IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., RUTAKANGWA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 173 OF 2007

ANNES ALLEN.....APPELLANT
VERSUS
THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

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

(Massati, J.)

dated the 20th day of April , 2007
in
Criminal Sessions No. 68 of 2003

JUDGMENT OF THE COURT

12th & 26th February,2010

RUTAKANGWA, J.A.

The appellant was arraigned before the High Court for the murder of one Shekundaeli Munisi on 12th May, 2003 at Njiro area within the Municipality of Arusha. He was convicted as charged and sentenced to death. Convinced, however, that he is innocent and was, therefore, wrongly convicted and sentenced, he has lodged this appeal.

Briefly, the prosecution evidence upon which the conviction was predicated was as follows:- The deceased Shekundaeli Munisi, henceforth the deceased, Patrick John (PW1) and Saidi Kilama (PW2) were, as of 12th May, 2003, employees of ABB TANALEC, whose offices are situated at Njiro within the Municipality of Arusha. They were employed as security guards.

On the morning of 12th May, 2003, the deceased, PW1 and PW2 among others were on duty. At or about 10.30 a.m. the trio was at the main gate. They then heard people shouting, saying "thief, thief". In the company of Kassim Omari and others, the trio went out of the enclosed office premises through the gate intending to assist the "thief" pursuers. When they came within reach of the thief, the latter threatened them with a knife and all, but the deceased, retreated. As the deceased was about to arrest the thief, he was stabbed on the left side of the chest. PW2 and others gave up the chase in order to attend the wounded Munisi. But PW1 pursued the thief relentlessly and with the help of K.K. Security Group guards, the said thief was ultimately arrested. The arrest took

place at a point 100 meters away from the spot where the deceased was stabbed. The arrested the thief was said to be the appellant. When arrested, the thief was still wielding a blood-stained knife he had used to stab the deceased. PW2 never saw arrested person until 27th June, 2005 when he purported to identify him in court when he was testifying.

While the thief was being pursued, PW2 Said and others rushed the injured Munisi to hospital where he succumbed to death the very night. According to the report on post mortem examination, (exhibit P3) the cause of death which was not disputed, was "bleeding into the chest with air "or "haemopneccnothoarax".

Report of the entire incident reached the police. PW4 ASP Ally Lugendo, rushed to Njiro. He found the appellant and one Johnson Kilonzo already under arrest. They were at the gate of ABB TANELEC. PW4 Lugendo proceeded to draw a sketch map of the scene of the crime which was tendered in evidence, without any objection, as exhibit P2. PW4 Lugendo was also handed over a gun

and some ammunitions, (exhibit P1) which were seized from the "bandits". However, he was categorical in his evidence that he **never saw any knife at the scene of the crime nor did he find the appellant with any blood stains.** After drawing exhibit P2,he took the appellant and his colleague to the Arusha Central Police station and upon learning of the death of Munisi he sent them to court.

Before the appellant was sent to court on 18th May, 2003 six days after his arrest, starting from **20.15 hrs (i.e. 8.15 p.m),** PW3 Ex-No. E8094 D/ Ssgt. Kassim Matokeo, began recording the cautioned statement of the appellant. Although this statement was repudiated by the defence at his trial, it was ruled by the learned trial judge to have been made. It was received in evidence as exhibit P4. In exhibit P4, the appellant is shown to have confessed to the murder of the deceased.

In his sworn evidence, the appellant who identified himself as a petty business man owning a kiosk at Unga Ltd area of Arusha

Municipality, admitted to have been arrested at Njiro on 12/5/2003 at around 11.00 hrs. He had gone there to buy "some flour" at Sunkist factory. Before he had entered the factory premises, he said, he heard noises from several people who were being chased and arrested by the K.K.Security guards. In the commotion which followed, he was arrested. Four of them, including himself, were taken to the central police station where they were detained. At around 10.00 p.m, together with another cell-mate they were driven by PW3 Kassim and PW4 Lugendo to BURKA COFFEE ESTATE, where the other fellow was shot dead and his body deposited at Mount Meru hospital. He was taken back to his police cell where he remained detained until 18th May, 2003.

On 18th May, 2003 at about 20.00 hrs, he said, PW3 Kassim took him out of the cell to a lit interrogation room. Therein he found two other officers. He was asked to confess his sins and sign two blank sheets of paper or be "be wiped out". A pistol was pointed at him and was asked to pray his last prayers. He was beaten. He succumbed and signed two blank sheets. On 21st May he was taken

to court. The appellant also denied making and/or signing exhibit P4 voluntarily which he claimed to have seen for the first time in court. He, therefore, denied causing the death of the deceased at all.

In the light of this evidence as proffered by both sides, the three assessors was aided the trial judge unanimously advised for the acquittal of the appellant. They were of this opinion, because given the indeterminate number of people at the scene, the prosecution evidence did not establish beyond any reasonable doubt the identity of the person who actually stabbed the deceased. They found support for their unanimous opinion from the fact that even the alleged murder weapon was not tendered in evidence.

The reasoned opinions of the gentlemen assessors did not persuade the learned trial judge. In his well reasoned judgment the learned judge conclusively found that on the basis of the evidence of PW1 Patrick, PW2 Said;PW3 Kassim, PW4 Lugendo, the confession contained in the cautioned statement (exh P4), the report on P.M. Examination (exh. P3) and the sketch map (exh. P2), it was

abundantly proved that it was the appellant who killed the deceased with *malice* aforethought. He accordingly convicted him as charged.

At one point in his bid to show that the appellant had malice aforethought while stabbing the deceased, he said:-

> *"From the facts narrated by the prosecution at the preliminary hearing, the accused and others had set over to ambush a vehicle carrying monies for JAFFERY ACADEMY and thereafter steal the money. And that before they could execute their plan, they were discovered and the accused had to run away. It was in the course of that attempt to escape arrest that the accused stabbed the deceased."*

We have studied the entire record of appeal. We have gleaned therefrom that indeed at the preliminary hearing stage such allegations were made in the narration of the facts. But we have also

found out that there was no single allegation which was accepted by the accused persons. These remained to be mere allegations which had to be proved by admissible evidence. No iota of evidence was adduced to prove these allegations. In our respectful opinion, it was wrong for the trial judge to rely on these denied and unproved allegations of facts, in determining the guilt of the appellant. All the same, since the conviction of the appellant was not based solely on these allegations, it remains our duty to re-visit the entire evidence on record, to satisfy ourselves on whether or not, the conviction for murder was justified.

Before us, the appellant has come with only two grounds of appeal, through Mr. Duncan Oola, learned advocate. Briefly, the appellant is complaining that the trial High Court judge erred in law in holding, that he was adequately identified by PW2. The other complaint is that the "weak, unreliable and uncorroborated testimony of PW1, PW2 and PW4", could not sustain a conviction for murder.

Arguing in support of the first ground of appeal, Mr. Oola submitted that had the learned trial judge objectively scrutinized the evidence of both PW1 Patrick and PW2 Said he could not have readily held that the latter positively identified the appellant as the assailant of the deceased. To him, given the prevailing commotion at the scene, the fact that PW2 Said never met the appellant face to face and had only a fleeting glimpse of the assailant, it could not be held with any degree of certainty that it was the appellant who stabbed the deceased. He accordingly pressed us to hold that the identification evidence was not watertight. He referred the Court to its decisions on this issue in the cases of **WAZIRI AMANI V REPUBLIC** [1980] TLR 250 at page 252 and **RAYMOND FRANCIS V. REPUBLIC** [1994] TLR 100.

On the second ground, he argued generally that the evidence of PW1 Patrick, PW2 Said and PW4 Ally was not reliable and needed corroboration. Such corroboration would have come from other people who participated in the pursuit of the thieves, but for

undisclosed reasons, they never testified. He, therefore, pressed for reversal of the appellant's conviction and death sentence.

The respondent Republic was represented by Mrs. Arafa Msafiri, learned Senior State Attorney, in this appeal. She urged us to dismiss the appeal as the conditions at the scene of the crime were conducive to an unmistaken identification of the appellant. She was of this stance because there was an unbroken connection between the evidence of PW1 Patrick and PW2 Said, which was corroborated by the sketch map and the cautioned statement of the appellant.

In disposing of this appeal we shall have to recognize, first, the fact that the death of one Shekundaeli Munisi is not disputed. Equally undisputed is the cause of his death. This was adequately established by exhibit P3. But this is far from holding that the deceased was murdered. Murder presupposes unlawful killing with malice aforethought. Therefore it was for the prosecution to prove that the appellant unlawfully killed the deceased with ***malice*** aforethought. To achieve this, the prosecution relied on the evidence

of PW1 Patrick, PW2 Said, PW3 Kassim who allegedly took the cautioned statement of the appellant (exh P4) and PW4 Ally who drew exhibit P2. But all in all, the most damning evidence came from PW2 who allegedly saw the appellant stab the deceased, and PW3 Kassim. If these were witnesses of truth, then the appellant was rightly convicted. We shall now turn our attention to the evidence of these witnesses.

At his trial the appellant's counsel had strenuously argued to discredit PW2 Said. To the learned advocate the identification of the appellant by PW2 Said was very unreliable because he (PW2) had at fleeting glance at the person was stabbed the deceased. The learned trial judge disagreed with him. This being a first appeal, we have the jurisdiction to re-evaluate the visual identification evidence going to implicate the appellant with the murder.

Admittedly, the stabbing of the deceased, whether intentionally or accidentally took place at about 11.00 hrs. There was sufficient sunlight therefore, all things being equal, to enable a dispassionate

observer to see and mark the assailant. But what were the circumstances leading to the stabbing of the deceased? They were described by PW1 Patrick and PW2 Said.

According to these two witnesses at about that hour as they were about their duties they heard people shouting "thief,thief, etc". Their evidence, however, is silent on where those cries were emanating from. It is equally silent on whether they saw those people who were crying after the "thief". We are saying so deliberately because none of those thief pursuers, who would have impeccably identified the thief they were pursuing, what he had stolen and from whom, never testified at all. But it is clear from the evidence of both PW1 Patrick and PW2 Juma that the thief pursuers were not within the fenced premises of ABB TANELEC. This is because they both testified to have gone out of the premises in haste to assist the thief pursuers. In that the case even the pursued thief was outside the ABB TANELEC compound. But if this reasoning is carried to its inevitable logical conclusion, it reduces the evidence of these two witnesses to a mere concoction.

According to PW1 Patrick, the pursued thief appears to have been within the fenced compound of ABB TANELEC because he saw him jump over "the factory's fence". But to PW2 Said, that thief was no within their compound because they had to run through the gate and go out of their compound to assist in giving chase to the thief. Going by the evidence of PW1 Patrick, after the thief had jumped past the fence the run was a continuous one and the thief had to snatch a bicycle of an unidentified person to make good the escape. However according to PW2 Said, as they chased the thief, he took refuge into a bush from which he eventually emerged wielding a knife with which he threatened them. All (including himself) with the exception of the deceased **turned back**, and when the deceased approached him he was stabbed. But PW2 Said had the audacity of telling the trial High Court (and he was believed) that he all the same witnessed the thief stab the deceased.

Here we have been confronted with a number of nagging and crucial questions which the learned trial judge never addressed his

mind to. **One**, what was the distance between the thief and PW2 Said and his colleagues before they turned back in haste to save themselves? **Two,** did PW2 Said have a chance of seeing the face of the thief? **Three,** how could PW2 Said have seen the thief stabbing the deceased when he had turned his back against them? **Four**, could PW1 Patrick and PW2 Said have been referring to one and the same person? **Five**, while PW1 Patrick testified that the thief jumped over the fence, PW4 Ally testified that the pursued thief had escaped by penetrating through the openings in the fence. These openings are marked 'F' in the sketch map. How, then, could one and same person have jumped over the fence and at the same time have escaped through the openings in the same fence? **Six,** if it was the appellant who had stabbed the deceased and escaped with a stolen a bicycle while brandishing a blood-stained knife, blood drops from which covered a distance of 100 meters, why was he found with no knife, leave alone a blood-stained one, and no single stain of blood on his body or on his clothes when he was arrested immediately in the vicinity of the scene of the crime?

To us, these unanswered questions do not create loopholes which can be justifiably ignored without occasioning a failure of justice. They go to expose both PW1 Patrick and PW2 Said as unreliable witnesses of identification. If they were not lying then they were honest but mistaken witnesses given the admitted fact that the appellant was a stranger to them. Indeed, PW2 Said never saw the appellant after his arrest. He only saw him for the first time while testifying on 27th June 2005. This dock identification evidence, as no identification parade was conducted, ought to have been given little weight; see, for instance, **Mussa Elias and two others v Republic,** Criminal Appeal No. 172 of 1993, CAT (unreported) This Court said:-

> *"... Furthermore, PW3's dock identification of the 3rd appellant is valueless. It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the*

accused before the witness was called to give evidence at the trial".

This is still good law and we shall strictly adhere to it.

The unworthiness of PW2 Said's evidence was put beyond doubt by his open lies in his testimony. As already shown, he testified that as they were chasing the "thief" the said thief ran into a bush from which he subsequently emerged wielding a knife with which he stabbed the deceased. This evidence was belied by PW4 Ally's evidence and exhibit P2 which clearly shows that the stabbing took place at the fence of ABB TANELEC along the down town Arusha – Njiro road, where there is no trace of any bush. So this was PW2 Said's figment of his own imagination.

This Court in the case of **MT.38350 PT. LEADMAN MAREGESI V THE REPUBLIC,** Criminal Appeal No. 93 of 1988 (unreported) said:-

"We think that where a witness is shown to have positively told a lie on a material point in

the case, his evidence ought to be approached with great caution, and generally the court should not act on the evidence of a such a witness unless it is supported by some other evidence".

We recently re-affirmed this salutary principle of law in the case of **ABDALLA MUSSA MOLLEL @BANJOO V THE D.P.P.**, Criminal Appeal No. 31 of 2008 (unreported).

In view of all these glaring implausibilities, inconsistencies and /or open lies in the evidence of the two so called eye-witnesses, we have found ourselves unable to share the learned trial judge's degree of certitude that the visual identification evidence of PW1 Patrick and PW2 Said against the appellant was watertight. In our considered opinion, no amount of corroboration would have lent any cogency to the evidence of PW2 Said. It ought to have been rejected. This then leaves us with the alleged confessional statement of the appellant.

In convicting the appellant as charged, the High Court placed much reliance on exhibit P4 after holding that it was voluntarily made. This statement was repudiated by the appellant not only during the trial within the trial, but also during his defence. He described in details the circumstances under which he was forced by armed policemen to sign two black sheets of paper on the pain of being "wiped out".

We have carefully read the cautioned statement and we would have readily upheld the appellant's conviction had we been convinced that it was voluntarily made or made at all. Admitting the statement in evidence the learned trial judge, in his short ruling, said:-

> *"A repudiated statement is admissible in law.*
>
> *It is only a question of weight to be attached*
>
> *to it that remainins to be resolved".*

We respectfully disagree with the learned judge. That is not the law. It is behoves us to state in passing the difference between a retracted and repudiated confession.

In law, a retracted confession is one which an accused person admits to have made but which he says he made under such circumstances that it must not be admitted. On the other hand, a repudiated confession is one which the accused denies to have made at all, or denies making the one before the court or that the record through faulty translation, does not represent what he actually said. It was stated with sufficient lucidity by the Court of Appeal for Eastern Africa in the case of **MWANGI s/o NYANGE vs REG.** [1954] 21 EACA 377 that a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged confessional statement but also whether or not it was made at all. This was re-stated by the same court in the case of **MOHAMEDI ALI AND ANOTHER v. REG** [1956] 29 EACA 166. It was held in the latter case that where the accused at his trial **repudiates or retracts** his confession or maintains that it was not voluntary, then before it may be admitted, the court must conduct a trial within trial and decide upon the evidence on both sides whether it should be admitted. See, also:-

(i) **[illegible]**

(ii) **TWAHA ALI AND FIVE OTHERS V REPUBLIC,** Criminal Appeal No. 78 of 2004. CAT (unreported) and

(iii) **PAULO MADUKA AND FORUR OTHERS V. REPUBLIC**, Criminal Appeal No. 110 of 2007 (unreported).

It goes without saying, then, that exhibit P4 was improperly admitted in evidence, as no determination was made on whether or not it was made at all and if made whether it was made voluntarily. Since it was irregularly admitted in evidence we hereby expunge it from the record.

Having expunged exhibit P4 and having rejected the identification evidence of PW1 Patrick and PW2 Said, we are left with no scintilla of evidence to support the conviction of the appellant for the murder of Shekundaeli Munisi.

In fine, we allow this appeal in its entirety. The appellant's conviction for murder and the death sentence imposed on him are

hereby quashed and set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED at ARUSHA this 25th day of February, 2010.

H.R. NSEKELA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL