

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

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 297 OF 2009

BUSWELO BUSALU APPELLANT
VERSUS
THE REPUBLIC RESPONDENT
(Appeal from the decision of the High Court of Tanzania
at Bukoba)

(Lyimo, J.)

dated the 17th day of April, 2008
in
Criminal Sessions Case No. 83 of 2004

.....

JUDGMENT OF THE COURT

18th & 25th November, 2013
RUTAKANGWA, J.A.:

The appellant and one Ndalakwa s/o Shilanga, were convicted as charged of the murder of Baraganile s/o Mswanzari by the High Court sitting at Bukoba. They were sentenced to suffer death by hanging. Aggrieved by the conviction and sentence each one instituted his own appeal in this Court. For unavoidable reasons, the appeal by Ndalakwa Shilanga, i.e. Criminal Appeal No. 247 of 2008, was heard first and disposed of on 15th November, 2011. Suffice it to observe in passing that the appeal against conviction, which was based on alleged but retracted confessional statements, was allowed in its entirety.

The undisputed facts forming the basis of the prosecution and subsequent conviction for murder of the two accused, we have found out, were stated with sufficient lucidity by the Court in Criminal Appeal No. 247 of 2008. As shown in the Court's judgment, the relevant facts are as follows:-

The deceased was Shilanga's mother. She was last living in Nyantimba, Choga village, where Shilanga had bought a piece of land and built a house for her. But Shilanga remained at Nyarweru village about 2 kilometers away from the deceased's residence, but within the same Nyantimba locality. On 11/4/2002, Faustine Kemiyaanda (PW1) who was the street chairman of Choga street, where the deceased resided, was visited by Shilanga. The latter 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 No. B 6156 Sgt. Venance) drew a sketch plan of the area, which was tendered during the preliminary hearing as prosecution exhibit P2. PW7 Sgt. Venance was also

accompanied by a doctor (PW3 Dr. Magade Kihulla) 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 Shilanga were formally arrested for being responsible for the deceased's death. They were accordingly charged, and convicted, as indicated above.

In convicting the appellant and Ndalahwa Shilanga, the learned trial judge relied heavily on the cautioned statements of both accused persons made to PW7 Sgt. Venance (exhibits P6 and P7) and the extra-judicial statements (exhibits P4 and D1) made before a Justice of the Peace, one PW6 Stephen Kabaka, all of which were retracted during the trial. Furthermore, the learned judge relied on the evidence of PW1 Faustine Kemiyaanda, PW2 Marude Kabange and PW4 Sixbert Ndarikule, before whom Shilanga had allegedly orally confessed killing his mother. Although these statements were retracted by the accused persons, the learned trial judge found them to have been made voluntarily and gave "a complete account of what happened":

He thereafter thus concluded:-

From the foregoing, and taking into account the confessional statements and the provisions of section 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 exhibit D1 and P4

sufficient to support the conviction of the two accused persons.”

In its judgment in Criminal Appeal No. 247 of 2008, the Court differed with the above findings of the learned trial judge. Relying on s. 33 (1) and (2) of the Evidence Act, the Court faulted the learned trial judge for predicating the conviction on the confessional extra-judicial statement of the appellant herein (Exhibit P4), which required corroboration not as “as a matter of practice but a matter of law”, which requirement appeared “to have escaped the mind of the learned trial judge.” The Court also found fault with the finding of the learned trial judge to the effect that Shilanga’s extra-judicial statement (exhibit D1) which was diametrically opposed to his cautioned statement (exhibit P6), was corroborative of exhibit P6. As the oral confession by Shilanga to PW1 Kemiyaanda, PW2 Kabange and PW4 Ndarikule was a result of Shilanga’s brother’s (Leonard) threats and was made in the immediate presence of the village leaders (PW1 and PW4), a police officer (PW7) and village vigilantes, without being cautioned, the Court found such evidence at best unreliable, hence needing corroboration, or at worst inadmissible. For these reasons, the Court concluded that:-

“we are certain in our minds that the only evidence against the appellant (his confession) Exhibit 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.”

On the basis of this sound reasoning, the appellant Shilanga escaped the hangman's noose.

In seeking to establish his innocence, the appellant herein, lodged a memorandum of appeal containing a litany of grievances. After studying these grievances, we have come to the conclusion that his main complaint is that the learned trial judge grossly erred in law in basing the conviction for murder on his retracted extra-judicial statement (Exh. P4) and that of Shilanga (Exh. P6).

To prosecute the appeal, the appellant appeared before us in person, but being legally defended by Mr. Antony Nasimire, learned advocate. For the respondent Republic, Mr. Yamiko Mlekano, learned State Attorney who supported the appeal, appeared.

The oral submissions of both counsel in support of the appeal were brief and focused. In their lucid arguments in support of the appeal, both counsel were of one accord on these salient facts which we find to be crucial in the just determination of this appeal:-

- (a) that no single witness eyewitnessed the murder of Baraganile d/o Mswanzari;
- (b) that the evidence of PW1 Kemiyaḁa, PW2 Kabange and PW4 Ndarikule, who arrested both the appellant and Shilanga, did not in any way implicate the appellant with the murder;

- (c) that it was only the evidence of PW6 Stephen Kabaka, who authored exhibits P4 and D1, and PW7 Sgt. Venance who recorded the cautioned statements (exhibit P6 and P7) which gravely incriminated the appellant; and
- (d) that both the appellant and Shillanga had unequivocally retracted exhibits P4, P6 and P7 in the trial High Court.

Furthermore, both counsel were in agreement on the firmly settled law that except in rare cases a conviction may not be grounded on an uncorroborated retracted or repudiated confession. Corroboration of such confession is required as a matter of practice, they pressed. It was both counsel's further strong contention, that a retracted confession cannot be corroborative evidence of another retracted confession.

Premising their arguments on the above facts and settled law, the learned advocates forcefully argued that the learned trial judge grossly erred in law in grounding the conviction of the appellant for murder on the uncorroborated retracted confessions. They accordingly urged us to allow the appeal in its entirety.

We must confess at the outset that we have found the arguments of both counsel in support of the appeal very attractive and convincing. They are resting on a firm legal and impeccable factual ground. We are also of the firm view that the only evidence proffered by the prosecution to prop up its case against the appellant was his retracted confession as contained in exhibits P4 and P7, as well as the retracted confession of Shilanga (exhibit P6).

This Court, in Criminal Appeal No. 247 of 2008, found exhibit P6 to be highly suspect. It accordingly concluded that:-

"[I]t is difficult to believe in the circumstances, if the appellant had voluntarily made the confession contained in the cautioned statement (Exhibit P6)."

The Court arrived at this conclusion after considering Shilanga's extra-judicial statement (exhibit D1) in which he was denying completely having had a hand in the death of his mother, whose killers he did not know. In that statement, he is also exonerating the appellant herein. We are, therefore, left with exhibit P4 and exhibit P7 (upon which no reliance was given by the learned trial judge).

As correctly pointed out by both counsel before us, a retracted confession, as a matter of practice, ought to be corroborated in some material particular by some other independent but cogent evidence before a conviction for any offence could be grounded on it. We have scanned the entire evidence on record and we have found such corroborative evidence totally wanting. All the same, we take it to be settled law that if such corroboration is not available, the court would still convict on an uncorroborated retracted confession if it finds the confession to contain nothing but the truth. This is only possible after it has warned itself of the danger of convicting without corroboration. See, for instance, **Tuwamoi v. Uganda** [1967] EA 84 and **Ndalahwa Shilanga v. R.** (supra).

In **Tuwamoi's** case, it was succinctly stated that:-

*"[I]n 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 the 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.**" (Emphasis is ours.)*

Also in **Ndalahwa Shilanga**, the Court unequivocally stated that:-

*"in determining whether or not the confession contains the truth, all the **circumstances of the particular case, must be taken into account...**"*

[Emphasis is ours.]

We take the words "all the circumstances of the particular case" to include but not limited to the entire evidence (be it oral, documentary, demonstrative, etc,) on record. In our determination of the crucial issue in this appeal, that is, whether or not the learned trial judge grossly erred in law in convicting the appellant on the basis of the uncorroborated retracted confessions of the appellant, we shall be guided by these salutary principles enunciated in the two cases cited above.

There is no goingsaying now that the appellant's conviction was based on his uncorroborated retracted confession and that of Shilanga. We have already shown that the confession attributed to Shilanga had no probative value even to the case against its alleged maker. We are of the settled view, therefore, that the learned trial judge erred in law in finding support from exhibit P6 while concluding that the appellant was one of the murders of Baraganile d/o Mswanzari.

Coming to the confessions ascribed to the appellants, after dispassionately reading the entire evidence on record, we have failed to agree with the finding of the learned trial judge that they contain nothing but only the truth. We shall show why we are saying so.

Both at the trial of the appellant and his co-accused and in this appeal, the fact that Baraganile was murdered was not disputed. Neither was the cause of her death. The doctor, who performed the post-mortem examination, PW3 Dr. Mageda Kihulya, categorically stated that "externally the deceased had sustained a depressed wound on the frontal area, and had blood in the mouth, ear and nose." From this he concluded thus:-

*"from the head wound and bleeding, I was of the opinion that there was internal bleeding. **In my opinion cause of death was due to severe brain injury.**"* [Emphasis is ours.]

In his alleged confessional statements, the appellant came up with versions diametrically opposed to that of PW3 Dr. Kihulya on how the deceased had met her death. In exhibit P4 he is shown to have stated that together with one Willy and

Shilanga, they had strangled the deceased to death ("Tulimkaba shingoni hadi alipokata roho.") If this assertion were to be taken as representing the truth, then PW3 Dr. Kihulya's evidence would be reduced to a mere pack of lies, which we are not prepared to do here. All the same, the appellant had a different version to tell to PW7 Sgt. Venance. In exhibit P7 he allegedly stated that when the deceased approached them they just got hold of her and killed her ("tukamkamata huyo bibi tulimuua"), without more. The matter is further complicated by the contents of exhibit P6 in which Shilanga gave a totally different story. According to Shilanga, his mother was assaulted physically using their bare hands until she died. But that is not all. There is the evidence of PW1 Kemiyaanda.

PW1 Kemiyaanda told the trial judge while under examination in chief that when they interrogated Shilanga, he admitted killing his mother as she had bewitched her children. PW1 Kemiyaanda went on to assert that "he did not name other persons in the killing." While under cross-examination from the appellant's counsel, PW1 Kemiyaanda testified that the appellant, who had admittedly not been assaulted by anybody by then, did not admit participating in the murder of Baraganile. If the appellant had not confessed to the murder on 11/04/2002, and Shilanga had not implicated him. how could he be said to have freely and voluntarily confessed the murder to PW6 Kabaka and PW7 Sgt. Venance, some days later, after he had been in police lock up for over three days and denied food for this entire period? We respectfully hold that it does not add up. Worse still, we have found exhibit P4 of little persuasive value because PW6 Kabaka never told the appellant that he was a Justice of the Peace, before recording exhibit P4. This was a fatal omission, as Mr. Mlekano rightly put it.

For the reasons given above, we have found ourselves constrained to hold that both exhibits P4 and P7 are not true at all. We accordingly respectfully accept the counsel's certitude that the learned trial judge erred in law in grounding the appellant's conviction for murder on his uncorroborated alleged confessional statements. The appellant, it is our considered finding, on the available highly suspect evidence, was entitled to an acquittal.

All said and done, we allow this appeal in its entirety. We quash and set aside the conviction for murder as well as the death sentence. We order the immediate release from prison of the appellant unless he is otherwise lawfully held.

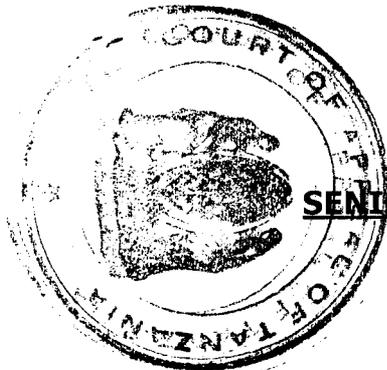
DATED at MWANZA this 25th day of November, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "P.W. Bampikya".

P.W. Bampikya

SENIOR DEPUTY REGISTRAR
COURT OF APPEAL