution statements are taken are different. The one taken under section 57 may be as a result either of answers to questions asked by the police investigating officer or partly as answers to questions asked and partly volunteered statements. The statement under section 58 is a result of a wholly volunteered and unsolicited statement by the suspect.

The next question to consider is whether the fact that the assessors sat in court during the trial within a trial would affect the probative value of Exhibit P5 – the Caution Statement? With respect, we do not think so in the circumstances of this case and Mr. Banturaki on reflection conceded to this position. During the trial within a trial the assessors heard evidence which was eventually adjudged admissible and, therefore, there was no prejudice to the appellant. But needless to say, the established practice is that, in a trial with the aid of assessors, as soon as it is apparent that the admissibility of a piece of evidence will be contested, the trial court asks the assessors to retire until the question of admissibility of that piece of evidence is decided one way or the other. If the court decides that that piece of evidence is inadmissible then the assessors will not have heard prejudicial, inadmissible evidence. In the event, however, that piece of evidence is found admissible, then it will be given in the presence of the assessors after they have been called back to court. Trial judges are enjoined to observe this practice.

The trial judge rightly considered that the prosecution case very much depended on the caution statement – Exhibit P5. It further considered the circumstances in which it was given and was satisfied that it was voluntarily given, was true and amounted to a confession. We think the trial court was entitled to come to that conclusion and could rely on it and the other pieces of evidence, such as the postmortem report as to the cause of the death of the deceased which was consistent with the appellant's confession, to convict the appellant as charged. The apparent suggestion that he acted under compulsion by the father would not meet the requirements in section 17 of the Penal Code, Cap. 16 of the Laws. In order for a defence of compulsion to be accepted an accused will have to show that during the whole of the time in which the act of killing was being done he was compelled to do the act under pain of instant death or grievous bodily harm if he refused to kill. Mere threats of future injury, a fear to displease, will not amount to compulsion within the meaning of section 17 of the Penal Code.

The appellant having been convicted of murder, should he have been sentenced to death?

Section 26 (2) of the Penal Code stipulates that a sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is under eighteen years of age.

Mr. Banturaki has argued that the appellant was under the age of eighteen at the time he was sentenced to death. But a medical report on a PF3 – Exhibit P2 – of 21/4/1994 showed that the appellant was eighteen years of age. By the time the sentence of death was pronounced on him on 21st November, 2003, which was nine years after 1994, the appellant would be 27 years. When he gave evidence in his own defence at the trial apparently on 10th December, 2002, he said he was 22 years of age. So, the appellant was about 23 years at the time he was sentenced, by his own reckoning. It was lawful, therefore, for the trial court to pass the sentence of death on the appellant.

The appeal is dismissed in its entirety.

GIVEN AT MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR