IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LUBUVA, J.A., NSEKELA, J.A. And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 92 OF 2007

1. DICKSON ELIA NSAMBA SHAPWATA
2. NELSON MOHAMED MWAZEMBE } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Lukelelwa, J.)

dated the 2nd day of October, 2006
in
Criminal Sessions Case No. 36 of 2004

JUDGMENT OF THE COURT

20 August 2007 & 14 July 2008

NSEKELA, J.A.:

The two appellants namely Dickson Elia Nsamba Shapwata and Nelson Mohamed Mwazembe were found to have murdered the deceased Loti s/o Mwalusanya at Sambewe Village, Mbozi District on or about the 16.12.2001. They were accordingly convicted and condemned to death by the High Court sitting at Mbeya (Lukelelwa, J.). Dissatisfied with the decision of the learned trial judge, they have appealed to this Court.

Briefly, the deceased was a village-mate of the appellants including PW1, Mapinduzi Wenes; PW2, Tamson Kalumwana and PW3, Simon Bumaje. The circumstances surrounding the deceased's death are still a mystery. There was no eye-witness to the murder. However on the 7.12.2001 the first appellant was seen by PW1, PW2 and PW3 at close range dragging a body and attempting to bury it in a pit. This is the event which led to the first appellant's arrest and subsequent incarceration in police custody. The appellants conviction almost entirely depended on the caution statements each made and recorded by PW5 C.6987 D/Sgt. Edward on the 8th and 9th December, 2001. We shall revert to them later in the course of this judgment.

Mr. Mkumbe, learned advocate represented the appellants, as he had in the court below, whereas the respondent Republic was represented by Mr. Malata, learned State Attorney. Mr. Mkumbe raised *the following two grounds –*

> *"(1) The trial High Court erred in law and fact in basing the conviction of the first appellant, Dickson Elia Nsamba Shapwata, on the evidence of PW1, PW2 and PW3 which evidence consisted of glaring contradictions and inconsistencies*

that made their evidence unworthy of belief.

(2) The trial High Court erred in law and fact in basing the conviction of the second appellant, Nelson Mohamed Mwazembe, on the retracted and uncorroborated confessions of the two appellants."

We propose to commence with the first ground of complaint. It is questioning the credibility of the evidence of PW1, PW2 and PW3 against the first appellant. We would like to point out at the outset that the first appellant's cautioned statement has not been made an issue. The learned advocate submitted that the evidence against the first appellant by PW1; PW2 and PW3 was riddled with glaring contradictions and inconsistencies, thus rendering their respective testimonies unworthy of belief.

On his part, Mr. Malata submitted that PW1, PW2 and PW3 arrived at the scene of crime at the same time, at about 5.00 pm. Each witness testified what he saw at the scene. It was not possible to have a uniform explanation for what each saw. Consequently, any

discrepancies in their respective testimonies was not something out of the ordinary. It was expected but inconsequential.

In the instant case, there is admittedly no eye-witness evidence to the murder of the deceased. The prosecution case was essentially based on the testimonies of PW1, PW2 and PW3 as well as the cautioned statement, exhibit P1 recorded by PW5. What emerges from the testimony of PW1, PW2 and PW3 is that on receipt of information of death in their locality, they proceeded to follow up marks and ended up in a semi-finished house where they saw the first appellant digging a pit. PW2, Tamson Kalumwana returned to the village to seek reinforcement and returned in the evening with militiamen. PW1 and PW3 the Village Chairman who had remained behind, saw the first appellant carry a dead body from the semi-finished house and deposit the same into a pit. The first appellant, on seeing PW1 and his party, attempted to flee from the scene but he was overpowered and arrested. The body of the deceased was found in the pit and when questioned, the first appellant admitted that he had deposited the body of Loti s/o Mwalusanya in the pit.

Mr. Mkumbe valiantly sought to discredit the prosecution evidence. He took exception to the following evidence by PW1 when, during examination-in chief, he said –

> *"We looked into the pit and saw a dead body which had no skin from the legs up to the neck."*

Under cross-examination from Mr. Mkumbe, PW1 said –

> *"I saw the body of the deceased in the pit. I did not identify it in the pit."*

On our part we do not see any contradiction in these two statements. The fact is that there was a dead body in the pit. Another purported discrepancy related to the number of holes dug by the first appellant. PW2 testified that there were about seven holes dug for planting bananas whereas PW3 during cross-examination stated –

> *"There was no other pits dug there apart from the collapsed pit."*

Yet another contradiction was the identity of the first appellant. Mr. Mkumbe submitted that the testimonies of PW1, PW2 and PW3 contradicted each other. PW2 was informed by PW3 that someone in the village was dead. This meant that his identity was not known. At

that point in time the first appellant had not been seen at the semi-finished house. PW1 then said –

> *"Then we followed the dragging marks and ended into unfinished house which we saw ahead of us. Then we stopped looking at the unfinished house,* ***that is when we saw our brother Dickson Elias Shapatwa digging out a pit. Dickson Elias Shapatwa is the first accused"*** (emphasis added).

PW1 and his village-mates saw the first appellant digging a pit when they arrived at the semi-finished house. With respect to the learned advocate, we do not subscribe to his view that the evidence of PW1, PW2 and PW3 was unworthy of belief. The learned trial judge considered their evidence and stated –

> *"I have also considered whether PW1, PW2 and PW3 made a correct identification of the first accused. They made the identification before sunset. It was daytime, and they knew the first accused before being their village-mate. PW1 and PW3 had kept the first accused under observation for a long time."*

The point being made here is that these three witnesses found the first appellant at the scene where he was trying to bury the deceased. Their evidence is not inconsistent with this finding. In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter. (See: **Mohamed Said Matula** v **Republic** [1995] TLR3). The learned authors of Sarkar, **The Law of Evidence** 16th edition, 2007, have this to say at page 48 –

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."*

We are of the firm view that the purported discrepancies in the evidence of PW1, PW2 and PW3 are trifling discrepancies and omissions which did not corrode their evidence. They do not shake the basic version of the prosecution case. We therefore reject the first ground of complaint.

We now come to the second ground of complaint. Mr. Mkumbe submitted that evidence against the second appellant was his cautioned statement recorded by PW5 on the 9.12.2001. The learned advocate challenged this statement on three fronts. First, he contended that this statement was made and recorded after PW5 had on the 8.12.2001 recorded the cautioned statement of the first appellant. Under the circumstances, he argued, PW5 had prior knowledge of the first appellant's cautioned statement. He submitted that the appellants' statements should have been recorded simultaneously. Secondly, Mr. Mkumbe submitted that the appellants had retracted/repudiated the statements and so far as the second appellant was concerned, there was no other independent evidence linking him with the murder, apart from the first appellant's cautioned statement, a co-accused. The evidence of such a co-accused was of little, if any, probative value.

We are in entire agreement with Mr. Mkumbe that PW5 recorded the appellants' cautioned statements on separate days, namely the 8.12.2001 and the 9.12.2001. However Mr. Mkumbe was unable to refer to any provision of the law that had been contravened. The recording of interviews and statements by the police is governed by sections 57 and 58 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA). The purported violation of the law is conspicuously absent from these provisions. We are in respectful agreement with Mr. Malata, learned State Attorney, that PW5 was enjoined to comply with section 58 of the CPA and there was no indication to the contrary shown.

We now proceed to consider whether or not the cautioned statements were voluntarily made or not. Mr. Mkumbe submitted that the first appellant was man-handed by the villagers and police in the course of being arrested but before being handed over to police custody. He therefore submitted that when he made the statement he was not a free agent. He added that the prosecution did not challenge this fact. Another aspect was that PW5 had noticed scars on the body of both the appellants.

In order to effectively challenge a confession, a person is practically obliged to give evidence. An appellant must give evidence to show how the threat, inducement, or promise caused him to made the confession as their mere existence is not enough to make the confession involuntary. One should be able to say that without it, the person would not have made a statement. In the instant case, the learned trial judge correctly conducted a trial within a trial in respect of each disputed statement, evaluated the evidence adduced before him and concluded that the statements were made voluntarily. This is what he stated –

> *"The crucial issue is whether the two statements were voluntarily made by the two accused persons. It is a fact from the evidence that the first accused was found to have a scar on his head. This was a result of the assault he received from the villagers, the same applies to the second accused. The two statements are clearly detailed and nobody who was not privy to the transaction could have given such statements.*

The claims that the accused persons were tortured by policemen including PW5 Sgt. Edward, is difficult to believe, if six policemen had systematically assaulted the accused persons, they could not have been able to give such details in their interview which took up to about three hours.

I don't think that they were still haunted by the beatings by the villagers when they made the confessions. I hold that the statements were voluntarily made by the two accused persons, and they are hereby admitted in court as evidence."

With respect, it is evident to us that the learned trial judge made a reasoned ruling and was satisfied that torture had not been applied in extracting the statements from the appellants and that they were voluntarily made. On our part, we have no cogent reasons to fault the learned trial judge. A trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a re-assessment of their credibility (See: **Omari Ahmed** v **The Republic** [1983] TLR 52).

The last question to be answered is, was it open to the learned trial judge to base the conviction of the second appellant solely on his retracted/repudiated confessional statement without any corroborative evidence? It will be recalled that this was the thrust of the second ground of appeal. With respect, we agree with Mr. Mkumbe that it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant. However, according to the current state of the law, a court may convict on a retracted/repudiated confession even without corroboration. In the words of Duffus, V.P. in **Tuwamoi** v **Uganda** [1967] EA 84 at page 91 –

> *"The present rule then as applied in East Africa, is regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstances of the case that the confession must be true." (See also:* ***Hemed Abdallah*** *v* ***Republic*** *[1995] TLR 172).*

The learned trial judge was left in no doubt that each of the statements admitted of no ambiguity as to who were the perpetrators of this murder. The confessions were enough to convict both the appellants with murder. We have equally read those statements. The words are clear, unambiguous and unmistakably convey that the appellants were responsible for the murder of Loti s/o Mwalusanya. Like the learned trial judge, we are satisfied that taking into account all the circumstances of the case, the learned trial judge was justified in his finding that the cautioned statements were but true and that the case against the appellants had been proved beyond reasonable doubt.

For these reasons, we dismiss the appeal in its entirety.

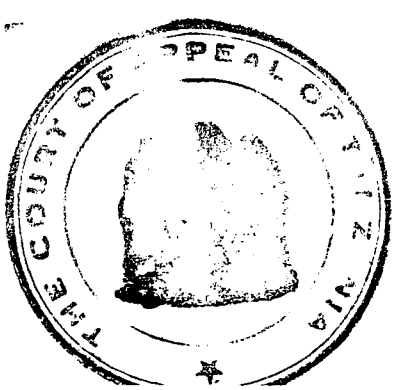
DATED at DAR ES SALAAM this 30th day of May, 2008.

D. Z. LUBUVA
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



(F.L.K. WAMBALI)
REGISTRAR