IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., MJASIRI, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 278 OF 2010

1. EMMANUEL LOHAY
2. UDAGENE YATOSHA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Sambo, J.)

dated the 15th day of June, 2010

in

Criminal Sessions Case No. 20 of 2004

.....

JUDGMENT OF THE COURT

27th February, & 4th March, 2013

MSOFFE, J.A.:

The appellants were sentenced to death consequent upon their conviction for the murder of ASQWARY AMMO (the deceased) on or about the 8th day of September, 2002 at Laja village, Karatu, Arusha Region. Aggrieved, they have preferred this appeal in which Mrs. Christine Kimale, learned advocate, appeared and argued it on their behalf. The

respondent Republic had the services of Mr. Haruni Matagane and Miss Elizabeth Swai, learned State Attorneys. Mrs. Christine Kimale preferred a sole ground of appeal which reads:-

> *(i) That the prosecution witnesses did not prove charge of murder against the appellants to the standard required, that of proof beyond reasonable doubt.*

In elaboration, Mrs. Kimale was of the general view that the prosecution case against the appellants was not proved beyond reasonable doubt. She emphasized that none of the prosecution witnesses was present at the scene of crime at the material time. She singled out two people i.e. Boay Margwe and Langwen who, it was alleged, heard the appellants confessing to have killed the deceased. In her view, these two people were vital in lending credibility to the prosecution case and yet they were not summoned as witnesses, she wondered.

Briefly, the prosecution case as it unfolded at the trial went as follows:- The second appellant was married to the deceased. The first appellant was their *"house help"* at the material time. As from 8/8/2002 the deceased went missing from the homestead. In the year 2002 PW1

Boay Mithay was the chairman of Tlomarawak hamlet. In that year a national census was conducted. On 15/8/2002 he went to the deceased's house with the sole purpose of inviting him to participate in the national census exercise. He found the deceased missing. The appellants told him that the deceased had gone to Gembark village. After about thirty days i.e. in September, 2002, he went back to the deceased's home and yet to be told again by the appellants that the deceased had not returned from Gembark. Apparently all this time the appellants had not reported to anyone about the loss of the deceased. PW1 became suspicious that something fishy or sinister could have happened to the deceased.

Accordingly, a search was mounted whereupon blood and a snuff bottle believed to be those of the deceased were found in a bush. The appellants were arrested after which they revealed that they had killed the deceased. Cautioned and extra-judicial statements were also taken from them in which they admitted the killing. The statements were eventually produced and admitted in evidence without objection by the defence.

As correctly submitted by Mr. Matagane, the appellants' conviction was mainly based on the testimonies of PW2 Tluway Ammo and PW3 Emmanuel Ammo and the extra-judicial and cautioned statements.

We begin with the evidence of PW2 and PW3. In essence the evidence of these two witnesses was to the effect that the appellants admitted the killing and volunteered to show the place where the sinister act was committed. PW3 in particular had this to say:-

> *...We arrested them and asked them and they said they killed him on 8/8/2002, in the valley and went to show us the place. The small village chairman was among those who went there we saw blood on the big stone, and a bottle of snuff, we got a pitshort (kaptura) hidden under sands, he showed us the axe and "mgolole." Emmanuel Lohay showed us all these. Later we got a small piece of meat being dry we were shown shoes known as "katambuga" with blood, one of them had blood. He told us that they did burn his head, and his body eaten by hyenas, we did not see the ribs. We were not told where the ribs were. He said Udagane had hidden the ribs and were*

not seen. He showed us where the head was burnt and we got ashes. Udagane Yatosha was present, but showed us nothing. The accused persons and the deceased went to the valley to look for honey, but they did not get it. While seated on the stone. Udagane started asking her husband as to why "anawagombeza na Emmanuel" the accused became furious and rembered (sic) that they do have sexual inter course together, then he slapped his wife (alimchapa kofi), then Emmanuel Lohay took the axe and cut him at the ear part, and Udagene hit him at the forefront of his face (usoni) and he fell down dead...

PW2 gave the same version as that of PW3 above.

The question is whether there is basis for us to disbelieve PW2 and PW3. In answer to this question our starting point will be our decision in **Goodluck Kyando v. Republic,** (2002) TLR 363 that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness. In the instant case, besides denying the killing the appellants did not seriously

deny the testimonies of PW2 and PW3 that they led the search party to the place where the deceased was killed. In the light of all this, like the High court, we too have no strong reasons for not believing PW2 and PW3.

Having believed PW2 and PW3 the issue is whether there was need to summon Boay Margwe and Langwen as suggested above by Mrs. Kimale. On this, we go along with Mr. Matagane that in terms of Section 143 of the Evidence Act no specific number of witnesses is required to prove something. In the justice of this case, we are satisfied that the evidence of PW2 and PW3 coupled with the cautioned and extra-judicial statements were enough to establish the appellants' guilt beyond reasonable doubt. In the premise, no useful purpose would have been served if Boay Margwe and Langwen had been called to testify on behalf of the prosecution side.

This brings us to the cautioned and extra-judicial statements. The statements have one common feature. All of them describe the circumstances and the manner in which the deceased met his death. They are so detailed that the events described therein could have only been given by people who had the knowledge of how the deceased met his death. The statements also show the role played by each one of them.

The extra-judicial statement of the first appellant in particular is a good illustration of the above point thus:-

> *...Baada ya kumaliza kula marehemu aliniambia mimi, mke wake na yeye kwa pamoja tufuatane tupeleke ng'ombe kwenye eneo la mkaa ili tukachome mkaa. Tukiwa sote watatu tulifika mahali tukapumzika juu ya mawe na kuvuta tumbaku ya ugoro. Wakati huo mke wake marehemu alianza kumuhoji mumewe alimleta mganga gani aliyesababisha yeye na mimi kuvimba mwili? Marehemu alichukua fimbo na kumpiga nayo mkewe. Nilipoona marehemu anampiga mke wake kwa kutumia shoka nililokuwa nalo nilimpiga nalo marehemu shingoni upande wa nyuma na akaanguka chini. Mke wake marehemu alipoona marehemu anataka kuamka alimpiga rungu usoni (paja la uso) na ikawa marehemu alifariki pale pale...*

In their respective defences at the trial the first appellant stated that he never gave a cautioned statement and an extra-judicial statement and

that he was forced to sign something he did not know. The second appellant testified to the effect that she gave both a cautioned and an extra-judicial statement but she disowned the statements tendered in court.

But, as earlier stated, the above statements were produced and admitted in evidence without objection by the defence. In essence, the appellants are now seeking to challenge the admissibility of the statements. With respect, it is too late in the day for them to do so because their admissibility or otherwise was never raised at the trial. As a matter of general principle an appellate court cannot allow matters that were not raised and decided by the court(s) below. In the instant case objection, if any, ought to have been taken under Section 27 of the Evidence Act that the statements were not made voluntarily or that they were not made at all. Objection could have also been taken under Section 169 of the Criminal Procedure Act that they were taken in violation of the CPA, etc. If objection had been taken under section 27 above the trial court would have been duty bound to conduct a trial within trial to determine the admissibility or otherwise of the statements. It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during

cross-examination or during defence – **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case, the appellants *"missed the boat"* by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence.

In the upshot, we are satisfied that this appeal has no merit. We hereby dismiss it.

DATED at ARUSHA this 1st day of March, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL