

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

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

CRIMINAL APPEAL NO. 157 OF 2009

**ABDI ADAM @ CHAKUU..... APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

**(Appeal from the Judgment of the High Court
of Tanzania at Moshi)**

(Mchome, J.)

dated the 16th day of April, 2009

in

Criminal Session Case No. 37 of 2006

JUDGMENT OF THE COURT

16th & 21st February, 2012

MUNUO, J.A.:

The appellant, Abdi Adam @ Chakuu ws convicted of murder and sentenced to death in Criminal Session Case No. 37 of 2006 in the High Court of Tanzania at Moshi before Mchome J. Aggrieved, he lodged this appeal. The prosecution alleged that on the 13th February, 2005 at about 17.30 hours at Tarakea Village in Rombo District within Kilimanjaro Region, the appellant murdered a girl called Clara Albert.

The deceased Clara Albert was the second daughter of Albert and Flora Ngowi. The latter deposed as P. W. 1. She stated that the deceased was the second child in their family of three children. On the material afternoon, P.W. 1 sent the deceased to check the gate to the pig sty. Clara went to the pig sty but delayed in returning so her mother got worried because half an hour elapsed before she returned. Her mother then walked to the pig sty. On the way she met the appellant cycling away. P.W. 1 recognized the appellant because he was cycling fast. The appellant lived in the neighbourhood and P.W. 1 knew him well. A few paces ahead, P.W1 was shocked to find her daughter, Clara Albert wounded and dead. She saw a dressing table on top of her indicating that she had been smashed by the said dressing table on her face which had a fresh lacerated wound.

The face of the victim was covered with pieces of glass. P. W. 1 removed the glass and lifted the 13 year old child who groaned and died.

No. E 5503 Detective Corporal Abbas visited the scene of crime where he found the body lying on its back surrounded by pieces of a broken bottle and a dressing table on top of her body. He drew a sketch map of the scene of crime which he tendered as Exhibit P3. The broken dressing table, the sandals and the khanga the deceased wore were tendered as Exhibit P4.

As to who killed the deceased, the appellant voluntarily recorded a cautioned statement. The cautioned statement was admitted as Exhibit P3.

The next question is, who killed the little girl, Clara Albert.

In his cautioned statement the appellant admitted that he killed deceased. He said that he raped the girl after seizing and dragging her into his house when she passed by his house on her way to the pigs' shed. The appellant further stated that he first raped the deceased and fearing that she would report the rape and put him in trouble, he fatally hit her with the dressing table and a soda bottle on

the head to conceal the crime of rape he had committed. The appellant stated in his cautioned statement in Kiswahili:

".....wakati natoka nje akawa anapita binti mmoja pale nyumbani ambaye kila siku huwa anapita kwenda kulisha nguruwe kwa Justine Masika. Nilichokifanya nilimchukua binti huyo.....Nikamkamata na kumvutia ndani ya chumba changu. Nlimvua chupi na kufanya nako tendo la ndoa. Binti huyo alikuwa analia. Nilimwambia asipige kelele. Binti huyo alinyamaza. Nilipomaliza haja yangu nilifungua mlango binti huyo akatoka mbio."

Meaning that he seized the girl; dragged her into his house and raped her. He then opened the door and she ran away. The appellant did not end there. An idea struck him for he said:

"...Alipotoka nilipata wazo kwamba binti huyo akienda kulalamika, nitapata matatizo.

Nilipata nguvu za ajabu. Nikanyanyua dressing table nikamfukuza na kumponda nayo kichwani. Binti huyo alianguka chini. Nikanyanyua tena dressing table na kumponda nayo kichwani. Nikachukua chupa ya soda nayo nikampiga nayo kichwani mpaka ikapasuka. Ninachokumbuka nilichukua baiskeli iliyokuwa pale nyumbani na kukimbia..."

He said that after sexually assaulting the victim he realized that he would be in trouble if she went to complain. He then lifted the dressing table and hit the deceased crushing her head. He also took a soda bottle and hit her on the head until it broke. He then took a bicycle and escaped to Kenya where he hid until he was arrested and repatriated to Tanzania to answer the murder charge.

In his sworn defence the appellant said that he was in Kenya from the 11th March, 2006 so he did not kill the deceased. He

admitted, however, that he did not remember the dates he went to Kenya.

In this appeal, Dr. Ronlick Eli Kasambala Mchami, learned advocate, represented the appellant. He filed two grounds of appeal namely:

"1 That the trial court erred in law when it convicted the appellant on the charge he was charged with when the charge preferred against the appellant was not proved beyond reasonable doubt.

2. The trial court erred in law and in fact when it relied on the caution statement to convict the appellant on the charge he was charged with when no trial within a trial was conducted to prove beyond reasonable doubt that the said caution statement was given voluntarily."

At the hearing, Dr. Mchami adopted his written submission in support of the appeal. He faulted the learned trial judge for not conducting a trial within a trial to establish the validity of the cautioned statement on which the conviction of murder was grounded. He urged the court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, 1979, Cap. 141 R. E. 2002 to quash the conviction, set aside the sentence of death and order a trial *de novo* because the appellant retracted the cautioned statement which incriminated him.

Counsel for the appellant faulted the learned judge for omitting to read the contents of the cautioned statement to the appellant. He compared the omission to an omission to read the charge to a suspect. Learned counsel cited the cases of **Republic versus Yonasari and others (1942) E. A. C. A. 65, Hando s/o Akunay versus Republic (1951) 18 E. A. C.A 307 and Wachira s/o Wambaga (1954) 21 E. A. C. A 396** in which the then Court of Appeal for East Africa held that a charge sheet must be read over to the accused. The learned trial judge should have conducted a trial

recorded, Dr. Mchami argued, saying the prosecution failed to prove the guilt of the appellant beyond reasonable doubt.

The issues before us are whether the appellant killed Clara Albert and whether he did so with malice aforethought.

The learned Principal State Attorney, Ms. Veritas Mlay, urged us to resolve the above issues in the affirmative. She maintained that since the appellant never suggested at the trial that the cautioned statement was not voluntarily recorded and also because no objection was raised against the cautioned statement when P. W. 3 Assistant Inspector Benjamin Baitana who recorded it testified, the appellant's denial of the statement during the cross-examination was an afterthought. The purported retraction of the cautioned statement, the learned Principal State Attorney contended, was a mere afterthought. She referred us to the case of **Michael Luhiye versus Republic (1994) TLR 181** wherein the Court held that a conviction can be grounded on a retracted confession without corroboration. In this case, the appellant also admitted the offence

of murder before PW 2 and PW. 3 so their evidence corroborated the cautioned statement in any event, the learned Principle State Attorney observed. She further referred us to the case of **Hemed Abdallah versus Republic (1995) TLR 173** in which the Court held that a conviction can be based on a retracted cautioned statement provided the trial judge is convinced that the said statement is true.

The learned judge revisited the cautioned statement and quoted:

"it is true I am a man of five prayers. This I just bad luck. I have been confronted by Satan, the devil. I do not know where to hide my face from the community that is around me in Tarakae. I regret to have killed an angel of god without cause. I plead to the community in Tarakae and especially the parents of the deceased to forgive me."

as:-

*"... the strongest evidence for the prosecution in this case. ... The accused repudiated the confession only in his defence. When P. W. 3 the police officer who took the accused's cautioned statement testified at the trial the question of admissibility or otherwise of that cautioned statement was not raised again. In **shibobe Seni and another versus Republic (1992) T. L. R. 330** the Court of Appeal of Tanzania held that once the confessions are repudiated, albeit during the defence stage the trial judge should **suo motu** check on their voluntariness, validity and /or seek corroboration thereof."*

We affirm the decision in **Shibobe Seni and another's** case. In this case the appellant admitted before P. W. 2 and P. W.3 that he raped the deceased and then killed her to muzzle her from

reporting the rape he had committed on her. The admission of the offence before P.W.2 and P. W. 3 fully corroborated his retracted cautioned statement. The appellant simply denied the statement during cross-examination after he gave his defence so the purported retraction of the cautioned statement was an afterthought. The appellant killed Clara Albert with malice aforethought and in cold blood after raping her.

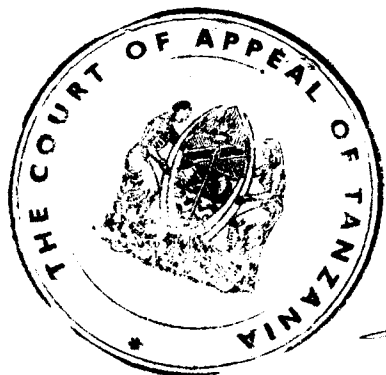
Like the learned trial judge, we are satisfied that the prosecution proved the guilt of the appellant beyond all reasonable doubt. We find no merit in this appeal. The appeal is accordingly dismissed.

DATED at Arusha this 20th day of February, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", is written over a horizontal line.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL