IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NSEKELA, J.A., KILEO, J.A. And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 150 OF 2005

UMALO MUSSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Luanda, J.)

dated the 29th day of June, 2005
in
Criminal Sessions Case No. 26 of 2000

JUDGMENT OF THE COURT

18 & 22 May, 2009

NSEKELA, J.A.:

The appellant Umalo Mussa, was convicted of the murder of (i) Miburo w/o Rwabuhaya and Rwabuhaya s/o Kilai. The murder was alleged to have taken place on or about the 18.3.95 at Karongo Village, Karagwe District, Kagera Region. The case for the prosecution was that the deceased persons, being husband and wife had gone out for a drink. Apparently, their son one Hezron (now deceased) together with Agnes Kalala (now deceased) and the appellant hatched a plot to kill them. When they returned home at

night, the couple were allegedly murdered by the appellant and his colleagues.

To establish its case, the prosecution called three witnesses. PW1, Kezia Manyama, a Justice of the Peace to whom the appellant made a confession; PW2 Sosthenes Kabusi and PW3 Ernest Tigelelwa, to whom it is also alleged, the appellant admitted committing the offence. The learned trial judge discounted the testimony of PW2 and PW3 but convicted the appellant on the basis of the extra-judicial statement recorded by PW1. Although at the trial the appellant retracted/repudiated the extra-judicial statement, the learned trial judge found, after conducting a trial within a trial, that the extra-judicial statement was voluntarily made and contained the truth.

At the hearing of the appeal, Mr. S. Kahangwa, learned advocate, represented the appellant and Mr. Victor Kahangwa, learned State Attorney, appeared on behalf of the respondent Republic. Mr. S. Kahangwa, preferred two grounds of appeal, but in

the course of hearing the appeal, he abandoned the second ground. The sole ground of appeal reads –

> *"The learned judge erred in law and in fact for his failure to observe that the conviction was based on the repudiated confession without ascertaining whether or not the same was made voluntarily."*

Mr. S. Kahangwa submitted the following reasons for holding that the confessional statement was not voluntary. **First,** the appellant was in police custody since the 20.3.95 but PW1 recorded the extra-judicial statement on the 24.3.95. He alleged that while he was in police custody, the appellant was subjected to torture. On the 23.3.95 the District Court had made an order that the appellant be remanded in custody but instead of being taken to remand prison, he remained in police custody, then taken the next day to PW1 to make his confession. The police did not give any explanation for keeping the appellant in their custody. **Second**, the learned advocate complained that the learned trial judge directed his mind only to the

voluntariness of the extra-judicial statement. He did not consider whether it was truthfully made or not.

Mr. Victor Kahangwa, learned State Attorney, on his part, submitted to the effect that the confession, standing alone, was enough to convict the appellant. He added that there was no evidence on the record that the appellant was subjected to torture while in police custody. If that was the case, then the appellant should have informed PW1 – the Justice of the Peace – who recorded his statement. There was no evidence of torture when the appellant was presented to PW1 on the 24.3.95. In support of his submissions, the learned State Attorney referred the Court to two cases (i) **Shihobe Seni and Another v Republic** [1992] TLR 330; (ii) **Hamis Athman and Two Others v Republic** [1993] TLR 110.

The resolution of this appeal depends entirely on the extra-judicial statement made by the appellant to PW1. This necessitates that we first of all decide whether or not it was a confession under law. Section 3 (1) of the Evidence Act, Cap. 6 RE 2002 defined **"confession"** as –

(a) words or conduct, or a combination of both words and conduct, from which whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence; or

(b) a statement which admits in terms either an offence the person making the statement has committed an offence; or

(c) a statement containing an admission of all the ingredients of the offence with which its maker is charged; or

(d) a statement containing affirmative declarations in which incriminating facts are admitted from which when taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence."

The relevant portion of the confessional statement, exhibit P4, is in the following terms –

> *"Tulifika muda wa saa 1.30 usiku hatukuwakuta hapo nyumbani naye Hezron aliingia ndani akasema sisi tupike tule, muda wa saa 4.00 usiku wakaja ndipo hapo Hezroni alianza kumpiga baba yake Rwebuhayo na kisha yule mama simfahamu jina lake* ***ndipo nami nilianza kumkata mapanga tukatoka mbio tukiklmbia na Hezroni akinifuata nyuma.*** *Asubuhi yake niliona sungusungu akiniweka chini ya ulinzi kwamba watu tumewaua,* ***nami niiieieza kwamba ni kweli sisi ndiyo tuliwaua*** (emphasis added).

This is undoubtedly an admission by the appellant of his active participation in slashing the deceased persons with *pangas*, then escaping from the scene of crime. The intention to kill the deceased persons is clearly shown in this statement read together with the post-mortem examination report – exhibit P1. The appellant attacked the deceased persons with *pangas* inflicting severe scalp

wounds as described in exhibit P1, from which they died. With respect, we are of the settled view that exhibit P4 is a confession in terms of section 3 (1) (b) and (c) of the Evidence Act.

The next issue for consideration and determination is whether or not the confessional statement was voluntary. In the case of **Ibrahim v The King** [1914] AC 599, Lord Sumner made the following pertinent observations at page 609 –

> *"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."*

Before we continue with our discussion on the voluntariness of the confessional statement, what does the Evidence Act have to say

on this? This takes us to sections 27 (2); (3) and 28 of the Evidence Act. They provide as follows –

> *"27 (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 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.*
>
> *28. A confession which is freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined in the Magistrates Courts Act, 1963, or a justice of the peace under the Act, may be proved as against that person."*

The confessional statement was recorded by PW1, a Justice of the Peace. After Mr. Rweyemamu, learned advocate, challenged the admission of the statement in evidence, the learned trial judge conducted a trial within a trial in order to establish its voluntariness or otherwise. How is the court to establish that the appellant was a free agent before PW1. This Court had occasion to deliberate on this issue in the case of **Hatibu Gandhi and Others v Republic** [1996] TLR 12. At page 36, the Court stated –

> *"In or considered opinion, the issue whether or not the appellants pretended to be free agents before the magistrates, cannot be resolved in a court of law by other means except by reference to the conduct and physical appearance of the persons concerned. Only the Almighty God, or perhaps those who claim to have what is known in psychology as Extra Sensory Perception (ESP), can tell directly what goes on in another persons mind without reference to the conduct or physical appearance of that other person. For most humans, including this Court, what goes on the minds of another*

person can reasonably be ascertained only by reference to the conduct or physical appearance of that person."

At the end of the trial within a trial, the learned trial judge concluded that the statement was voluntarily made. Even at this appellate stage, we can review that evidence and make our own findings. This is what we intend to do now. The burden is on the prosecution to prove that all the requirements for recording confessional statements had been complied with. It is not in dispute that PW1, Kezia Manyama, Justice of the Peace, recorded the confessional statement on the 24.3.95. It is also not in dispute that PW1 followed the procedures under the Chief Justice's Instructions. PW1 examined the appellant's body and did not find any scars on his body. The appellant did not inform PW1 that he was tortured by the police so as to induce him to make a statement before him. We wish also to point out that before recording the statement, PW1 explained to the appellant that he was not bound to make one, and if he did make one, the same could be used against him. Therefore, like, the

learned trial judge, we hold that the appellant's extra-judicial statement was a voluntary one and properly admitted in evidence.

As a matter of law, such a confessional statement does not require any further corroboration. Before reliance could be placed on such a statement, even though voluntarily made, it has to be seen by the court whether it is truthfully made or not. This Court, in the recent case of (i) **Richard Lubilo** (ii) **Mohamed Seleman v The Republic,** Criminal Appeal No. 10 of 1995 (unreported) after discussing the case of **Tuwamoi v Uganda,** [1967] EA 84 at page 91 stated thus –

> *"What this passage says is that in order for any confession to be admitted in evidence, it must first and foremost be adjudged voluntary. If it is involuntary that is the end of the matter and it cannot be admitted. If it is adjudged voluntary and admitted but it is retracted or repudiated by the accused, the court will then as a matter of practice look for corroboration. But if corroboration cannot be found, that is, if the confession is the only evidence against the accused, the court may*

found a conviction thereon if it is fully satisfied that the confession is true."

The learned trial judge came to the settled conclusion that the appellant made the confessional statement voluntarily and the same was nothing but the truth. With respect, on our part, after reviewing the evidence, have come to the same conclusion that the appellant's narration of what happened was indeed the truth he poured out to PW1. It was voluntarily and truthfully made by him.

We accordingly dismiss the appeal in its entirety.

DATED at MWANZA this 21st day of May, 2009.

H. R. NSEKELA
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

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

(P. A. LYIMO)
DEPUTY REGISTRAR