IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO, J.A., MASSATI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 247 OF 2008

1. **NDALAHWA SHILANGA**
2. **BUSWELU BUSARU ..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Bukoba
(Lyimo, J.)
Dated 18th day of June, 2008
in
Criminal Session No. 83 of 2004

JUDGMENT OF THE COURT

4th & 15th November, 2011

MASSATI, J.A.:

Originally, there were two appellants in this appeal, namely, NDALAHWA SHILANGA (the appellant) and BUSWELU BUSARU. (the second accused) However, before the hearing of the appeal, Mr. David Kakwaya, learned State Attorney, drew the Court's attention to the fact that the second accused had not filed his notice of appeal. Mr. Makenena Ngero, learned counsel for the second accused, conceded and added that even his own efforts to trace a copy of the notice were unsuccessful. As the original record of the trial court also had no such document, it was

apparent to the Court, that there was no such notice of appeal. Since a notice of appeal institutes a criminal appeal to this Court, its absence means that there was no appeal before us. It was accordingly struck out. We were thus left with only the first appellant's appeal (hereinafter the appellant).

The appellant and the second accused were tried on information for murder under section 196 of the Penal Code (cap 16 RE 2002). It was alleged before the High Court of Tanzania, sitting at Bukoba, that, on the 10th day of April, 2002, at Mbindi Village, Biharamulo District, Kagera Region, the duo unlawfully and with malice aforethought, killed BARAGANILE d/o MSWANZARI. At the end of the trial, (Lyimo J) he was convicted as charged and sentenced to death. He is now appealing against both conviction and sentence.

The undisputed material facts as found by the trial court are these. The deceased was the appellant's mother. She was last living in Nyantimba, Choga village, where the appellant had bought a piece of land and built a house for her. But the appellant remained at Nyarweru Village about 2 kilometers away from the deceased's residence, but within the

same Nyantimba locality. On 11/4/2002, Faustine Keminyanda (PW1) who was the street chairman of Choga street, where the deceased resided, was visited by the appellant. The appellant informed him that he had passed at his mother's place but she was nowhere to be found and her domestic animals were astray. They proceeded to the market in search for her only to be told that she had been around, but had gone back home. An alarm was then raised. The villagers assembled at the deceased's house. A search was mounted in the surrounding areas. On one short cut to the market, they spotted a bottle with kerosene, some salt, and a pair of green sandals. A further search revealed some marks of a struggle and violence, and something having been dragged away. Some 70 paces later, they found the deceased's body with a kitenge piece of cloth round her neck hanging from a tree. However, although the deceased's neck was tied to the tree, her legs were bent and touching the ground; leading to an inference that it was probably a fake suicide. Information of this discovery was later passed on to the village authorities and later to the police. On arrival, the police (PW7) drew a sketch plan of the area, which was tendered during the preliminary hearing as prosecution exhibit P2. PW7 was also accompanied by a doctor (PW3) who did a post-mortem-examination of the deceased's body and prepared his report (Exh P3).

According to exhibit P3, the cause of death was severe brain damage. After collecting all the evidence, some of which will be discussed in the course of our judgment, the appellant and his cohort were arrested for being responsible for the deceased's death. He, as indicated above, and another, were accordingly charged, and convicted.

As shown above, at the hearing, the Respondent/Republic was represented by Mr.Kakwaya, learned State Attorney, whereas the appellant was represented by Mr. Elias Kitwala, learned counsel.

Mr. Kitwala had filed three grounds of appeal, but before hearing, he intimated that he would abandon the second ground and proceeded to argue the first and third grounds together. The remaining grounds were:-

1. That the Honourable trial judge erred to believe and rely on piece of evidence arising from implications of accused persons.
2. That the Doctor's autopsy report and the Exh. P4 raises strong doubts and vitiates the first accused's implication in the killing of the deceased.

In elaboration, Mr. Kitwala, argued generally as follows. First that, if Exhibit P4 (the 2nd appellant's extra judicial statement) was true, as the trial court found, and which implicates the appellant, then it goes contrary to the findings shown in Exh P3 (the post-mortem examination report) as to the cause of death of the deceased. He pointed out that, whereas Exh P4 points to strangulation as the cause of death, Exh P3 points to severe brain damage as its cause. Secondly, if Exh P4 contained nothing but the truth, the fact of the number of the appellant's children who were allegedly killed by the deceased by witchcraft, which according to Exh P4, was, all of them, was contradicted by PW2 who said that the appellant had lost only one child. Thirdly, Exh P4 should not be wholly believed because the maker thereof had his own interests to serve. Fourthly, Exh P6, (the appellant's cautioned statement was retracted by the appellant on account of it having been obtained through torture, as evidenced by the testimony of PW7 who admitted giving him a PF3 but did not produce that document in court. It was therefore problematic and required corroboration. He referred us to the decision of this Court in **PASCHAL KITIGWA VR** 1994 TLR 65 for effect. Finally, it was his view that although the trial court relied on oral confessions allegedly made by the appellant before the villagers, such alleged confessions were neither consistent nor proved to be

voluntary. It was therefore a weak piece of evidence. He therefore concluded by saying that the prosecution case was not proved beyond reasonable doubt, and so the appeal should be allowed.

On the other hand, Mr. Kakwaya, who fully opposed the appeal, supported the appellant's conviction on the following grounds. Firstly, he submitted that there was no contradiction between Exh P4 and Exh P3 and PW3 regarding the cause of death of the deceased. In his view, since Exh P4 discloses that the deceased was first beaten in order to subdue her, the beating may have caused the severe brain damage which led to her death. Secondly there was also no inconsistency in the prosecution case regarding the number of the appellant's children allegedly killed by the deceased through witchcraft, because, if the defence was referring to the evidence of PW2, that witness was only referring to the child lost by the appellant in that "year" and not all his life, to which Exh P4 was referring. Thirdly, although Exh P4 was a confession from a co accused, it was reliable, and together with Exh P7 (the second accused's cautioned statement) could be used to corroborate the appellant's own confession in Exh P6. He referred us to the decision of **HADIJA SALUM AND ANOTHER VR Criminal** Appeals No. 11 and 31 of 1996 (unreported) to support his said argument.

Fourthly it was the learned counsel's submission that Exh P6 (the appellant's cautioned statement) was legally admitted at the trial and it was too late in the day to object to its admissibility at this stage. For that he cited the decision of this Court in **ZAKAYO SHUNGWA MWASHILINDU AND 2 OTHERS VR.** Criminal Appeal No.78 of 2007. (unreported) He went on and submitted at length that, that exhibit was obtained without any kind of torture at the police station. If there was any torture, according to Exh D1, this might have taken place at the village. At least the appellant was a free agent when he appeared before PW6 (the justice of the peace) where he did not disclose that he was tortured at the police station. Finally, Mr. Kakwaya, submitted that in the light of Exhibits P6 and D1 as corroborated by Exhibits P4 and P7, the prosecution case against the appellant was proved beyond reasonable doubt. He therefore urged us to dismiss the appeal.

In our view, since there is no serous dispute that BARAGANIE d/o MSWANZARI is dead, and from the testimonies of PW1, PW2 and PW4 her death was not natural, it is futile to go into the discussion about whether there were any contradictions on the nature and or the cause of her death. Whether it was by brain damage or by strangulation the death was nevertheless unnatural. To that extent the contradictions were immaterial.

The fact of the unnatural death and the identity of the deceased could still be established independently of Exh P3 and P4 or the evidence of PW3. We think the crucial issue in this case is, who killed the deceased?

We agree with the learned trial judge that the evidence leading to the finding on who killed the deceased is entirely circumstantial. We therefore think it is appropriate here to recapitulate briefly the law on circumstantial evidence. Simply put, for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (**See SIMON MUSOKE vR** (1958) EA. 715) It has been authoratively stated by some legal sages that where a case rests on circumstantial evidence, such evidence must satisfy, three tests:-

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

(ii) those circumstances should be of a definite tendency un-erringly pointing towards the guilt of the accused; and

(iii) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else

(**See SARKAR ON EVIDENCE**, 15th ed (2003 report) Vol. 1, P 63) **OBEDI S/O ANDREA vR** Criminal Appeal No. 231 of 2005 (unreported).

The next thing we feel it is pertinent to comment upon, is on corroboration, on which both counsel here, have submitted at length. The leading case on the subject of "corroboration" remains to be that of **Rv BASKERVILLE (**1916) 2KB 658 at 667 where Lord Reading CJ said;. It must be:

> *"independent testimony which affect the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him that is, which confirms, in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it"*

The requirement for corroboration is either a matter of law, or of practice. Where it is a matter of law, no conviction can be sustained without corroboration if it is based on evidence that requires corroboration. If it is a matter of practice, a conviction would not necessarily be illegal or be quashed if it stands on uncorroborated evidence, but it is also a matter of practice in such cases for a trial court to warn itself and if the trial be with the aid of assessors to direct the assessors on the danger of

convicting without corroboration. Corroboration by law will normally be spelt out in a statute. The source of law on the requirement of corroboration by practice, is case law.

It has been held that the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm or support that which is sufficient, satisfactory and credible (**See DPP v HESTER** (1973) AC 290 cited with approval in **AZIZI ABDALAH vR** (1991) TLR.71. It has also been long established that a witness (who himself) or evidence which itself requires corroboration cannot corroborate. (**See SOLU WATUTU vR** (1934) I EACA. 183 R v **RAMAZAN BIN MAWINGU,** (1936) 3 EACA 39, **ALLY MSUTU vR** (1980) TLR 1, **SWELU MARAMOJA vR** Criminal Appeal No. 43 of 1991 (unreported).

In this case, the trial court convicted the appellant on the basis of four pieces of evidence. First, his oral admissions to the killing made to the villagers, PW1, PW2, and PW4. Second, the appellant's cautioned statement (Exh P6) Third, the appellant's own extrajudicial statement (Exh D1) Fourthly, Exhibit P4 the cautioned statement of the second accused.

We must note at the outset that in his summing up to the gentlemen assessors, the trial judge did not direct them on the need for corroboration on any of those pieces of evidence; neither did he, in his judgment seriously advert his mind to the need for corroboration on retracted confessions or warn himself against the danger of acting on uncorroborated evidence.

We find it convenient to begin with Mr. Kakwaya's forceful argument about Exhibits P4, P6, P7, and D1. According to him, Exhibit P6 (the appellant's cautioned statement) is a full confession freely obtained from him and lawfully admitted at the trial. It was too late in the day to object to its admissibility on the grounds of it having been obtained by torture as Mr. Kitwala had attempted to do in the course of hearing the appeal. He was of the further view that if he was tortured he would have told the justice of the peace in his extrajudicial statement (Exhibit D1) Since he did not, Exhibit D1 only lends credence to the truth of the matters contained in Exhibits P6. And that confession is corroborated by Exh P4 and P7 (the second accused's cautioned statement and extra judicial statement respectively).

It is true that Exhibit P6 was received in evidence without objection from the defence. We agree that the proper time to take objection to the admissibility of an alleged confession is, when it is about to be received in evidence and not in cross-examination or during defence (**See SHIHONE SENI AND ANOTHER vR** (supra) and **ZAKAYO SHUNGWA MWASHILINDU AND TWO OTHERS vR** (supra) But, that does not deprive an appellate court of the right to review the evidence and make its own findings. (**See RICHARD LUBILO AND MOHAMED SELEMAN vR** Criminal Appeal No. 10 of 1995 (unreported).

Mr. Kakwaya, has submitted that if the appellant was tortured into making Exhibit P6, he would have mentioned that fact in his defence Exh D1, a statement he made to the justice of the peace, where he was a free agent. That may be correct, but we think the circumstances of the whole case must be taken into account. Most importantly in this case, Exhibit D1 should be evaluated for what it contains, and not for what it does not contain. There, the appellant told the justice of peace that he had to admit to the killing to the villagers to save his life. He was thereby implicitly recanting his cautioned statement (Exh P6). Unfortunately, the prosecution did not cross examine him to explain why he did not tell the

justice of peace about the tortures at the police. We think it is a mere conjecture for us to conclude that because he did not say so to the justice of the peace, therefore he was not tortured by the police. We are not prepared to venture into that.

We think that the law relating to confessions is now fairly settled, after the decision of the Court of Appeal for East African, in **TUWAMOI v UGANDA** (1967) EA. 84, henceforth religiously followed by all courts in this country. **In HATIBU TENGU vR** Criminal Appeal No. 62 of 1993(unreported) this Court extracted two tests from **TUWAMOI's** case, which any confession must pass if it is to be acted upon by a court. The first test is whether the confession was made voluntarily and properly, that is legally by, (if necessary) by the process of a trial within a trial or inquiry (in trials without assessors). This determines the **admissibility** of the confession. The second stage is the evaluation of the confession, to determine, whether it is true, including the need of and whether or not there is corroboration. This stage determines the **weight/value** of the confession. If the court finds that there is corroboration it can convict. If the court finds no corroboration, it can still convict if the court finds that the confession contains nothing but the truth, and after warning itself of

the danger of convicting without corroboration. But in determining whether or not the confession contains the truth, all the circumstances of the particular case, must be taken into account, including whether the confession is retracted or repudiated by an accused person. In **TUWAMOI's** case, the defunct appellate court summarised the position of the law on confessions on p-91 as follows:-

> *" We would attempt to simplify the position. First the onus of proof in any criminal case is on the prosecution to establish the guilt of an accused person. A conviction can be founded on a confession of guilt by an accused person. The prosecution must first prove that this confession has been properly and legally made. The main essential for the validity of a confession is that it is voluntary, but the other legal requirements of each territory must also be established. Thus in Uganda if the confession is made to a police officer then it must have been made to an officer of the rank of corporal or upwards and also in accordance with the Evidence (Statement to Police*

Officers) Rules, 1961. If the court is satisfied that the statement is properly admissible and so admits it, then when the court is arriving at its judgment it will consider all the evidence before it and all the circumstances of the case, and in doing so will consider the weight to be placed on any confession that has been admitted. In assessing a confession the main consideration at this stage will be, is it true? And if the confession is the only evidence against an accused then the court must decide whether the accused has correctly related what happened and whether the statement establishes his guilt with that degree of certainty required in a criminal case. This applies to all confessions whether they have been retracted or repudiated or admitted, but when an accused person denies or retracts his statements at the trial then this is a part of the circumstances of the case which the court must consider in deciding whether the confession is true."

So, **TUWAMOI's** case clearly distinguishes between **admissibility** of a confession, and the **weight** to be attached to that confession. That case and all the other cases following it, do not establish a rule that once admitted, a confession **must** lead to a conviction. The court "might only found" a conviction, depending on its analysis of all the circumstances of the case, and upon reaching a conclusion that the confession must be true.

In convicting the appellant, the trial court said on p. 141 of the record:-

> *" I cannot but hold that in terms of Section 27(1) of the Tanzania Evidence Act, 1567 the cautioned statement made by the 1st accused to PW7 was voluntary and a complete account of what happened. When Exhibit D1 is considered in the totality of the evidence before the court there can be no doubt that the 1st accused voluntarily admitted killing the deceased. I reject his assertion that he admitted to avoid being killed as an afterthought.*

And concluded on p. 142

> *"From the foregoing, and taking into account the confessional statements and the provisions of sections 33(1) of the Evidence Act, 1967 I am more than satisfied that in the instant case, there is more than ample corroborative evidence in support of exhibits D1 and P4 sufficient to support the conviction of the two accused persons"*

So, to the trial court, the greatest asset in the prosecution case, was the confessions of the appellant namely Exh P6 in the case of the appellant, which according to him is "amply corroborated" by Exh D1 and P4 (the 2nd accused's extra judicial statement).

With respect, first, although Exhibit P6 was admitted without objection from the defence it was nevertheless not only retracted, just two days after it was made before the justice of the person in Exh D1, but also in his defence at the trial. We agree that it was too late to challenge its admissibility, but he still retained the right to retract it at the trial. There is no rule of law prohibiting that. Exhibit D1 was produced by the appellant

as defence exhibit to prove that he was forced to admit to the killing to the villagers, in fear of his life. We don't know why the trial court found his piece of evidence to be corroborative of Exh P6, which is dialectically opposed to it.

The second point is that in using Exh P4 (the second accused's extra judicial statement) as corroboration, the trial court relied on Section 33(1) of the Evidence Act. It is true that Section 33 (1) allows a court to take into consideration the evidence of a co accused against another, but Section 33(2) of the same Act, prohibits a conviction to be based solely on such confession. This provision appears to have escaped the mind of the learned trial judge. So corroboration of a confession from a co- accused, is not just a matter of practice but a matter of law. This provision was enacted by an amendment to the Evidence Act by Act No. 19 of 1980, and thus overriding all case law, that had originally demanded such corroboration only as a matter of practice. Henceforth, a conviction of an accused person cannot rest solely on the confession of a co accused (See **THADEO MLOMO AND OTHERS vR** (1995) TLR. 187.

But, what further reduces the corroborative value of Exh P4 and even P7 (confessions of the second accused) is that, the said accused having retracted them both, both confessions, in practice, require corroboration. It is indisputably the law that, evidence which itself requires corroboration, cannot corroborate. So a retracted confession cannot corroborate another retracted corroboration (**See JOHN CHEREHANI AND ANOTHER vR** Criminal Appeal to 189 of 1989 **MT 38870 PTE RAJAB MOHD AND OTHERS vR** Criminal Appeal No. 141 of 1992 (both unreported) and **MKUBWA SAID OMAR v SMZ** (1992) TLR. 365).

Then, there is this evidence that the appellant admitted the killing in the presence of the villagers, PW1, PW2 and PW4. Of course, oral admissions/confessions are admissible in certain circumstances but extreme care must be taken before taking them on their face value (See **SHAYO AND OTHERS vR** (1998)TLR. In the present case, this piece of evidence is not free from difficulty. First, the appellant did not make the alleged confession until the arrival of his brother, Leonard, who threatened him, and the atmosphere became so tense that the village authorities had to arrest the appellant to prevent further chaos. This in our, view, only confirms the appellant's fears expressed in Exhibit D1. Secondly, if they

could be taken as confessions, there were made in the presence of PW1, PW4,(both village chairmen) and PW7 (a police officer) at the scene without cautioning the appellant, because these people were all persons in authority in terms of S. 27(2) of the Evidence Act (**See SHIHONE SENI AND ANOTHER vR** (supra) Equally, the appellant is alleged to have made such confessions in the presence of a group of village vigilantes (sungusungu). In **REGINA KARANTINA AND ANOTHER vR** Criminal Appeal No. 10 of 1998 (unreported) it was held that although in law sungusungu were not policemen, in real life, they had more coercive power than ordinary citizens and therefore feared. In fact PW2 admitted that he was their commander. Such confessions must be corroborated as a matter of practice. We therefore think that such evidence was not only inadmissible but, if admissible, it unreliable and required corroboration.

These are some of the circumstances that, in our view, affect the value and weight of Exhibit P6. But in addition, we also have the following facts on the record. First, we have the fact that the appellant not only reported about his missing mother but also played a leading part in discovering the crime perpetrated against the deceased, so much so that even the village authorities did not suspect him as the offender. He was

above suspicion. Secondly the appellant was the one who was taking care of the deceased, including buying a shamba and building a house for her.

The first finger of accusation was pointed by the appellant's brother who intimidated the village authorities into arresting the appellant, and there made to admit to the killing. But this Leonard, was not called to testify. This accusation prevailed before the investigation, and probably influenced the investigator PW7, who also took a statement from Leonard. The appellant must therefore have been shocked by the accusation of the killing, and that Leonard, was left to prevail on the village authorities and the investigator. Considered against the background of love and affection that the appellant had shown to his mother, the contents of Exh P6 are too hostile to the deceased, to be believed that they came from the same person. All these circumstances, plus, Exhibit D1 which was given two days after Exh P6 ought to have put the trial court on alert. It is difficult to believe in the circumstances, if the appellant had voluntarily made the confession contained in the cautioned statement. (Exh P6). If so, why did he not do the same before the justice of the peace? This question was asked by this Court in **SAMSON KADEYA KAZEZE vR** Criminal Appeal No. 137 of 1993 (unreported) where a suspect was also alleged to have

confessed in a cautioned statement, but declined to do so before a justice of the peace. The court directed that such statement ought not to have been admitted and/or taken with caution.

Having considered all the evidence on record, and the submissions of the learned counsel, we are certain in or minds that the only evidence against the appellant (his confession, Exh P6), although admitted without objection, ought to be treated with circumspection, and in the peculiar circumstances of this case we think there ought to be some corroboration and we could find none. Therefore the appellant's conviction is not safe.

For the above reasons we allow the appeal. We quash the conviction and set aside the sentence. We order his immediate release from prison unless he is otherwise lawfully held.

DATED at **MWANZA** this 11th day of November, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL.