IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 317 OF 2013

MASHIMBA DOTTO @ LUKUBANIJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwangesi, J.)

dated 7th day of August, 2013
in
Criminal Sessions Case No. 122 of 2007

.....

JUDGMENT OF THE COURT

20th & 22nd October, 2014

MSOFFE, J.A.:

The appellant was convicted of murder contrary to section 196 of the Penal Code and sentenced to death. Aggrieved, he is appealing, and the effort is resisted by Mr. Hemedi Halidi Halfani, learned State Attorney, representing the respondent/Republic.

Mr. Sylveri Chikwizile Byabusha, learned counsel, is advocating for the appellant. He has advanced three grounds, to wit:-

1. That the learned trial Judge erred in admitting a cautioned statement taken outside the time provided by law and not read out to the gentlepersons assessors.
2. That the appellant did not append his signature to the last 9th question on whether or not he wished to give his statement, so, the extra judicial statement cannot be attributed to the appellant and it was therefore inadmissible.
3. That the learned trial Judge misdirected himself in convicting the appellant on the strength of the cautioned statement and extra judicial statement without corroborative evidence as the two statements could not corroborate each other.

At the hearing, Mr. Byabusha abandoned the second ground of appeal. Having done so, we will not address this ground. We will leave it at that.

As far as the first ground of appeal is concerned, Mr. Byabusha at first pursued it to a certain extent. On reflection, however, he abandoned

it too after realizing the difficulty in pursuing it. The difficulty arose from the fact that the allegation that the cautioned statement was recorded outside the statutory period was not canvassed at the trial. Ideally, under section 169 (1) of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act) objection regarding the admissibility of the statement on that aspect ought to have been raised at the trial in order to give the prosecution the opportunity to discharge the burden mandated to it by virtue of the provisions of sub-section (3) thereto. As it is, since objection to the admission in evidence of the statement based on the above point was not raised at the trial it would be futile and out of place to raise it at this late stage where this Court is not seized with the jurisdiction to determine the admissibility or otherwise of the statement in question - See also this Court's decision in **Zakayo Shungwa Mwashilingi and Two Others v Republic**, Criminal Appeal No. 78 of 2007 (unreported).

The main complaint in the third ground of appeal arises from one or two passages in the judgment of the High Court where the trial judge held the view that the cautioned statement corroborated the extra-judicial statement. For instance, in his judgment the trial judge is on record as having stated as follows:-

...Although in the instant matter after having sincerely warned myself, I am of considered view that, the caution statement that got retracted by the accused is nothing but the truth there is yet the extra judicial statement, which the accused did voluntarily give to the Justice of peace wherein he has readily admitted to have committed the offence....apart from the fact that, the extra judicial statement suffices to found conviction to the accused, it as well corroborates what is contained in the retracted/repudiated statement...

In his oral submission before us, Mr. Byabusha was of the view that the judge erred in saying that the cautioned statement could safely corroborate the extra-judicial statement. In response, Mr. Halfani shared the same view save that he was of the opinion that even without the cautioned statement a conviction could still safely lie based on the extra-judicial statement only.

With respect, whether or not the extra-judicial statement was on its own enough to ground the conviction is a point we will address later. It will suffice at this stage to say that both learned counsel are correct in asserting that it is trite law that evidence which itself requires corroboration cannot corroborate another – **Ally Msutu v Republic** [1980] TLR 1, and **Swelu Maramoja v Republic,** CAT Criminal Appeal No. 43 of 1991 (unreported). In this sense, the cautioned statement in the case before us could not corroborate the extra-judicial statement. We say so because in an ideal case each one of the two required independent corroboration before a conviction could safely lie.

Mr. Byabusha challenged the cautioned statement on three other fronts. **One**, the Ruling subject of the trial within trial in respect of the admissibility or otherwise of the cautioned statement was not delivered in court. **Two**, the statement was not read over to the assessors after conclusion of the proceedings relating to the trial within trial. **Three**, in his summing-up, the judge did not direct the assessors on the cautioned statement; rather his address was in respect of the extra-judicial statement only. In response, Mr. Halfani conceded to these shortcomings save that

he contended that they were inconsequential because the appellant was not prejudiced.

With respect, the above points raised by Mr. Byabusha on the cautioned statement are sound. We say so because in our appreciation of the record, after looking at it thoroughly, we are satisfied that there is merit in Mr. Byabusha's submission. Under section 265 of the Act all trials before the High Court are with the aid of assessors. In this regard, it cannot be safely said and concluded that the trial in respect of the cautioned statement was properly conducted with the aid of assessors. It is true that as judges of fact the court was not bound by the opinions of assessors. That is fine, but being a trial with the aid of assessors the said assessors ought to have been involved in every stage of the trial, except of course in the conduct of a trial within trial. That was important because even under normal circumstances where a judge differs with the opinions of assessors he/she is duty bound to disclose his/her reasons for doing so. If so, it defeats reason that the assessors could be said to have meaningfully given views on the cautioned statement when they were not involved in its admission in evidence after the trial within trial, in the first

place. In view of the foregoing, the cautioned statement ought not to have been given the weight it was accorded by the High Court.

There was no dispute at the trial that Esther d/o Sevania is dead and that she died a violent death. According to the post-mortem examination report, which was exhibited at the trial without objection, the death was due to external bleeding and shock. PW1 Dr. Patrick Bulugu who conducted the autopsy on the deceased's body observed that it had multiple deep cut wounds all over the body which led to severe bleeding, shock and then death.

Admittedly, nobody testified in court to have seen the appellant killing the deceased. His conviction was based on both the cautioned and the extra-judicial statements. The High Court was particularly influenced by the following passage in the extra – judicial statement where the appellant is on record as having stated:-

> *"Mwaka 2001 Sekwa Kalidishi wa Ivumwa alinituma nimuue mama yake kwa sababu alikuwa mchawi na kwamba atanilipa shilingi laki nne (400,000/=). Yule mama nilikwenda usiku*

nikamuua kwa kutumia panga. Alishindwa kunilipa zile Tshs. 400,000/= akakimbilia Msalala akawa mtu wa kuhamahama mwaka huu nilisikia yuko Bukombe Ilangashika nikaenda pale kudai zile Tshs. 400,000/= (laki nne) aliponiona alikimbia upande wake na mke wake na huyo mtoto alikimbia kwa sababu mimi nilikasirika nikamkata Esther alikuwa amebeba mtoto baada ya kumuua Esther nilirudi nyumbani. Haya matukio ni ya mwezi wa tatu mwanzoni.... Ninakiri na kukubali kabisa kuwa niliua siwezi kuzungusha mahakana."

In his defence, the appellant told the High Court that the above words were not his own. Rather, the police told him to write the above words when he was being taken to a justice of the peace.

The High Court disbelieved the Appellant's version of the story appearing in the above passage, holding in effect that, this was an afterthought "*aiming at palliating the probative value of his confession*". In its decision, the High Court also ruled out the possibility of a conviction for

the lesser offence of manslaughter because, so it opined and held, from the available evidence there was nothing to suggest that the appellant could have possibly killed in a heat of passion after being provoked.

This brings us to the crucial aspect of the case. In other words, having ruled out the probative value of the cautioned statement and the weight accorded to it by the High Court, the question is whether or not the conviction could safely be sustained on the basis of the extra-judicial statement. On this, as correctly opined by both learned counsel, the judge was certainly correct in saying that under normal circumstances, a conviction could safely lie so long as the court warns itself of the danger of acting on the statement without corroboration. It is trite law that as a matter of practice a conviction would not necessarily be illegal but it is a matter of practice in such cases for a trial court to warn itself and if the trial is with the aid of assessors to direct them on the danger of convicting without corroboration.

In the present case, the judge addressed the assessors on the extra-judicial statement as follows:-

With regard to the extra-judicial statement

that was recorded by the justice of the peace, it has

been the testimony of the accused, that, he did give it voluntarily only that, he had been instructed by the police officer who send (sic sent) him to the justice of peace, what he had to narrate before her. He has thus requested the court not to take what is contained therein, as true story that did come from him.

It is evident from the above passage that the judge mentioned to the assessors the existence of the extra-judicial statement, without more. With respect, that was not enough. He ought to have gone further and direct them on the danger of convicting without corroboration. It is no wonder, therefore, that in the absence of a direction to the above effect when the assessors were invited to give their opinions they did not say anything about the statement! Yet again, in terms of section 265 (*supra*), the trial on this aspect of the case was not properly conducted with the aid of assessors.

This brings us to another aspect of the case. The appellant's defence was premised on an allegation that he was tortured before he was sent to

the justice of peace. Indeed, he was not seriously contradicted in his assertion about torture, in this regard, and that he was in police custody for a period of about six days before he was sent to the justice of peace. This aspect of his evidence invites two points. **One**, as this Court has held in other cases, once torture is alleged, courts should always be cautious in relying on the statement(s) – See **Paulo Maduka and four Others**, CAT Criminal Appeal No. 110 of 2007 and **Paschal Lazaro and Another v Republic,** CAT Criminal Appeal No. 189 of 2006 (both unreported). **Two**, no reason was assigned to explain why it took about six days to take the Appellant to the justice of peace. The failure to do so contravened the provisions of section 32 (2) of the Act which provides:-

> *(2) Where any person has been taken to custody without a warrant for an offence punishable with death, he shall be brought before a court* ***as soon as practicable.***
>
> *(Emphasis added.)*

In our view, the period of about six days was not a period we could safely say was "*as soon as practicable*" within the dictates of the above provision. If so, and to borrow this Court's words in **Martin Makungu v Republic,**

Criminal Appeal No. 194 of 2004 (unreported), during the stated period "... *It does not need extra-ordinary thinking to know that the appellant must have been under very stressful condition* ..." On this, we tend to agree with Mr. Byabusha that it was quite possible that during the stated period the appellant could have been stressed so much that it cannot be safely said without utmost certainty that when he eventually gave his statement before the justice of peace he was a free agent.

Before we conclude this judgment we wish to make one observation. There is no dispute that murder is a very serious offence which upon conviction attracts the death penalty. That being the case, it is always expected that its investigation and eventual prosecution would always be done with great care and seriousness. In this case, we get the impression that the case was poorly investigated and prosecuted. We say so because in the absence of any other evidence, the prosecution case was to stand or fall on the word of the appellant regarding the alleged events of the day. We think, in this case prudence demanded that the deceased's parents and the investigating officer ought to have been summoned with the aim of hearing their version of the event of the day. We say so because, assuming the above statements are anything to go by, the Appellant's

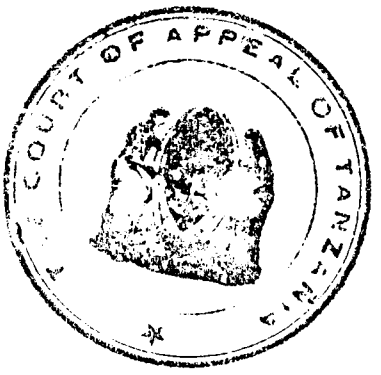
version of the incident was that at the time of the killing the deceased's parents were present and that they had to flee from the scene for fear of him and that the deceased could not flee because she was holding a small baby. Perhaps, if summoned the evidence of these people would have helped in lending credence to the appellant's story contained in the extra-judicial statement, as it were. In the absence of evidence by the above people it is not safe to believe wholeheartedly that the conviction is sound. We are fortified in this view by this Court's decision in **Azizi Abdallah v Republic** [1991] TLR 71 at page 72 where under holding (iii) thereof it was stated:-

> *(iii) the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.*

When all is said and done, the cumulative effect of the foregoing is that there is doubt in our minds regarding the appellant's conviction. The doubt, in our respectful opinion, has to be resolved in favour of the appellant.

For reasons stated, there is merit in the appeal. Consequently, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from prison unless otherwise held on a lawful cause.

DATED at MWANZA this 22nd day of October, 2014.



J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

I. P. KITUSI
CHIEF REGISTRAR
COURT OF APPEAL