

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KIMARO, J.A., JUMA, J.A., MZIRAY, J.A.,)**

CRIMINAL APPEAL NO. 221 OF 2010

**1. RAMADHANI SEIFU @ BAHARIA
2. JEMA OMARY @ MWENYEKITI
3. TUJUANE JUMA @TUJU APPELLANTS**
VERSUS
THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Dar es Salaam)**

(Aboud, J.)

Dated the 21st day of June, 2010

In

HC. Criminal Session Case No. 131 of 2004

JUDGMENT OF THE COURT

25th February, & 4th March, 2016

MZIRAY, JA.:

The appellants, Ramadhani Seif @ Baharia, Jema Omary @ Mwenyekiti and Tujuane Juma @ Tuju (hereinafter referred to as the first, second and third appellants respectively) were each sentenced to suffer death by hanging following the conviction by the High Court of Tanzania at Morogoro of the offence of Murder c/s 196 of the Penal Code Cap 16 R.E. 2002. The other accused person, one Omary Seif Honero was acquitted. They have each filed a memorandum of appeal to challenge the conviction and sentence.

There was no dispute as to the fact that the deceased met a violent death. According to the autopsy report which was tendered in court as exhibit, the cause of death was due to haemorrhage which was a result of a shotgun hole on the left lateral chest fracture on 5th and 6th rib bones. It was the prosecution case that the deceased was killed in the course of an armed robbery. No one among the prosecution witnesses witnessed the event in which the deceased was killed and the case for the prosecution was purely based on circumstantial evidence. The prosecution led evidence which tended to suggest that on 7/6/2003 the first appellant in the company of PW3 Ramadhani Athuman went to the home of PW1 Omary Mbwana, a traditional medicine man, to seek for local medical protection "zindiko" after having killed a person at Kwadori village.

PW4 Sgt. Juma Nyoka and PW5 Detective Corporal Mkaze received information of the murder and started investigation for which at the end they managed to arrest the first appellant. When interrogated, he confessed to have killed the deceased while in the company of the second and third appellants and that it was the second appellant who had a gun on that material day. Following such information, the second and third appellants were arrested and upon interrogation, the second appellant disclosed that

the gun used to commit the offence belonged to Omari Seif Honero who was the fourth accused in the trial court. With that information Omari Seif Honero was also arrested. When searched, he was found with a shotgun with serial No. 316135, Winchester make, registered in the name of Hamis Mbwana, his brother in – law. The gun and the cartridges found were taken to the Identification Bureau (IB) and its report revealed that the cartridges were from the shotgun found with the second appellant.

In arriving at the conviction of the appellants the trial Judge relied heavily and crucially on the cautioned statement (Exh. P4) and the extra judicial statement (Exh. P5) of the first appellant and other circumstantial evidence from the testimonies of PW1, PW2 and PW3.

When the appeal was called on for hearing Mr. Oscar Msechu, learned counsel appeared for the first and second appellants. Mr. James Bwana, learned counsel, was for the third appellant and Ms. Neema Haule, learned Senior State Attorney represented the respondent Republic. While the learned Senior State Attorney signified that she was ready and willing to proceed with the hearing, Mr. James Bwana prayed for adjournment of the matter as he was not well prepared because he had not met with the third

appellant whom he represents and discuss about the case. On the other hand, whilst appreciating the concern of Mr. Bwana, the Court found it opportune to inform both parties to the case the serious setback of the trial court in allowing the assessors to cross-examine the witnesses.

Ms. Neema learned Senior State Attorney after satisfying herself that the trial court allowed the assessors to cross examine the witnesses, she unhesitatingly submitted that under the circumstances there was no need to adjourn the matter. She pointed out that since allowing the assessors to cross examine witnesses offended the mandatory provision of section 177 of the Tanzania Evidence Act, Cap. 6 R.E. 2002, then, the proceedings were illegal. In addition, the learned Senior State Attorney pointed out that even the extra judicial statement by the first appellant and his cautioned statement were also defective. Commenting on the extra judicial statement she pointed out that it does not show if the first appellant was examined by the Justice of the Peace in his body to ascertain if he had any fresh marks or bruises before his statement was recorded.

The learned Senior State Attorney went on to state that the first appellant did not sign on his extra judicial statement recorded. According to

the Chief Justice instructions, the extra judicial statement taken does not meet the test, she argued. As its authenticity is questionable she prayed the same to be disregarded. In support thereof, the learned Senior State Attorney referred us to the decision in the case of **WALI ABDALLAH AND TWO OTHERS v R**, Criminal Appeal No. 181 of 2006 (unreported). On the cautioned statement, she contended that the first appellant was arrested on 7/6/2003 and his cautioned statement was recorded on 12/6/2003, five days thereafter. There was no explanation why the statement was not taken within the time limit prescribed by the law which is four (4) hours as per the requirement of section 50 of the Criminal Procedure Act, (CPA). The learned Senior State Attorney stated that since there was no explanation as to why the caution statement was taken out of the time limit, then, the statement in the circumstance cannot be accorded due weight. She suggested for the extra-judicial statement and the cautioned statement of the first appellant be expunged from the record for being unlawfully obtained. According to her if the two documents are expunged from the record of the case, then the evidence left cannot sustain a conviction. With that regard therefore, the learned Senior State Attorney supported the appeal, urging the Court to quash the conviction and set aside the sentence imposed.

On their part, Mr. Msechu and Mr. Bwana, Advocates for the defence side supported the learned Senior State Attorney's concessions as well as the attending consequences to the glaring irregularities.

Admittedly, the trial Court erred in allowing the assessors to cross-examine the witnesses. As rightly asserted by the learned Senior State Attorney the act violated the mandatory requirement of the Tanzania Evidence Act. Section 177 thereof provides that:

"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the Court, which the Court itself might put and which it considers proper."

It is clear from the said provision that, in the course of testimony by witness, assessors have duty to put questions and not otherwise. Putting questions in our view is quite distinct from the function of cross examination. The object of cross-examination is to contradict, impeach the accuracy, credibility and general value of the evidence given in chief; to sift the fact already stated by the witness, to detect and expose discrepancies or to elicit suppressed fact which will support the case of the cross-examining party. We

think that this is not what is anticipated in a criminal trial conducted with the aid of assessors.

By the nature of their function, assessors in criminal trial are not there to contradict. Their role is to aid the Court in a fair dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness in a case. They should only ask him/her questions (See **Mathayo Mwalimu and another V.R Criminal Appeal No. 147 of 2008 (unreported)**). That said, in the case under our consideration, we clearly express that it was wrong for the trial judge to give room to the assessors to cross examine the prosecution witnesses. By doing so, obviously it tremendously tainted the case for the Prosecution.

There was another impropriety which undermined the conduct of the trial as expressed by the learned Senior State Attorney. Surely, the first appellant did not sign on his extra-judicial statement recorded, let alone the other requirement that his body ought to have been examined by a Justice of the Peace to ascertain if he had bruises or not in compliance with the Chief Justice Instructions. In the circumstance therefore, the extra judicial

statement taken contrary to the procedures laid down would be as a result irregular hence unlawful.

As regards the cautioned statement, the bottom line is also impropriety. There is no dispute that the first appellant was arrested on 7/6/2003. His cautioned statement was taken on 12/6/2003 five days from the day he was arrested, which period was beyond the basic period of four hours as required by section 50 of the C.P.A and no extension was sought and obtained in terms of Section 51 of the Act, However, there is no explanation to account for this inordinate delay.

It is now settled law that cautioned statement taken without adhering to the procedure laid down in section 50 and 51 of the CPA is inadmissible. **(See Janta Joseph Komba & 3 others V.R, Criminal Appeal No. 95 of 2006 (unreported).** It follows therefore that like the extra judicial statement, the cautioned statement is not admissible in evidence for the observed glaring irregularity and as correctly submitted by the learned Senior State Attorney, the two documents are liable to be expunged from the record of the case. We subscribe to that and accordingly the two documents are hereby expunged from the record. The two documents having been

expunged coupled with the fact that section 177 of the Tanzania Evidence Act was breached by allowing assessors to cross-examine makes the conviction made to be unsustainable.

On that basis therefore, we invoke the revisional powers conferred in us under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and we proceed to quash the judgment of the High Court dated 21/6/2010 and set aside the sentence thereof. The appellants are to be released from prison forthwith unless otherwise lawfully detained.

Order accordingly.

DATED at DAR ES SALAAM this 1st day of March, 2016.



N. P. KIMARO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read 'J.R. Kahyoza', is written over a horizontal line.

J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL