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

**(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)**

**CRIMINAL APPEAL NO. 175 OF 2015**

**KIJA ISEME ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Tanzania, at Tabora)**

**(Mrango, J.)**

**dated the 5th day of November, 2014**
**in**
**Criminal Session Case No. 53 of 2012**

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# JUDGMENT OF THE COURT

4th & 13th April, 2016

## MUSSA, J.A.:

In the High Court of Tanzania sitting at Maswa, the appellant was arraigned and convicted for the murder of one Jeremiah Joseph whom we shall henceforth simply refer to as "the deceased". Upon conviction, the appellant was handed down the mandatory death sentence (Mrango, J.). He is aggrieved and presently seeks to impugn both the trial court conviction and sentence.

At the hearing before us, the appellant was represented by Mr. Mugaya Mtaki, learned Advocate, whereas the respondent Republic had the services of Mr. Ildephonce Mukandara, learned State Attorney. The learned counsel for the appellant fully adopted the memorandum of appeal which goes thus:-

> *"1. That in view of clear evidence on records showing that the appellant had been beaten by villagers and sungusungu vigilantes, the learned trial Judge erred in law in holding that the extra-judicial statement and cautioned statement were voluntarily made by the appellant and in relying on such statements to convict him of the offence of murder C/S 196 of the Penal Code Cap 16 R.E. 2002.*
>
> *2. That the learned trial Judge erred in law in holding that the circumstantial evidence against the appellant had proved his guilt beyond reasonable doubts."*

For his part, Mr. Mukandara went along with the grievances raised by his friend and declined to support the conviction and sentence meted out by the court below. To appreciate the force behind the concurrent arguments from either side, it is necessary to explore the factual background giving rise to the arrest, arraignment and the ultimate conviction of the appellant.

During the trial, the prosecution sought to establish that on the 22nd day of February, 2011, at Sakwe Village, within Bariadi District, the appellant murdered the deceased. To buttress the claim, a total of eight witnesses and seven documentary exhibits were featured.

From the totality of the prosecution version, it cannot be doubted that, up until his demise, the deceased was a resident of Nguliati Village in Bariadi District. It is also common ground that, at the village, the deceased used to operate a motorcycle Registration No. T414 BGR with which he plied the business of transporting persons. The bike was not his but its owner, namely, Malimi Kimbili (PW2), had entrusted it on the deceased so that the latter operates the business at an agreed weekly payback of a sum of shs. 30,000/=.

On the fateful day, that is, the 22nd February, 2011 the deceased set off for his routine business but this time, he did not make it back home. His wife, namely, Minza James (PW1) tried to reach him through his (deceased's) mobile phone to no avail. As it turned out, on the morrow of his disappearance, the deceased was found lying dead at a shrubbery on a side of the Sakwe – Itubikilo road. The deceased body was lying in a supine position, completely naked, with a cut on the anterior neck as well as small cuts on the chest, face and the groin. In addition, both eyes of the deceased had been perforated. Beneath the body, there was a pool of dried darkish blood. The medical officer who conducted a post-mortem examination on the body attributed death to severe haemorrhage secondary to a slaughter. According to the autopsy report (exhibit P1), the deceased was identified to the medical officer by Esther Mayombya and Joseph Mayombya who, incidentally, were not called into testimony. It later came into picture that the deceased's assailants made away with the referred motorcycle as well as a mobile phone.

In the meantime, Mabina Juma (PW3), who held himself to be the deceased's brother, initiated his own self-driven "investigations" on the incident. In the process, he was tipped off that the deceased was murdered

by the accused with the assistance of a certain Lwenge. To access more information, on an undisclosed date, PW3 befriended the latter's sister, namely, Mbuke and went so far as to propose marrying her. Apparently, the intimate relationship paid dividends much as, soon after, PW3 was given both the appellant's and Lwenge's cell phone contacts. Upon contacting the appellant, the latter informed him that he was at a place called "centre". PW3 immediately sought the assistance of the traditional vigilantes (*sungusungu*) to reach him there. As to what transpired upon meeting the appellant, we think it is best if the witness picks the tale in his own words:-

> *"We interrogated him over the stolen motorcycle. He admitted that he has sold it for shs. 1,300,000/= but has only received an advance of shs. 1,050,000/= he said that he has sold it to one Madima.. He took us to where Madima resides though he was not at home, however, we got the said motorcycle parked outside the house. The plate number was removed. He (accused) further said that he was in possession of the deceased's cell phone. He had two cell phones in his pocket. I*

*identified that one of the deceased. It was Chinese make, with a photo of Michael Jackson on its back (He was shown the cell phone and identified)."*

Thus, from this witnesses' telling, one gets the impression that the appellant was arrested at the so-called "centre" and that he (appellant) took the arresting party to Madima's residence where they retrieved the motorcycle in the absence of Madima. As regards the other detail pertaining to the mobile phone, there was further evidence from the deceased's wife (PW1) who also claimed to have similarly identified the phone on account of the photo of the late legendary world class musician, Michael Jackson, which was affixed at the back of the device.

More details with respect to the appellant's arrest came from Sai Ntelemko (PW6) and Leonard Maduhu (PW7). PW6 and PW7 were, at the material times, respectively, the commander and assistant commander of the *sungusungu* regiment stationed at Mwabulutagu Village, Meatu District. The two witnesses testified to an occurrence at the Village on the 16th March, 2011 which ultimately gave rise to the arrest of the appellant. Again, we think, it will be best if we let PW7 speak of the occurrence in his own words:-

*"...on 06/03/2011 at about 18:00 hours I was at a place we call "centre" at Mwabulutagu village. PW6 sent a person to call me. I responded and went where he was. I found him with three people one of them is Madima Ludima. The other two were strange to me. PW6 told me that the two people were looking for their stolen motorcycle and which were (sic) sold to Madima Ludima. Madema Ludima mentioned the seller to be the accused Kija Iseme – Efforts to arrest him failed in (sic) that partibular date. However, we managed to arrest him at Mwasengela village, Meatu District in the following morning. We then roped him and took him to Mwabulutagu village..."*

The foregoing extracted portion of PW1's evidence is more or less replicated in the testimony of the *sungusungu* commander (PW6). According to the two witnesses, at Mwabulutagu village, the appellant was interrogated before a huge gathering of about 400 villagers. The appellant, it was so claimed, confessed to have killed the deceased with the assistance

of two others so as to obtain possession of the motorcycle which they sold to Madema Ludima. It is, however, significantly noteworthy that according to PW6 and PW7, it was Madema Ludima and, not the appellant, who was arrested at the so-called "centre" and, furthermore, the appellant was arrested on the following day at Mwasengela Village. To say the least, their version contradicts PW3's claim that the appellant was apprehended first and that, when he (appellant) led them to where Madima resides, the latter was not found.

Moments later, the appellant was handed over to a police team which included No. E 6498 Detective corporal Ladislaus (PW4). According to the corporal, as he was being transmitted to the police station, the appellant, again, repeatedly confessed to the killing. Upon reaching Bariadi Police Station, the appellant was interviewed by No. D 5355 Defective Sergeant James (PW8) who recorded, from him, a cautioned statement on that same day. During the trial, the cautioned statement, in which the appellant, once again, confessed complicity to the murder, was adduced into evidence by the prosecution (exhibit P7) without demur from the defence. Rather strangely, the contents of the cautioned statement were not read over in court.

In a further development, on the 9th March, 2011 the appellant was taken before a Primary Court Magistrate, namely, Liberata Mhagama (PW5). At the court house, the Magistrate recorded an extra-judicial statement from the appellant in her capacity as a justice of the peace. In the statement, the appellant just as well incriminated himself for the homicide. The extra-judicial statement was adduced into evidence (exhibit P5) but, in the same vein, its contents were not read aloud in court. Of signifance, however, upon her physical inspection, the justice of the peace noticed that the appellant had a fresh wound on the upper side of his right eye. When he was asked to account for it, the appellant told the Magistrate that he sustained the wound in the course of beatings administered to him by the *sungusungu*. This detail concludes the version as told by the prosecution witnesses during the trial.

In his sworn reply, the appellant told the trial court that between the 22nd and 23rd February, 2011 he was throughout indoors at his Mwabulutagu residence, except for a brief spell on the 23rd when he went to his *shamba* in the morning and returned back home around 1:00 p.m. The following days passed uneventfully up until on the 7th March, 2011 when he was

encountered with an incident at Masengela village. As he was strolling around, the appellant was suddenly ordered to stop and sit down by three men who were on a motorcycle. The three persons who stopped him were PW6, PW7 and a certain Kisija Makongelya. His captors tied him with a rope and took him to Mwabulutagu village where he found himself surrounded by *sungusungu* and a huge gathering of villagers. He was thoroughouly beaten to the extent of being rendered unconscious. The appellant was then taken to Bariadi Police Station where PW8 subjected him to further beatings before he was finally taken before the justice of the peace. As regards the cautioned and extra-judicial statements, the appellant urged the trial court to disregard the documents on account that he could not recall that the same were read over to him. The appellant wound up his testimony by completely disassociating himself from the prosecution accusation.

On the whole of the evidence, the learned trial Judge was fully satisfied on the fact of the deceased's death and that his was a violent demise. As to who perpetrated the killing, the Judge was of the opinion that the evidence on the issue was essentially circumstantial, save for the appellant's own incriminating account on the oral confessions as well as the cautioned and extra-judicial statements. Thus, in convicting the appellant,

the trial Judge heavily relied upon the appellant's oral confessions before the *sungusungu*, PW4, as well as the recorded cautioned and extra-judicial statements which he unreservedly found to be voluntary and truthful. Furthermore, the Judge took into account the evidence leading towards the retrieval of the motorcycle and the deceased's mobile phone which, he said, corroborated the contents of the confessional statements.

Arguing in support of the first ground of appeal in lucid style, Mr. Mtaki impressed upon us that to the extent that the confessional statements were made or recorded in the course of, or moments after the appellant was subjected to beatings in the hands of *sungusungu* it cannot be legitimately claimed that the same were voluntary. To buttress his submissions, the learned counsel for the appellant referred to us the unreported Criminal Appeal No. 403 "B" of 2013- **Abeid Malifedha and Another vs The Republic**. On the second ground, Mr. Mtaki argued that the trial court improperly applied the doctrine of recent possession, the more so as the mobile phone which was allegedly retrieved from the appellant was not distinctively identified by PW1 and PW3. As regards the motorcycle, the learned counsel for the appellant submitted that the prosecution gave conflicting versions with respect to the arrest of the appellant and the

retrieval of the motorcycle. Mr. Mtaki had reference to the testimony of PW3, on the one hand, who claimed that the appellant was the one who was arrested first and took his captors to the residence of Madema Ludima where the motorcycle was retrieved in the latter's absence. On the other hand, the version testified to by PW6 and PW7 was to the effect that the motorcycle was retrieved from Madema Ludima who was the first to be arrested and the appellant was actually apprehended at Mwasengela village on the next day. In the light of the conflicting versions, Mr. Mtaki urged that the trial Judge improperly imputed possession of the motorcycle on the appellant. Much worse, counsel added, for some obscure cause, the alleged buyer of the motorcycle (Madema Ludima) was not featured as a witness to clarify the apparent conflict. In sum, the learned counsel for the appellant invited us to allow the appeal, quash the conviction and set aside the sentence.

As hinted upon, the learned State Attorney supported the appeal and, in effect, Mr. Mukandara echoed Mr. Mtaki's complaint that the appellant's alleged confessional statements might have been involuntary. Furthermore, he added, after the cautioned and extra-judicial statements were accepted as exhibits, the trial court did not proceed further to put them in evidence by

causing the same to be read over, more particularly, for the benefit of the assessors. On the circumstantial evidence, the learned State Attorney similarly submitted that the retrieved mobile phone was not distinctively identified by the prosecution witnesses just as the motorcycle was not sufficiently linked to the appellant to attract the application of the doctrine of recent possession.

Having dispassionately considered the learned arguments from either side, we propose to first address the confessional statements which were allegedly given by the appellant. According to the prosecution version, the appellant made confessional statements on three separate occasions. The first one was an oral confession before the *sungusungu,* that is, immediately after his arrest. In the second occasion, the appellant is also said to have orally confessed to PW4 moments after he was handed over by the *sungusungu* to the police team. Then, finally, the third and fourth occasions came about when he was, respectively, recorded in the cautioned and extra-judicial statements. As we have already intimated, the learned trial Judge heavily relied upon all the respective confessional statements and to demonstrate his stance that the confessions were voluntary and amounted

to nothing but the truth, he summed up what he perceived to be the appellant's self-incrimination as follows:-

> *"...He was so co-operative from the day of the arrest before the sungusungu. He confessed before the sungusungu to have murdered the deceased. He again confessed before PW4 who re-arrested him. His confession before the sungusungu assisted for the recovery of the motorcycle. He further confessed voluntarily before the police officer who recorded his cautioned statement. He further admitted and confessed before the justice of the peace. He had no reason to lie. He didn't object to the cautioned statement and extra-judicial statement to be tendered as exhibits. He admitted in his defence that he made the two statements and signed them. However, what he can't recall is whether the said extra-judicial statement was read over to him before he signed. To me this is an afterthought."*

With respect, as regards the alleged confession before the *sungusungu* we need only pay homage to what this Court stated in the unreported Criminal Appeal No. 10 of 1988 – **Regina Karantini and Another vs The Republic**:-

> *"...the confession of the appellants were made in the presence of a big group of the village vigilantes (sungusungu). Although they are not policemen according to law, they have more coercive power than ordinary citizens and, for that reason, the presence of such vigilantes is not conducive to the making of a voluntary and truthful confession by a suspect. There must be corroborative evidence..."*

More recently, corresponding remarks were pronounced in another unreported Criminal Appeal No. 5 of 2008 – **Inota Gishi and Three Others vs The Republic**. In that case, the appellant allegedly, inter alia confessed before a group of about 50 *sungusungu* in the wake of which the Court was quick to remark:-

*"In our view, such a large group of vigilantes was not conducive to the making of confessions. Such confessions shall therefore need to be corroborated."*

Although, in the matter under our consideration, the exact number of the *sungusungu* who were involved is not disclosed, the evidence is to the effect that the interrogation was made in the presence and hearing of crowd of 400 or so villagers! That in itself, we are afraid to remark, militated against a relaxed atmosphere which is an essential prerequisite for the making of a voluntary confession.

Coming now to the second alleged confession before PW4, with all due respect to the learned trial Judge, we take the position that it was wrong for him, in the first place, to access that portion of the evidence of this witness respecting the alleged confession. As we shall shortly demonstrate, that portion of the witnesses' testimony was clearly inadmissible. Much worse, the learned trial Judge proceeded to subsequently rely on the alleged confession in convicting the appellant. As he himself conceded during the trial, at the material times, PW4 was a mere constable and, on that score, unauthorized to administer any confession in terms of section 27 (1) of the

Evidence Act, Chapter 6 of the Revised Laws (the Act). It should be recalled that section 3 of the Act, as it then stood, defined a police officer to mean "a member of the Police Force of or above the rank of corporal".

Addressing, finally, the cautioned and extra-judicial statements, to begin with, the fact that the appellant was tortured at the hands of the *sungusungu* is clearly exhibited by the fresh wound on the upper side of his right eye as testified to by PW5. In our view, irrespective of the fact that the admissibility of the statements was not objected to, the existence of the fresh injury imposed a duty on the trial court to exercise due caution in admitting the documents as, that alone, raised a likelihood that they might have been a product of the torture or threats.

In **Inota Gishi** (*supra*) the court had to grapple with a corresponding situation. Just as is the case in the matter at hand, the appellant there was subjected to torture at the hands of *sungusungu* and sustained several injuries. He later gave a confessional extra-judicial statement before a justice of the peace who, as here, testified to the presence of the fresh injuries. Again, during the trial, the extra-judicial statement was, similarly,

adduced without demur from the defence but, on appeal, the Court observed:-

> *"...even if the confession was not objected to by the defence, the court was still bound to be cautious in admitting such statement, and ought to have looked for corroboration and could only convict if it is satisfied that the confession contained nothing but the truth..."*

Thus, when all is said with respect to the alleged confessions, the crucial question is whether the same are materially corroborated. Unfortunately, a short answer to the question is in the negative. As correctly formulated by both Mr. Mtaki and Mr. Mukandara, the retrieved mobile phone which was desired to link the appellant with the offence on a doctrine of recent possession, was not distinctively identified to be the deceased's belonging. Who knows: It may be that there are a score of other persons out there who have affixed the photo of the renowned musician, Michael Jackson, on their mobile phones. On the motorcycle, we, again, entirely subscribe to Mr. Mtaki's submission that its retrieval was predicated upon contradictory versions from PW6 and PW7 on the one hand,

and PW3, on the other. In the absence of Madema Ludeima who was not called to testimony, the appellant is barely linked to the motorcycle. To say the least, in its failure to feature him as a witness, the prosecution hoisted itself with its own petard.

In sum, we are of the settled view that the available evidence falls short and, accordingly, we uphold both grounds of appeal. We appreciate that Messrs Mtaki and Mukandara highlighted to us a number of other shortcomings in the conduct of the trial by the court below which were, however, not raised in the memorandum of appeal but, we think, the points of grievance in the memorandum of appeal will suffice to dispose of this appeal.

We wish to conclude with a brief remark on the Judge's summing up notes, albeit, in passing because it was also not a subject of the grounds of appeal. In his summing up address to the assessors who sat with him, the trial Judge, *inter alia* directed them thus:-

> *"Gentle assessors all the (8) eight prosecution witnesses none of them testified to have seen the accused murdering the deceased. What we have is*

*circumstantial evidence which was cemented by the extra-judicial statement and cautioned statement of the accused person."*

To begin with, we think it was unfortunate for the Judge to express that the "circumstantial evidence was cemented by the extra-judicial statement and the cautioned statement..." The expression is more of a projection of his personal opinion on the available evidence which was prone to unduly prejudice the assessors. But, more particularly, the learned Judge did not quite address the assessors on what in law is entailed by the subject of circumstantial evidence. That was, no doubt, a serious misdirection on the part of the trial Judge. In this regard, for future guidance, we wish to reiterate what was stated by the defunct court of Appeal for Eastern Africa in **Washington Odindo vs The Republic** (1954) 21 EACA 392:-

*"The opinion of assessors can be of great value and assistance to a trial judge but only if they fully understand the facts of the case before them in relation to the relevant law.* ***If the law is not explained*** *and attention not drawn to the salient*

*facts of the case, the value of the assessor's opinion is correspondingly reduced."* [Emphasis supplied].

In the instant case, the failure to address the assessors on the essential elements of circumstantial evidence, was a non-direction of a vital point but, in view of the position we have taken in relation to the insufficiency of the evidence, we need not order a retrial.

As already observed, the conviction cannot be sustained and, accordingly, we allow the appeal and, respectively, quash the conviction and set aside the sentence. The appellant should be released from prison custody forthwith unless he is otherwise lawfully held. It is so ordered.

**DATED** at **TABORA** this 12th day of April, 2016.

S. A. MASSATI
**JUSTICE OF APPEAL**

K. M. MUSSA
**JUSTICE OF APPEAL**

A. G. MWARIJA
**JUSTICE OF APPEAL**

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

P. W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**