**IN THE COURT OF APPEAL OF TANZANIA**
**AT TABORA**
**(RAMADHANI, C. J.; RUTAKANGWA, J. A.; And MASSATI, J. A.)**
**CRIMINAL APPEAL NO. 318, 319 and 320 OF 2009**
**BETWEEN**

**MASUMBUKO S/O MATATA @ MADATA }**
**EMMANUEL S/O MASANGWA } ... APPELLANTS**
**CHARLES KARAMJI @ CHARLES MASANGWA}**

**V.**

**REPUBLIC ... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Tabora,)**
**(Rwakibarila, J.)**
**dated the 23rd day of September , 2009**
**in**
**Criminal Sessions Case No. 24 of 2009**

**JUDGMENT OF THE COURT**

.....

8 & 11 JUNE, 2010

**RAMADHANI, C. J.:**

On 01/12/2008 at Bunyihuna Village, Bukombe District, Shinyanga Region, the house of Grades d/o Masunga (PW 1), a crippled, was invaded by strangers who killed her albino son, Matatizo s/o Dunia, chopped off both legs at the knees and disappeared with them.

PW 1 suspected Emmanuel s/o Masangwa, appellant 2, to have been one of the murderers. PW 1 explained that there was a video show that night

at the village which she and the deceased attended. Appellant 2 was also present and he created all sorts of excuses to be in association with them. After the show, at about 0100 hours, appellant 2 escorted PW 1 and the deceased back home. That was the first day appellant 2 got to their house. Sometime later PW 1 went out responding to a call of nature and she saw appellant 2 roaming about aimlessly close to their house. She did not enquire anything but went back into their house.

Shortly afterwards, their house was raided and the deceased was fatally attacked. An alarm was raised and many people turned out. PW 1 aired her suspicion on appellant 2 and thereupon the militia men present arrested him. The matter was reported to police who rushed to the scene. Among the first cops to arrive were D/Cpl Sospeter (PW 10) and D/Cpl Erick (PW 11). At the scene of crime the cops took appellant 2 under custody and he volunteered to take them to the murderers.

The cops got into their van with appellant 2 up to some point when some changed vehicle and asked for a lift in a taxi driven by Julius Mihayo (PW 3). Appellant 2 took them to the premises of Masumbuko s/o Matata @

Madata, appellant 1, and as they were about to alight from the taxi appellant 1 and two other persons with him scuttled. The cops gave chase and they managed to arrest Charles Karamji @ Charles Masangwa, appellant 3, whom they took back to appellant 1's premises.

At those premises the cops found Yunice d/o Peter (PW 2), the third wife of appellant 1, and Juma Matata (DW 4), the brother of appellant 1, among others. The cops searched all the six houses in the compound but found nothing worthwhile. Then the cops combed the surrounding area and they stumbled over a bundle which they asked PW 2 to unravel. The bundle contained a semi-nylon bag with two albino legs freshly cut at the knees, two machetes, a bush knife, a trouser, a shirt and a pair of shoes. PW 2 told the cops that the bush in which the bundle was found is appellant 1's place for medicinal rituals. Appellant 1 was a local medicine man.

PW2 and DW 4 together with appellants 2 and 3 were taken and detained at Bukombe Police Station. Appellant 1 was arrested five days later, on 06/12/2008, by Fita s/o Kaswende (PW 6) in a company of other villagers.

The three appellants recorded extra judicial and caution statements but their admissions at the trial were objected to and so, trials within trial were conducted after which some statements were rejected and others were admitted. The extra judicial statement of appellant 1 before Peter Reuben (PW 8), a Primary Court Magistrate, was admitted as Exh P 4. A caution statement of appellant 1 before D/Cpl Nakembetwa (PW 13) was admitted as Exh P14 while that of appellant 2 before D/Sgt Beatus (PW 14) was admitted as Exh P 15.

In those statements: Exhibits 4, 14 and 15, appellants 1 and 2 confessed to murdering the deceased and implicated appellant 3 to the hilt.

The articles recovered from the bush, together with others like a torch (Exh P 10) and a jacket (Exh P 11), which were recovered at the scene of crime, were sent to Gloria Tom Machuve (PW 9), the Principal Government Chemist, for DNA tests. Her evidence, Police Form No. 180 was admitted as Exh P 5 and her report taken as Exh P 6.

The totality of the evidence of PW 9 from the DNA tests was that the two legs recovered from the premises of appellant 1 and the profiles of all the blood stains on the various articles matched those of the deceased. The profiles of the buccal swab taken from appellant 1, that is, the suspect sample, matched those of the stained trouser, that is, the evidence sample. So, she concluded that one in a billion chances the trouser stained with the deceased's blood could not have belonged to appellant 1 that is, it belonged to appellant 1.

As a result of the sum total of the above evidence RWAKIBARILA, J. convicted all three appellants and visited them with the mandatory death penalty and hence these appeals which we have consolidated. As it has already been obvious, we have taken Masumbuko s/o Matata to be appellant 1, Emmanuel Masangwa – appellant 2 and Charles Masangwa as appellant 3.

Appellant 1 was represented by Mr. Kamaliza K. Kayaga, learned advocate, while appellant 2 had the services of Mr. Medard Mutongore, learned counsel, and appellant 3 was advocated for by Mr. John Ng'wigulila, learned attorney. On the other hand the respondent/Republic was

represented by Ms. Neema J. Ringo, Principal State Attorney, Mr. Edgar Luoga, Mr. Edwin Kakolaki, and Mr. Prudens Rweyongeza learned Senior State Attorneys.

Before we get into the grounds of appeal we are of the decided opinion that we lay bare three matters which have never been in controversy at all: One, it is an undisputed fact that Matatizo s/o Dunia was unlawfully killed on 01/12/2009 in the house of PW 1, his mother, at Bunyihuna Village. Two, whoever killed him did so with malice aforethought because the motive was to get the deceased's body parts, in this case, the two legs, because of the most stupid and barbaric misconception that albinos' parts are charms.

Lastly, we have only the confessions of appellants 1 and 2 and some circumstantial evidence to go by. The main issue is who were the murderers or the murderer and whether the available evidence is proof beyond reasonable doubt to sustain the convictions of all the appellants or any of them.

Mr. Kayaga for appellant 1 had three grounds of appeal:

1. That the appellant was wrongly convicted on the basis of uncorroborated and inadmissible cautioned statement to the police (Exh P 14) and extra-judicial statement (Exh P 4).
2. There was a misuse of scientific evidence on part of the forensic DNA analyst (PW 9) and the court wrongly convicted the appellant on such evidence without establishing its validity and reliability.
3. That the Hon Judge erred in law by his failure to observe that the circumstantial evidence on record was capable of other reasonable hypothesis, to wit, it did not irresistibly point to the guilt of the appellant.

As for the extra judicial statement (Exh P 4) the learned advocate submitted that it was not voluntary because of three reasons: One, PW 8 admitted that appellant 1 was escorted into his office by PW 13 and others who were in a vehicle armed to the teeth and so he was scared. Two, PW 13 was the one who recorded the caution statement of appellant 1 (Exh 14) just a day before appellant 1 was taken to PW 8 to record Exh P 4 so appellant 1 was not really a free agent. Lastly, PW 8 stated that PW 13

briefed him "on how a suspect wanted to give his extra-judicial statement". He referred us to Ibrahim Issa & Two Others v. R., Criminal Appeal No. 159 of 2006.

We agree with Mr. Rweyongeza, Senior State Attorney, that PW 8 in recording Exh P 4 took all the necessary care of ascertaining that appellant 1 was a free agent. PW 8 stated that he remained just with appellant 1 and thoroughly examined his body for any marks of torture and assured him that he was free to make or not to make a statement.

Mr. Kayaga himself conceded that as the court is situate in Runzewe which is about 50 km from the police post in Ushirombo and as the road passes through a dense forest reserve, it was necessary to take security precautions of having armed policemen.

Again we are at one with Mr. Rweyongeza that Ibrahim Issa is distinguishable in that in that case the Justice of Peace was given a copy of a police cautioned statement before he recorded the extra-judicial statement. That is not the case here. In any case Mr. Kayaga failed to tell

us why he did not cross-examine PW 8 to know exactly what was the briefing by PW 13.

In Steven Jason & Two Others v. R, Criminal Appeal No. 79 of 1999 (unreported), this Court said at p. 13 of the type written script:

> It is incredible that a magistrate of whatever level would be so naïve as to allow a policeman to hold the accused person while recording the extra-judicial statement.

We agree with Mr. Rweyongeza that a Primary Court Magistrate of 25 years standing will not take directions from a D/Cpl on how to go about recording an extra-judicial statement.

As for Exh P 14, the caution statement recorded by PW 13, Mr. Kayaga submitted that appellant 1 was tortured before recording the statement and so it is involuntary and inadmissible. He submitted further that not all types of tortures leave marks or scars and, therefore, the bodily examination by PW 8 failed to reveal torture.

Mr. Kayaga conceded that appellant 1 acknowledged that he did not tell PW 8 that he had been tortured and the reason he gave is that he was not

asked about torture. In any case the learned trial judge considered torture but discounted it.

Mr. Kayaga also complained about the absence of the signature of appellant 1 at the end of his caution statement. We agree with Mr. Rweyongeza that this Court decided that matter in Hadija Salum & Another v. R, Criminal Appeals Nos. 11 and 32 of 1996 (unreported) that:

> In this case, there is yet another aspect. The record quite clearly shows that the statement bears the thumb print of the second appellant. The irregularity, therefore, was of no consequence.

In fact in this case appellant 1 admitted that the thumb prints in Exh P 14 belong to him.

But apart from the foregoing, we agree with Mr. Rweyongeza that the statement was so detailed that what is disclosed therein could only be true. In Steven s/o Jason this Court remarked:

> The detailed account of the initial stages of the plan to kill the deceased, the role played by each of the appellants in the plan and the sequence of events leading to the death of the deceased, could not in our view, be given by a person

who was not either a party to the plan or had knowledge of it. Otherwise, it is inconceivable that all this information was thrust upon the first appellant by the Justice of Peace or someone else as he claims.

Therefore, this ground of appeal fails.

As for the second ground of appeal on DNA evidence Mr. Kayaga conceded, when asked by the Court, that no where did the learned trial judge said that he used the DNA results to secure the conviction of any of the appellants and so, Mr. Kayaga abandoned that ground.

In ground three, on circumstantial evidence, Mr. Kayaga pointed out the distance from Bunyihuna Village, the scene of the crime, to Ituga Village, the home of appellant 1, is between 50 and 60 kilometers and as the roads are so rough, there is grave doubts on how the bundle containing the two legs and other articles could have been transported by appellant? His hypothesis is that the Police took the bundle and dumped it at appellant 1's premises.

We agree with Mr. Rweyongeza that D/Cpl Sospeter (PW 10) one of the cops who assembled at the scene of crime stated that the distance between Bunyihuna Village and Ituga Village was between 55 and 60 kilometers which takes about 50 to 60 minutes to drive and three hours to ride on a bicycle. PW2, the wife of appellant 1, gave evidence that on 30/11/2008 at about 1700 hours appellants 1 and 2 left home together with a third person. She said that each had a bicycle and that the trio returned at about 0600 hours on 01/12/2008. So, there was ample time for one to go to the scene of crime and then return to appellant 1's premises.

Again PW 3, the taxi driver was emphatic that "The policemen had no luggage, when they arrived at the compound." That is corroborated by what DW 4, the brother of appellant 1, said:

> I saw policemen when they disembarked from the motor vehicle. The policemen who disembarked from the saloon car or police motor vehicle had no luggage, except some of them had rifles.

So, the police could not have planted that piece of evidence.

PW 2 was not in a position to know what appellants 1 and 2 and their companion had that morning when they returned home. This is what she said:

> I have already stated how I was in the bathroom on 01/12/2008, when the Accused No. 1, Rajabu and Accused No. 3 arrived at our compound. I didn't manage to sight what each one of them was holding.

Ground three fails also and the appeal of appellant 1 is without merit.

Appellant 2 had four grounds of appeal, to wit:

1. That the learned trial judge erred in law and fact when he admitted the retracted caution statement of the 2nd Appellant contrary to the provisions of the law.
2. That the learned trial judge erred in law and fact when he based the 2nd Appellant's conviction on his uncorroborated retracted caution statement.
3. That the learned trial judge erred in law and fact when he failed to consider the defence of the 2nd Appellant.
4. That the learned trial judge erred in law and fact when held that prosecution had proved the case beyond reasonable doubt against the 2nd Appellant.

Mr. Mutongore stated that he would argue all the four grounds generally. He pointed out that the evidence against appellant 2 is the caution statement Exh P 15 which was objected to because he did not make it and hence did not sign it. The learned advocate argued that that omission violated the provisions of s. 57(3) of the Criminal Procedure Act [Cap 20 RE 2002]. Mr. Mutongore stressed that this Court in Ibrahim Issa emphasized that sub-section.

Mr. Luoga, Senior State Attorney, replied that this appeal is distinguishable from Ibrahim Issa. In the present case the statement was read over to appellant 2 who then thumb printed every single sheet of paper of Exh P 15. Appellant 2 admitted to have done so.

Section 57(3) reads as follows:

> (3) A police officer who makes a record of an interview with a person in accordance with subsection (2) shall write, or cause to be written, at the end of the record a form of certificate in accordance with a prescribed form and shall then, unless the person is unable to read–
>
> (a) show the record to the person and ask him–

(i) to read the record and make any alteration or correction to it he wishes to make and add to it any further statement that he wishes to make;

(ii) to sign the certificate set out at the end of the record; and

(iii) if the record extends over more than one page, to initial each page that is not signed by him;

Admittedly, the provisions of that sub-section were not followed to the letter in Exh P 15 and admittedly, too, this Court in Ibrahim Issa decided that because of such omission the statement ought not to have been admitted.

It appears to us that Ibrahim Issa and Hadija Salum, cited earlier, are at variance. We leave their hormonisation for another occasion. For the time being even without Exh P 15, there is sufficient evidence on which to convict appellant 2. He has been mentioned and his activities have been detailed in Exh P 4, the extra-judicial statement of appellant 1. We are aware that that requires corroboration which we are satisfied is found in appellant 2's conduct.

Appellant 2 is the one who took the police to the home of appellant 1 where the two legs of the deceased were found. The question is how did he know about it? It is also important to remember that the murder took place at about 0200 hours while the appellant 2 escorted the police a few hours after that. So, the involvement of appellant 1 could not have been the talk in town so as to make appellant 2 a recipient of that talk. So, appellant 2 must have had a special knowledge of that fact.

Mr. Luoga drew our attention to what this Court said in Dotto Ngasa v. R, Criminal Appeal No. 6 of 2002,at p.13:

> The appellant having retracted the confession in the statement, the learned trial judge properly directed himself on the applicable legal principle relating to retracted confessions. He looked for corroboration and found such corroboration in the evidence of PW 1 to the effect that the appellant led to the discovery of the murder weapon and the clothes that the appellant was wearing at the time of the incident. These items were found hidden in such place that only the one who was either involved in the hiding the items or had knowledge of the places would be in a position to show.

That was a confession leading to discovery. In this appeal we have conduct leading to discovery which corroborates just the same. We have no flicker of doubt on our minds that Exh P 4, the extra-judicial statement of appellant 1 and the conduct of appellant 2 is proof beyond reasonable doubt on the part of appellant 2.

There is another piece of corroboration on the part of appellant 2. This time it is his lies. He said at the trial that:

> Accused No. 3, Charles Karamji, and me are not related. Accused No. 3 and me met for the first time in remand prison, after our arrest.

Appellant 2 again disowned his brother and appellant 1 in the following terms:

> Both Accused No. 1 and Accused No. 3 were not known to me until when we were charged with this offence.

Appellant 2 is an unabashed liar. How did he escort the police to appellant 1 whom he did not know? At that time it was only himself who was under arrest not appellant 1. But apart from that his sister-in-law, Sophia d/o Andrew (DW 6) stated:

> I knew Accused No. 2 because he is my in-law. Accused No. 2 and Accused No 3 share the same father and mother and that is why Accused No. 2 is my in-law.

Elsewhere DW 6 said:

> Whoever states that Accused No. 2 and Accused No. 3 are not brothers shall be telling lies.

This Court said in Paschal Mwita & Others v. R [1993] TLR 295 at p. 300 citing with approval a decision of the East Africa Court of Appeal:

> Although lies and evasions on the part of an accused do not in themselves prove the facts alleged against him, they may, if on material issues, be taken into account along with other matters and the evidence as a whole when considering his guilt.

This Court expressed the same opinion in Hamidu Mussa Timotheo & Another v. R [1993] TLR 125 at 129:

> Secondly, they told a number of lies in a situation where, had they been innocent, telling the naked truth was the most natural and easiest thing to do.

There was also the question of alibi by appellant 2. We think that this matter need not detain us. Appellant 2 claimed that he went to church that Sunday of 30/11/2008 and then returned home and had lunch and dinner with his father and other members of the family. He had a rest then went to a video show. However, his father, Masangwa Holela (DW 5) denied to have been in Bunyihuna Village where appellant 2 was. So, his alibi is not supported by the witness he brought for that purpose.

So, the appeal of appellant 2, too, is dismissed in its entirety.

Appellant 3 had three grounds of appeal:

1. That the honourable trial Judge erred in law and fact in convicting the appellant without corroborative evidence against him.
2. That the honourable trial Judge erred in law and fact in not considering defence of the appellant concerning him being arrested at the house of the 1st Accused Masumbuko Matata @ Madata.
3. That the honourable trial Judge erred in law and fact in shifting the burden of proof to the appellant.

Mr. Ng'wingulila was very brief in his presentation. He submitted, and rightly so, that one of the evidence against appellant 3 is Exh P 4, the

extra-judicial statement of appellant 1. But is there no corroboration as the learned advocate contends?

As for his defence appellant 3 claimed that he was found at appellant 1's premises that morning of 01/12/2008 because he had gone for medicine for his son who had a sudden attack of cerebral malaria, commonly called *degedege* by people.

On the respondent's side was Ms. Ringo, Principal State Attorney. She pointed out that the learned trial judge used the extra judicial statement as corroborating other pieces of evidence. She categorized four other classes of evidence against appellant 3:

The first piece of evidence is the whole issue of preparation. Ms. Ringo pointed out, and correctly so in our opinion, that on 30/11/2008 appellant 3 was at the home of and with appellant 1 and some other person making preparations for the execution of the murder on the following day. The trio started with some rituals and continued with some top secret engagement as is revealed by PW 2, the wife of appellant 1:

> After that activity started, I tried to walk into that house for the purpose of picking something from there. Accused No. 1 warned me not to enter into that house. I remained outside.

After that the trio left for an unknown destination each one on a bike until the next morning.

The second type of evidence is the lies of appellant 3. He said that he had gone to church on 30/11/2008 but he was given the lie by his own wife Sophia d/o Andrew (DW 6) who said:

> On 30/11/2008 it was Sunday. When I returned from church, I found Accused No. 3 no longer at home. But before I went to church, Accused No. 3 was still in bed.

The second lie was when he said that he went to appellant 1 to look for medicine for his child who had a bout of cerebral malaria. Again PW 6 did not mince words when she said:

> I went to church with the children on that Sunday. There was no sick child on that Sunday.

The third piece of evidence against appellant 3 is his action of running away from the premises of appellant 1 when the vehicles with the policemen appeared at the scene. Apart from appellants 1 and 3 and the

other person who is still at large, there were at the scene Juma Matata, DW 4, the brother of appellant 1, who was mending his bicycle when the policemen went to the premises of appellant 1. He did not run and he said:

> I didn't run when policemen arrived at Accused No. 1's compound. I didn't know why three men ran away and that is why I didn't run as well.

Ms. Ringo referred to the decisions of this Court in Hamidu Mussa and also Paschal Mwita which we have already quoted above when dealing with appellant 2: the lies of an accused person can be used to corroborate evidence against him.

We are satisfied, therefore, that the appeal of appellant 3 is devoid of any merit and we dismiss it.

After considering the appeals of each one of the three appellants we have to state the obvious. We have not the slightest doubt that there was common intention among the three as was well enunciated in the decision of this Court in Mathias Mhyeni & Another v. R [1980] TLR 290 in holding (iii) that:

> Where a person is killed in the prosecution of a common unlawful purpose and the death was a probable consequence of that common purpose each party to the killing is guilty of the murder.

As a matter of fact in this instance death was not a probable consequence of that common purpose. That is totally wrong. Death was the aim of that common purpose. One does not slaughter another person like a chicken and then say that death was a probable consequence.

We are of the well decided opinion that it is our bounden and most solemn duty to make these final remarks. This was a most atrocious, heinous and a dastardly act by three healthy young persons to take the life of an innocent child of a tender age of thirteen years in freezing cold blood because of some quick and possibly easy gain. Some names have been mentioned in Exh P 4, the extra-judicial statement of appellant 1, but we cannot broadcast them for all we know they might be innocent. But we are cork sure that there must be some wealthy people who hire stupid young fellows like these to perform these callous acts. We just hope that the powers that are will follow up these clues which are in the hands of police

and save our Heaven of Peace from such extremely shameful and debasing incidents.

We dismiss all the three appeals in their entirety.

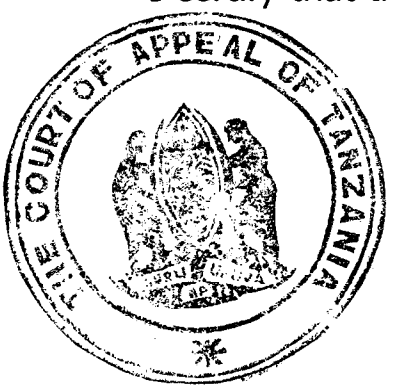
DATED at TABORA this 11th day of June, 2010.

**A. S. L. RAMADHANI**
**CHIEF JUSTICE**

**E.M.K. RUTAKANGWA**
**JUSTICE OF APPEAL**

**S.A. MASSATI**
**JUSTICE OF APPEAL**

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




M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**