IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 105 OF 2014

RASHID ROMAN NYERERE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Karua, J.)

dated the 1st day of October, 2013
in
Criminal Sessions Case No. 21 of 2012

JUDGMENT OF THE COURT

2nd& 3rd September, 2015

MASSATI, J.A.:

The appellant was aggrieved by the decision of the High Court, sitting at Mbeya (Karua, J.) dated 1/10/2013, in which he was convicted of the offence of murder and sentenced to death by hanging. He has filed the present appeal to impugn the said decision.

The brief background of the case is that, the deceased SAIL NYERERE and his two wives were living in Swaya village, in a homestead consisting of three houses, one for each of the wives, and the one for himself. This was in Rungwe District, Mbeya Region. On the night of the 8th August, 2008, the deceased left from a house of one of his wives, for his own. At around midnight, some of his grandchildren were surprised to find that their grandfather had not closed his door, which was unusual. They called him but he did not respond. When they entered the house, they found the deceased lying on the bed, with his clothes in blood. An alarm was raised. Neighbours responded and went to the scene. On a closer look, they found that the deceased had been slaughtered. Next day, one of the deceased's nephews secretly told the deceased's step-brother called **LEONARD NYERERE**(PW2) that he was responsible for the killing. The deceased's brother (PW2) spread the news to relatives and finally to the authorities which finally led to the arrest of the killer, who was the appellant. After some investigations, the appellant was charged with the murder of the deceased. As indicated, he was eventually convicted.

What built the foundation of the appellant's conviction was the evidence from five (5) prosecution witnesses, (3) three documentary

exhibits and two other physical exhibits. PW1, **FARIDA SAIDI NYERERE** is one of the deceased's sons. On the night of 8th August, 2008, he was out chatting with his sister in law when one of the deceased's grand daughters' ERNESIA MUSSA came to inform them that the deceased's door had not been closed. They all went there to investigate. After receiving no response, from the deceased, they entered into the house only to find him lying prostrate on the bed, dead. The death was reported to the village leaders who notified the police. Eventually the appellant was arrested in connection with the murder. Next day the police brought the appellant to the village, and before a gathering of many people, the appellant admitted the killing and volunteered to show where he had hidden the bush knife, with which he killed the deceased, and a jug in which he put hot water to apply to the slaughtered neck of the deceased. On the other hand, PW2 **LEONARD NYERERE MWAMBOGA** testified that on the night of the incident, he was informed of the death, and had to go there. At around 4.00 am the appellant called him to confess to him in secret that he was the one who killed the deceased. He also explained how he killed his victim and where he hid the machete with which he killed the deceased. The rest of his story tallies with that of PW1, except that he also noticed

some blisters all over his hands resulting from burns by hot water used to soothen the deceased's blood. He is the one who arranged for the appellant's arrest first by the village leaders, then by the police. PW3, **MARTIN MWILE MWALENDE** was a Ward Counselor for Kinyala Ward, when he received information about the murder on 9/8/2008. He went to the scene of the crime at Swaya village. He saw the body of the deceased. Then a police vehicle arrived. They had the appellant with them. The handcuffs were removed, and in the presence of the gathering, the appellant confessed to have murdered the deceased on the belief that the deceased intended to kill him by witchcraft. He led them to where he unearthed a machete, which was covered by blood and soil and a yellow jug where he kept hot water. PW4, E. 8239 **D/CPL ELENERICO**, and PW5 **D. 2385 SGT MAJOR MICHAEL**, were police officers. PW4 was involved in the earlier stages of investigation where the appellant is alleged to have admitted the killing, although he could not take his cautioned statement. However, he collected the machete and the jug which the appellant had volunteered to produce as Exhibits P3 and P4 respectively. On the other hand, PW5 took and recorded the appellant's cautioned statement which was received in evidence as Exhibit P5.

On the other hand, the appellant gave his evidence on oath, in which he admitted that the deceased was his uncle, who had in fact given him a piece of land to build a house. He said that on the 8th day of August 2008, he was at Ntokela village, some five kilometres away, partaking local brew, with some friends. While there, he even met one Amenye at a nearby shop. He informed the court that the deceased's grandson SADICK LUSEKELO, had also been arrested in connection with the murder. Upon his arrest, he was severely beaten, but he never gave any statement. He denied to have had any blisters or to have produced the panga and the jug (Exhibits P3 and P4). It was PW4 who found the panga and it was not soaked in blood. He denied having admitted to have killed the deceased to PW2 or PW3, to the gathering as alleged by PW1, PW2, and PW3. In short order, the appellant denied to have committed the offence.

After hearing the prosecution and the defence cases, the trial court believed PW1, PW2 and PW3 as witnesses of truth, that the appellant confessed to the killing of the deceased. He also relied on Exhibit P5, the retracted confession. With regard to the appellant's defence of alibi, the trial court found that the defence did not raise any reasonable doubt to the prosecution case and so rejected it.

The appellant, seeks to impugn the above findings of the trial court. As in the trial court, the appellant is represented in this appeal by Mr. Simon Mwakolo, learned counsel, who had filed a two-ground memorandum of appeal. They are as follows:

> *"1. That the learned Honourable Judge erred both in points of law and facts when he convicted and sentenced the appellant to suffer death by hanging on allegation that the appellant had confessed to kill the deceased before PW1, PW2, PW3 and PW5.*
>
> *2. That the learned Honourable Judge erred in points of law and facts when he admitted the caution statement of the appellant as Exhibit P5 and the report on the post-mortem examination as exhibit P2 contrary to law."*

Mr. Mwakolo had also filed a written submission in support of his grounds of appeal. Elaborating on each of the grounds briefly, Mr. Mwakolo submitted on the first ground, on two fronts. First, Exhibit P5 which was extracted and tendered by PW5, was taken after the prescribed period although it was ruled voluntarily made after a trial within trial. Therefore, it was not properly admitted because whereas PW5 said he took

it on 8/8/2008, Exh. P5 shows it was taken on 10/8/2008. The exhibit also shows that the appellant's rights were not explained. So, he sought that this exhibit be expunged. But secondly, although the appellant denied it in his defence PW1, PW2 and PW3 insist that he orally confessed. However there was conflicting evidence between PW1 and PW2, suggesting that the appellant was under restraint when he made the oral confession before the gathering. The doubt should be resolved in favour of the appellant, he argued.

On the second ground, Mr. Mwakolo, repeated that the cautioned statement was not properly admitted, but so was the post-mortem examination report (Exh. P2). He submitted that a post mortem report is usually issued on the authority of a coroner, so appointed under the Inquests Act (Cap. 24 R.E. 2002). There was no evidence in this case that the report was prepared at the behest of the coroner. Therefore this too was illegally admitted and in conclusion, the learned counsel prayed that the two exhibits be expunged. He went on to argue that after expunging these two documentary exhibits, the question remains whether there was any other evidence to prove the cause of the deceased's death? And who caused it? It was his submission that on the evidence on record, the

prosecution case was not proved to the required standard, and so the appellant's appeal should be allowed.

But Mr. Joseph Pande, learned Principal State Attorney, resisted the appeal. In response to the second ground of appeal. Mr. Pande submitted by first conceding that Exhibit P5, was taken outside the prescribed period of 4 hours, and should therefore be expunged as it was improperly admitted. But in relation to the post mortem examination report he had a different view. Since Exhibit P2, was admitted without objection at the preliminary hearing and it was recorded as a matter not in dispute the appellant is bound by it, in terms of section 192(4) of the Criminal Procedure Act Cap 20 R.E. 2002 (the CPA). So, Exhibit P2 should not be disturbed,he argued. He referred to us the decision in **CHARLES MASHISHANI NKENYENYE v R** Criminal Appeal No. 288 of 2008 (unreported) to support that view.

He then went on to argue that even if the defence had taken such objection, the trial court would have considered it under section 169 of the CPA and in its discretion, decide whether or not to admit it, howsoever it

was obtained. He further opined that the irregularity was curable under section 388 of the CPA.

He finished his submission on this leg of the ground of appeal by saying that even if Exhibit P2 was expunged, the fact of the deceased's death could not be disputed, and cause of death could be proved by other evidence.

Turning to the first ground, the learned counsel submitted that evidence of the appellant's oral confession was overwhelming. He confessed not only to PW2 in confidence but also openly to a large group of people, including PW1, PW2, PW3, PW4 and PW5. He even led to the discovery of a panga which he used in killing the deceased, which he dug out from his shamba as well as the jug. In such a situation section 31 of the Evidence Act squarely covers the situation. He also referred to us the decision of **MBOJE MAWE & 3 OTHERS v R** Criminal Appeal No. 86 of 2010 (unreported) in support of that point. He further pointed out, that the witnesses such as PW3 and the others were credible, and admission before such witnesses was admissible. For that he cited the decision of **DPP v NURU MOHAMED GULAMPASUL** (1988) TLR 82. He went on to

submit that so long as there was no torture, mere restraint could not prohibit the admission of such evidence thatleads to discovery in terms of section 29 of the Evidence Act.

For that he referred us to the decision of **THADEI MLOMO AND OTHERS v R** (1995) TLR 187.

Dwelling on the apparent contradictions between PW2 and PW3 on whether or not the appellant was under restraint when he made the open air confession. Mr. Pande submitted that the contradictions were not material, as they did not touch on the prosecution central story, which was that, he confessed.

Mr. Pande also submitted on other areas from the appellant's written submission relating to the need for a notice of seizure of Exhibits P3 and P4 which he said, was not necessary because there was no search under section 38 of the CPA; the non-calling of the Village Executive Officer of the village, which to him, was neither here nor there, because PW3 himself was present during the confession making by the appellant; and lastly as to the appellant's motive, which he said, was immaterial in law.

With those remarks, Mr. Pande submitted that on the basis of the credible evidence of PW1, PW2, PW3, PW4 and PW5 the appellant's conviction was well founded, and the conviction should not be disturbed.

In his rejoinder submissions, Mr. Mwakolo insisted that it was important that the law be put on its proper setting regarding the preparation of post-mortem examination reports by the highest Court on the land. He insisted that, as long as the appellant was still under restraint when he allegedly confessed to the gathering, **GULAMRASUL's** case was distinguishable. After this, he reiterated his prayer for the appeal to be allowed.

It is common ground that the conviction of the appellant by the High Court was predicated upon his confessions in the cautioned statement (Exhibit P5) the open air confession to the gathering, and the confession he had made in confidence to PW2 alone. It has been argued before us that the cautioned statement (Exhibit P5) was taken outside the prescribed period of four hours in terms of section 57 of the CPA, and the post-mortem examination report was prepared contrary to the dictates of the Inquests Act. Therefore, it was spiritedly argued, especially by Mr.

Mwakolo, that the cautioned statement was admitted improperly, and Mr. Pande has also conceded so, although he resisted the alleged impropriety in the admission of Exh. P2, the post-mortem examination report.

In our view, the proper stage to take up an objection to the admissibly of any evidence, is at the trial court. This is implied in the provisions of section 145 of the Evidence Act and section 169 of the CPA in the case of criminal trials. For ease of reference we reproduce both provisions below. Section 145 of the Evidence Act provides:

> *"145.(1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved would be relevant.*
>
> *(2) The court shall admit the evidence of any fact if it thinks that the fact, if proved, would be relevant,, and not otherwise.*
>
> *(3) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned unless the party undertakes to give*

proof of such fact and court is satisfied with such undertaking.

(4) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the judge may, in his discretion, either permit evidence of the first fact to be given before the second fact before evidence is given or the first fact.

On the other hand section 169 of the CPA provides:

"(1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequences of a contravention of, or of a failure to comply with a provision of this or any of other Act or law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.

(2) The matters that a court may have regard to in deciding whether, in proceedings in respect of any offence,it is satisfied as required by subsection (1) include:

(a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;

(b) the nature and seriousness of the contravention or failure; and

(c) the extent to which the evidence that was obtained in contravention of in consequence of the contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained.

(3). The burden of satisfying the court that the evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(4). This section is in addition to, and not in derogation of, any other law or rule under which a court may refuse to admit evidence in proceedings."

In terms of section 145 of the Evidence Act, the first duty of a court in a trial is to ascertain the relevancy of the evidence proposed to be given, or which evidence is necessary before some other evidence is admitted. Under section 169(1) of the CPA, a trial court has discretion to admit or not to admit evidence alleged to have been illegally obtained or in contravention of the provisions of the CPA. In terms of section 169(4) the provisions of that section have to be read along with other laws or rules relating to the court's power to admit or refuse to admit evidence in proceedings. This in our view, includes section 145 of the Evidence Act. Given the two provisions, it will be noted that a trial court is better placed to entertain an objection on admissibility of evidence than an appellate court, because, it is easier for a trial court to conduct an inquiry on the relevancy/or legality of a particular evidence from the witnesses before him, than an appellate court who only come to deal with the evidence which is already on record.

That said, our first reaction to the admissibility of Exhibit P2 and P5, is that, the trial court had a better opportunity to decide on whether or not and why the two documents were taken in contravention of the relevant laws if the objections were raised before it. Be that as it may, we agree with Mr. Pande that Exhibit P2, was admitted at the preliminary hearing where it was not objected to. The intention of that exhibit was to prove that the SAIL NYERERE was dead, and died in a violent death, and this was listed as one of the undisputed matters. Under section 192(4) of the CPA, such fact shall be deemed to have been duly proved, unless the trial court was of the opinion that, such fact ought to be proved, in the interests of justice. With regard to Exhibit P5, both counsel are agreed that it was improperly admitted. As hinted above, we are not sure whether the objection is well taken at this stage. Similarly the objection to the admission of the post-mortem report could have been raised at the trial, but it was not. We do not therefore have the benefit of the learned trial judge's opinion on this matter if the objection had been taken before him. We shall therefore take it up when the appropriate moment arises.However, since Mr. Pande has not seriously resisted against the

expulsion of Exhibit P5 resisted, we would say no more on this. We shall accordingly expunge it.

But having done so, the next question is whether there is any other evidence to sustain the appellant's conviction. That takes us to the first ground of appeal.

The first ground challenges the quality and substance of the prosecution evidence on the appellant's confession. The thrust of Mr. Mwakolo's submission is that the said oral confession was not voluntary.

We think that Mr. Mwakolo's missile is misguided. According to the evidence, the appellant confessed on two occasions. He first confessed to PW2 in confidence on the wee hours following the night of the killing. On the second occasion, the appellant made an open air confession in the presence of a gathering of many persons, including PW1, PW2, PW3, PW4 and PW5. Mr. Mwakolo is not seriously challenging the confession in the first occasion but has taken a strong exception to the one on the second occasion on the ground that he uttered the words while under restraint. However this aspect does not feature in the appellant's defence which was simply that he did not make any confession to the gathering or to, PW2.

Mr. Mwakolo is better placed to know the difference between not making a confession at all or making a confession under restraint. In view of the appellant's defence, we think the trial court was entitled to decide the issue on the basis of credibility and we think he rightly believed in the credibility of the prosecution witnesses.

In our view, the admission that the appellant made to PW2 alone in confidence is, for all intents and purposes, a confession in terms of section 3 of the Evidence Act and is sufficient to sustain the conviction. It has never been convincingly repudiated by the appellant. There was also another oral confession to PW4 during the preliminary investigations. The subsequent confessions made to the gathering on 9/8/2008, and the appellant's own action of unearthing the panga (machete) and the jug which he used in the murder, only, in our view reinforced the truth of the contents of the confession to PW2. In almost similar circumstances, the appellant's conviction in **JUMA IBRAHIMU v R** Criminal Appeal No. 110 of 1989 (Tanga)(unreported) was confirmed by this Court on the basis of his own confession to PW1 that he had killed the deceased because of his witchcraft. In that case PW1 decided to have the accused's confession be heard by other villagers, where PW2, PW3 and PW4 also heard. There was

also the oral confession to a police sergeant that he had killed the deceased using a panga. The Court found that this evidence all the more confirms what the appellant had told the villagers. In the circumstances the conviction of the appellant cannot therefore be faulted.

For the immediately foregoing reasons, we find this appeal devoid of any semblance of merit. We accordingly dismiss it in its entirety.

DATED at **MBEYA** this 3rd day of September, 2015.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL