

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

CRIMINAL APPEAL NO. 255 OF 2012

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.)

FESTO MWANYANGILA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Mkuye, J.)

dated the 9th day of August, 2012

in

Criminal Sessions Case No. 34 of 2007

JUDGMENT OF THE COURT

18th & 25th June, 2014

KAIJAGE, J.A.:

The appellant was charged with and convicted of the offence of murder. The High Court sitting at Iringa sentenced him to death. He is now appealing against both conviction and sentence. It was alleged that on 15/9/2005 at Wangama village, Iringa Rural District, Iringa Region, the appellant murdered one Samson Kindole (the deceased).

At the trial, it was common ground that the deceased suffered a violent death. The undisputed report on post-mortem examination

(EXHP1) has it that his death was due to multiple injuries and brain laceration. What was contested, however, was the issue as to who killed the deceased.

The prosecution led evidence to the effect that on 15/9/2005 during the morning hours, the deceased left on a bicycle to Kitawaya village where he operated for gain through selling local brew and roasted meat. The next morning of the 16/9/2005, his two wives realized that the deceased did not sleep to any one of them. Later on the same day, news spread about the finding of an unidentified body of a dead person lying in the forest situated between Kitayawa and Wangama villages. The dead body was later identified to be that of the deceased.

Following the discovery of the deceased's body, Wangama villagers initiated a search for the murderers. The search party comprised of PW1 Ferdinand Kitogere and PW2 Miraji Kindole, among other villagers. According to PW1 and PW2, the appellant was the first suspect to be arrested somewhere in Lundamata village. The said two prosecution witnesses told the trial High Court that upon his arrest, not only did the appellant admit in their presence and hearing to have killed the deceased

using a club and a machete in collaboration with two other persons he named as Noisi Makowo and Nazanga Duma, but he also voluntarily led them to the premises of PW3 Lukia Kikove and her co-wife PW4 Maria Mfalamagoha where he had temporarily kept a bicycle belonging to the deceased. Upon its recovery, the said bicycle was positively identified to belong to the deceased, and in the course of trial it was tendered and admitted in evidence as EXHP2.

In their respective testimonies, PW3 and PW4 confirmed the story of PW1 and PW2 to the extent that on 18/9/2005 the appellant came to their premises with a request that he be assisted in keeping the said bicycle in safe custody until the following day when he promised to collect it. They agreed. Apparently, the said co-wives were told by the appellant that the bicycle was defective, hence the latter's request to the former.

The incident in question having been reported to the police authorities, investigations were immediately mounted. In the course of Police investigations, D/Sgt. Nicholas obtained and recorded the appellant's cautioned statement (ExHP5) in which the latter confessed to have killed the deceased in cold blood. On 21/9/2005 the appellant's

extra-judicial statement (EXHP7) was taken by PW5 Mwinyiheri Kondo, a Justice of the Peace. Consistent with the testimonial account of PW1, PW2, PW3 and PW4, in EXHP 7 the appellant made a confession its substance of which we take the liberty to reproduce hereunder:-

"Ilikuwa Alhamisi tarehe 15/9/2005 nilikuwa natokea kwenye biashara zangu nikakutana na Marehemu majira ya saa kumi na mbili jioni katika pori la Kitayawa yeye akiwa na baiskeli. Mimi nikampiga panga kichwani, na kumkata kwenye mikono yake yote miwili, marehemu akadondoka chini na kufa papo hapo, nikamburuza na kumtupa kwenye vichaka, kisha nikaondoka na baiskeli yake."

It is significant to take note here that EXHP7 was admitted in evidence without any objection forthcoming from the defence.

In his sworn defence, the appellant made a categorical denial of having killed the deceased. He denied almost every piece of evidence adduced by the prosecution witnesses. For instance, he stated that he did not know whether he was taken to PW5, the Justice of the Peace, and that the extra-judicial statement which was read over in court by the said witness was not true. However, upon being cross-examined, the appellant

changed his earlier version and he unequivocally stated that the evidence tendered by PW5 was nothing but the truth.

The appellant's trial was conducted with the aid of three (3) assessors who returned verdicts of guilty as charged. Relying on the report on post-mortem examination (EXHP1), the appellant's cautioned statement (EXHP5), his extra judicial statement (EXHP7), his oral admission to the killing of the deceased he made to PW1 and PW2 and his conduct leading to the discovery of a bicycle (EXHP2), the learned trial judge was satisfied that the appellant killed the deceased with malice aforethought.

The memorandum of appeal lodged on behalf of the appellant by Mr. Rwezaula Kaijage, learned advocate, lists four (4) grounds, but two (2) were abandoned. The remaining two (2) grounds are predicated upon the following grievances:-

- 1. That the Hon. trial judge greatly erred in law by convicting the appellant basing on an improper cautioned statement that offends the provisions of section 57 and section 58 of the Criminal Procedure Act, Cap. 20 R.E. 2002.*
- 2. That the Hon. trial judge erred in law by convicting an accused person basing on circumstantial evidence from which facts*

inference of guilty was drawn although the circumstantial evidence itself was wrapped in great doubts.

At the hearing of the appeal, the appellant was advocated for by Mr. Rwezaula while the respondent Republic which resisted the appeal was represented by Mr. Abel Mwandalima assisted by Ms. Lilian Ngilangwa, both learned State Attorneys.

Believing that cautioned statements are exclusively taken and made under section 58 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA), Mr. Rwezaula submitted in support of the first ground of appeal that the appellant's cautioned statement (EXHP5) was irregularly taken in the form of questions and answer instead of an unsolicited statement by the appellant himself. He thus urged us to discount the evidence in EXHP5. However, a focused response in rebuttal made by Mr. Mwandalama changed that stance of Mr. Rwezaula who, consequently, declined to further pursue the first ground of appeal.

Relying on the decision of this Court in **YUSTA KATOMA V.R;** Criminal Appeal No. 242 of 2006 (unreported), Mr. Mwandalama correctly submitted that statements made by suspects either under section 57 or

under section 58 of the CPA are recognized to be cautioned statements. What differentiates such statements is the mode in which they are taken or made, he said. Those taken under section 57 may be a result either of answers given by suspects to questions asked by the police investigating officers or partly answers to questions asked and partly volunteered by suspects, he stressed. He further pointed out that those taken under section 58 are wholly volunteered and unsolicited statements by suspects. He thus contended that the appellant's cautioned statement (EXHP5) was properly taken under section 57 of the CPA in the form of questions and answers. With respect, we are in full agreement with Mr. Mwandalama and, for that reason, we dismiss the first ground of appeal for being misconceived.

Next we proceed to consider the second ground of appeal. On this, the trial High Court is being faulted for having allegedly convicted the appellant basing on circumstantial evidence "*wrapped in great doubt.*" A single strand of circumstances which Mr. Rwezaula claimed not to have been established beyond reasonable doubt touches on the appellant's conduct which led to the discovery of the deceased's bicycle (EXHP2). In elaboration, he contended that, because the appellant took EXHP2 to PW3

and PW4 on 18/9/2005, two (2) days after the deceased's death, it was doubtful that the appellant could have been responsible for the murder in question.

In his rebuttal submission, Mr. Mwandalama, once again, correctly pointed out that the appellant's conviction was grounded upon his confessional statements in the cautioned statement (EXHP5) and in the extra-judicial statement (EXHP7), his oral admission to PW1 and PW2, the evidence of the report on post-mortem examination (EXHP1) and his conduct which led to the discovery of EXHP2. No single piece of evidence was taken in isolation to ground the appellant's conviction, he contended.

This being a first appeal, we are entitled to re-evaluate the evidence on record and come to our own conclusions. However, having carefully gone through the record of proceedings and the judgment of the trial High Court, we have found no material basis upon which our interference with its sound decision could be justified.

After the trial High Court had satisfied itself that in the circumstances of the case the appellant's retracted confession in EXHP5 was nothing but

the truth, and after it had addressed the rules and principles governing retracted and repudiated confessions lucidly stated in **TUWAMOI V. UGANDA** [1967] EA 84, it nevertheless went ahead to find other corroborative incriminating evidence including but not limited to the appellant's conduct which led to the discovery of EXHP2. The corroborative incriminating evidence relied on by the trial High Court supports, in all material particulars, a detailed confessional statement made by the appellant in EXHP5. In **TUWAMOI'S** case (*supra*), the following pertinent observation was made:-

"The present rule then as applied in East Africa, in regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court might do so if it is fully satisfied in the circumstance of the case that the confession must be true."

So, on the authority of **TUWAMOI'S** case, a court may convict on a retracted/repudiated confession even without corroboration. In this case, the trial High Court could have as well convicted the appellant on the strength of EXHP5 or EXHP7 in which the appellant confessed to have killed

the deceased, without even resorting to the impugned strand of circumstances touching on the appellant's conduct. In any case, it became clear to us, in the course of hearing of this appeal, that Mr. Rwezaula was labouring under the wrong impression that the appellant's conduct which led to the discovery of EXHP2 was the sole evidence which grounded the appellant's conviction.

On the strength of the foregoing brief discussion, we are settled in our minds that the appellant's appeal was instituted without any sufficient ground of complaint. Consequently, the appeal is hereby dismissed in its entirety.


DATED at IRINGA this 24th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL