IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 583 OF 2015

SIMON ARON..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the High Court of Tanzania at Singida)

(Makuru, J.)

dated the 2nd day of October, 2015
in
Criminal Session No. 87 of 2010

JUDGMENT OF THE COURT

13th & 18th April, 2016

JUMA, J.A.:

The appellant Simon Aron was charged with the offence of murder of Ruth d/o Daud contrary to section 196 of the Penal Code, Cap. 16. The particulars of the offence alleged that at around 06:00 hours on 16/11/2009 at Isene village in Iramba District of Singida Region he murdered the deceased. He was tried in the High Court at Singida and upon conviction by Makuru, J; the appellant was sentenced to suffer death by hanging. For purposes of the instant appeal before us, KIDUMAGE &

ASSOCIATES, the appellant's learned counsel, filed a memorandum of appeal containing the following five grounds of appeal:

1. *That, the Honourable Learned Trial Judge erred in fact and law in convicting the Appellant on the basis of the allegations that the Appellant confessed to have committed the offence whereas evidence to that effect is wanting.*

2. *That, the Honourable Learned Trial Judge erred both in law and fact in finding as fact that the inflicted wounds, postmortem report and the observed conduct of the Appellant in not responding [to] some of the questions put to him were pieces of evidence corroborative of the alleged repudiated confession.*

3. *That, the Honourable Learned Trial Judge erred in fact and law in not calling the Doctor who prepared the Postmortem Report to clarify on the death of the deceased.*

4. *That, the Honourable Learned Trial Judge erred in fact and in law in arriving at the impugned decision without taking into account the defence evidence of which raised reasonable doubts to the prosecution case as such wrongly convicted and sentenced the Appellant.*

5. *That, the Honourable Learned Trial Judge erred both in fact and law in not drawing adverse inference against the*

prosecution's case for non-calling in court of the key/material witnesses who witnessed the incident and non-production of material exhibits without assigning any plausible reasons.

The evidence of the three prosecution witnesses, PW1, PW2 and PW3; together with the appellant's own evidence when he testified as DW1, provides the background to this appeal.

The discovery of the body of the deceased dates back to 16/11/2009 when one Lucas Samson (PW2) who was the commander of the village militia was at home training his oxen how to pull farming ploughs when he heard a village alarm known as 'Chonjo' calling the villagers to assemble. The body of the deceased, Ruth Daudi, had just been discovered along a cattle path. The police arrived at the scene almost immediately. The police called the medical officer, who performed a post-mortem examination of the body of the deceased before the villagers were allowed to proceed with the burial arrangements.

The post-mortem examination report which was tendered during the Preliminary Hearing as exhibit P1 showed that the death of the deceased

was due to severe hemorrhage and multiple injuries. The report further disclosed that the deceased was before her death assaulted, sustaining multiple cut wounds on the neck, face, arms, chest and right leg. Her injuries resulted in severe bleeding and death.

For six days after the discovery of the body of the deceased, there were no suspects. This was to change on 22/11/2009 when the appellant was taken by a group of villagers to a police post. The appellant's uncle Isaya Martine (PW1) and PW2, were amongst the villagers who informed E4573 Corporal Shaban (PW3) that the appellant had confessed to them that he is the one who killed the deceased. PW3 testified that when he personally asked the appellant whether he had confessed to PW1 and PW2, the appellant remained silent.

Narrating how the appellant confessed to him, PW1 recalled the night of 21/11/2009 when the appellant visited his household and joined them in their evening meal. It was after their supper together when the appellant allegedly told him that he in fact used a machete to kill the deceased. After making this oral confession, the appellant tried to escape with a view of committing suicide. PW1 restrained him and took him to his parent's home.

PW1 informed the appellant's parents what he had told him. According to PW1, the appellant's mother one Rahel Martin, went out to report the incident to PW2, the commander of the village militia. PW2 testified how on the following day, he went to Kitongoji Chairman's house where the appellant was held in custody. Upon PW2 interrogating the appellant, the latter told him that he killed the deceased because she suspected her of bewitching his son to death.

In his defence the appellant gave a different version of evidence from that of PW1and PW2. He completely denied any role in the death of the deceased. He also denied ever confessing to PW1 and PW2. The appellant recalled that on 18/11/2009, he was stopped by one Gidion Hamisi, the Village Executive Officer who wanted to go and search the appellant's house. On the way they passed by PW2's house where there were several policemen. Apparently, the policemen joined the search party heading to the appellant's house. After searching his house, the police took away his shorts and a piece of cloth which he used as his sleeping mattress. The police asked him where he kept his machete. They picked the machete from his sitting room. The police carried away these items. According to

the appellant, it was during the search when the police told him that he was their suspect. He was taken to Matongo Police post. He was remanded overnight till the following day when PW1 stood as his surety and he was released on bail.

The appellant denied visiting his uncle's (PW1) house on 21/11/2009 as claimed. He was at home when his uncle visited him at his house. Soon thereafter, PW2 forcefully entered his house blowing police whistle to draw the crowds to his house. That is when he was handcuffed, forced to lie down and his house locked from outside.

When the appeal came up for hearing before us on 13/4/2016, the appellant was represented by learned Advocate Mr. Cheapson Kidumage, while the respondent Republic was represented by the learned State Attorney, Mr. Morrice Sarara.

In his submission, Mr. Kidumage abandoned the third ground of appeal on failure to summon the medical officer who had carried out the post-mortem examination. Arguing the first ground of appeal, he submitted that the learned trial Judge based her decision on oral confession made out

to PW1 and PW2, whereas on the record, there is no confession that can legally stand the scrutiny of the law governing confessional evidence. The learned advocate drew our attention to pages 35 and 38 of the record of appeal where PW1, contradicts himself. On page 35, PW1 stated that: *'The accused confessed while we were inside the house. The accused told me that he killed the deceased while he was alone.'* But on page 38, while responding to a question raised by the second Assessor PW1 varies his earlier version of evidence and stated: *'We were taking supper outside the house in a cattle kraal. We had no cattle. We were about six people including the accused.'*

Mr. Kidumage also submitted on the contradiction between the evidence of PW1 and that of PW2 regarding where the appellant was immediately taken to, after he had first confessed to PW1. The learned counsel pointed at the evidence of PW1 where he stated that after the appellant had confessed to him, he arrested him and took him to his father (Aron Chunyu) and mother (Rahel Martin). The appellant's mother then went and reported the incident to Lucas Samson (PW2) who was the village militia commander at the time. PW2 advised the appellant's mother

to take the appellant to the Kinyangude sub-division. This account, Mr. Kidumage added, is different from what PW2 said when the appellant's mother knocked at his door around 10 p.m. that evening. PW2 stated that when he opened the door, the appellant's mother told him (i.e. PW2)— "*...that at that material time the accused had already been taken to the Chairman of the sub division (Kitongoji)*", whereupon PW2 told her that he would visit the sub-division Chairman (one Edson Hango) the following morning, which he did. These contradictions, Mr. Kidumage submitted, create doubt whether the appellant ever made any confession to either PW1 or PW2.

On the second ground of appeal where several pieces of evidence were regarded by the trial Judge to be corroborating the oral confession, the learned counsel for the appellant placed reliance in the decision of the Court in **Azizi Abdalah vs. R.** [1991] TLR 71 (CA) and submitted that the pieces of evidence which the learned trial Judge relied on to corroborate the oral confession which the appellant had repudiated, cannot in law corroborate a confession that is in the first place defective or shaky from the beginning. He argued that it was wrong for the trial Judge to suppose

that the appellant had confessed to PW1 and PW2 and to conclude that the confession was corroborated by the nature of wounds inflicted on the deceased. He argued that the wounds described in the post-mortem report were well known to the villagers who saw the body of the deceased when it was first discovered. He pointed out that since the villagers, including PW1 and PW2 had seen the body of the deceased when it was discovered, what these two witnesses attributed to the appellant was their own recollection of the state of the body of the deceased when they themselves saw it.

Mr. Kidumage also faulted the learned trial Judge for regarding the purported failure of the appellant to answer questions put across by appellant's own learned counsel, could in law corroborate the oral confession which the appellant had repudiated. Mr. Kidumage submitted to us that since the learned Judge did not identify the questions which were put across to the appellant which he declined to answer, it was wrong for the trial judge to conclude that the conduct of the appellant in response to questions put during his examination in chief could corroborate a repudiated confession.

Submitting on the ground of appeal wherein the trial Judge is faulted for failing to give any consideration of the appellant's defence, Mr. Kidumage referred us to the operative parts of the judgment of the trial court on pages 124 and 125 where the learned Judge gives the prosecution evidence prominent consideration while summarizing in passing the evidence of the defence. He submitted that this part of the trial court's judgment is where the learned trial Judge should have weighed the prosecution evidence against the accused person's evidence offered in his defence. This, according to the learned counsel, is a fatal irregularity.

In the final ground of appeal, Mr. Kidumage faults the learned trial Judge for failing to draw an adverse inference against the respondent for failing to call the witnesses (like Edson Hongo, Aron Shunyu and Lucas Simon) who were listed during the Preliminary Hearing as the prosecution witnesses. He also faulted the learned trial Judge for failing to draw adverse inference on the failure to exhibit the machete which was not only listed as part of the prosecution exhibits, but featured in the confession which the appellant is alleged to have made to PW1 and PW2.

From the very outset of his submissions, Mr. Sarara, learned State Attorney expressed his unwavering opposition to this appeal. He reiterated that the conviction of the appellant is based oral confession which the appellant made to PW1 and PW2. The confession made to these two witnesses, he submitted, founded on law because it is included in the definition of "confession" under the definitional section 3 of the Evidence Act. He added that the oral confession is envisaged under section 27 of the same Act which identifies persons who can receive confessions, including members of people's militia who are police officers in accordance with the law.

In so far as voluntariness of the confession is concerned, the learned State Attorney submitted that no torture or any type of influence was exerted on the appellant when he made his oral confession to PW1 and PW2. He referred us to the evidence of E4573 CPL Shaban (PW3) who investigated the murder of the deceased. The appellant did not report to PW3 that he had been tortured to extract his oral confession. To support his conclusion that there was no torture, Mr. Sarara pointed at the fact that

PW1 is the appellant's own uncle, we should not expect him to torture or falsely accuse his own nephew.

On contradictions in the various parts of the evidence of PW1 regarding where the appellant confessed to this witness, Mr. Sarara brushed these concerns aside by insisting evidence proves that the appellant made oral confession on that material night. He similarly downplayed the apparent contradictions in the evidence of PW1 and PW2 regarding the sequence of informing other villagers about the oral confession.

To cap his submission, Mr. Sarara submitted that in law, the trial Judge was right to conclude that the oral confession which the appellant made to PW1 and PW2 was sufficient to convict the appellant. On line of submission that oral confessions to witnesses can sufficiently sustain a conviction, Mr. Sarara referred us to two decisions of the Court for support: **The Director of Public Prosecutions vs. Nuru Mohamed Gulamrasul** [1988] TLR 82 and **Matei Fidoline Haule vs. R**. (1992) TLR 148.

With regard to the submissions made that there was a failure to call material witnesses, the learned State Attorney contended that the most important witness was PW1 who was the first person to be informed about the role of the appellant in the death of the deceased. He argued that even if Edson Hango had been presented as a prosecution witness, his testimony would not be anything different from what PW1 and PW2 had testified on.

Responding to the submission that the learned trial Judge failed to consider defence evidence before convicting him, at first the learned State Attorney adamantly contended that every trial judge has own style of composing judgments and for the purposes of this appeal, the learned State Attorney contended that the trial Judge had sufficiently summarized the defence evidence and arrived at a correct decision. When pressed to revisit the actual pages of the judgment where the summary of the defence evidence was made, Mr. Sarara relented and conceded that indeed the trial Judge did not consider the evidence the appellant had presented in his defence. However, the learned State Attorney was quick to urge us to cure the anomaly by playing our role of first appellate court to give the defence evidence a fresh re-evaluation.

In a brief rejoinder, Mr. Kidumage urged the Court to find that PW1 and PW2 are not persons who can receive confessions under section 27 of the Evidence Act and their evidence on oral confession should not carry any weight to sustain a conviction. He insisted the confession the appellant made to PW1 and PW2 is of no probative value in law and is incapable of being corroborated. He argued further that even if the confession had any probity, the pieces of evidence which the trial Judge regarded as corroborating the confession do not amount to corroboration.

After hearing the submissions of the two learned counsel for the appellant and for the respondent Republic, we shall not lose sight of the fact that there was no eye witnesses to the killing of the deceased and it was the oral confession which the appellant made to his uncle, PW1 and to the commander of the village militia, PW2, which persuaded the learned trial Judge to convict the appellant. The learned trial Judge stated:

> *"...The question which arises is whether what the accused said to PW1 and PW2 amounted to a confession. According to* ***O'sborn's Concise Law Dictionary, Seventh Edition*** *by Roger Bird a confession is 'an admission of guilty made to another by*

a person charged with a crime. It is admissible only if free and voluntary'. In the present case, I am of the view that the accused confessed to PW1 and PW2 free and voluntary. The accused admitted in terms of the offence charged.

As a matter of practice a repudiated or retracted confession needs corroboration. In the present case, I am of the view that the repudiated confession has been amply corroborated by the inflicted wounds which the accused specified the parts which he inflicted.... The Post-Mortem Examination Report is another piece of corroborating evidence, which tells what the accused confessed about the inflicted wounds. Regarding the conduct of the accused person, that he did not respond to some of the questions put to him, this is also another piece of corroborating evidence. The case of Matei Fidoline Haule V. R (1992) TLR 148 which was cited by the Republic is relevant in the present case."

In determining this appeal as first appellate court, we shall subject the evidence of oral confession to our own evaluation in order to arrive at our own conclusion regarding the probity of this piece of evidence. We shall not lose sight of the fact that the trial Judge had a better vantage

position to see and hear the witnesses: see- **Juma Kilimo vs. R.,** Criminal Appeal No. 70 of 2012 (unreported).

Mr. Sarara, for the respondent has expressed himself that the oral confession the appellant made to PW1 and PW2 is firstly covered by the definition of confession under section 3 (1) (a) of the Evidence Act which provides:

> ***3.-****(1) In this Act, unless context requires otherwise–*
>
> *"confession" means–*
>
> *(a)- words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence;* or

Secondly, the learned State Attorney contended that the oral confession also complied with the provisions of section 27 (1) of the Evidence Act governing proof of confessions that are made voluntarily to police officers:

***27.**-(1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person.*

Whilst on one hand we agree with Mr. Sarara that the oral confession the appellant made to PW1 and PW2 is covered under the definition of "confession" under section 3 (1) (a), we shall first deal with the aspect of how the trial Judge related the evidence on record to the equally important requirement of voluntariness of that oral confession.

The generalized conclusions which the learned trial Judge made, like—*"In the present case, I am of the view that the accused confessed to PW1 and PW2 free and voluntary"* – and –*"I am satisfied with the truthfulness of the confession in all the circumstances of [the] case. I observed the demeanor of the prosecution witnesses who testified in court, I am of the view that they were reliable and credible witness [es]. I have warned myself of the danger of convicting on retracted or repudiated confession of the accused and I am satisfied that the confession of the accused was nothing but the truth..."*— were no substitute to the duty the

law imposed on trial courts to determine the voluntariness of confessions, albeit be oral confession in substance.

While cautioned statements recorded by police officers and extra-judicial statements taken before justices of the peace, are both hedged-in with statutory and judicial safeguards to ensure their voluntariness, the learned trial Judge did not subject the oral confessions to tests to determine voluntariness. For instance, sections 57 and 58 of the Criminal Procedure Act, Cap 20 (CPA) provides such precautionary details as requiring the police officer who records a cautioned statement, to specifically issue a caution to the accused person before he records the confession, hence the word "cautioned statement". In **Mohamed Shiraz Hussein v Republic** [1995] eklr, the Court of Appeal of Kenya, came out very clearly on the need to extend that caution to oral confessions to ensure their voluntariness:

> *"...We agree with Mr Kivuitu that* ***oral confession must be received in evidence with a lot of care and caution****. But once a court is satisfied that an accused person did make an oral confession and that* ***all the rules as to the voluntariness of any confession***

> ***were complied with**, then there cannot be any legal basis for excluding such evidence. The Judge and the assessors were satisfied on these points and on the record before us we can find no reason to disagreement."* [Emphasis added]

Had the learned trial Judge in the instant appeal before us demanded compliance with tests on voluntariness by evaluating the evidence of the circumstances under which the appellant confessed to PW1 and PW2, she would not have concluded that the appellant **"confessed to PW1 and PW2 freely and voluntarily"** and the **"confession of the accused was nothing but the truth."** For example, PW1 testified that at least six people were at his household that night when the appellant made his oral confession and later taken to his parents' home. These people could have been identified in a trial within trial and asked to testify on voluntariness of the oral confession the appellant made to PW1.

It seems obvious that the treatment which the appellant received while he was detained in the village lockup was not conducive for him to give a free and voluntary confession. Our observation is borne out of the

evidence of PW2 who stated that he visited the appellant who was under custody in the house of Edson Hango, the village chairman. PW2 also disclosed the state which the appellant was:

> *"...I called the accused. I told him to get out as he was inside Edson Hango's house.* ***The accused came out without shoes****. I inquired why he did not put on shoes. He told me* ***'acha tu'*** *[I]* ***inquired further why his eyes were red****. The* ***accused looked confused.*** *I inquired from the accused if it is true that he killed Ruth Daudi. He said it's true that he killed Ruth Daudi. The accused told me that he used the machete [to] kill the deceased."* [Emphasis added].

Whilst under cross-examination by Mr. Thadey, PW2 who was the commander of militiamen; disclosed the real reason for his visiting Edson Hango's house was —*"to interrogate the appellant"*:

> *"At the Chairman of the sub division I went around 08:00 a.m.* ***I decided to interrogate the accused as Commander of militiamen. As Commander I had the responsibility of interrogating the accused.*** *I*

was allowed by the Chairman of the sub division to interrogate the accused ..." [Emphasis added].

The learned trial Judge did not conduct any trial within a trial at very least to revisit the environment under which oral confessions were made. This would have also enabled the trial court to appreciate what the so called "interrogation by the Commander of militiamen" entailed in the practical village environment. We do not think that the legislature intended to strictly regulate the way the police officers interrogate suspects in accordance with the provisions of section 57 and 58 of the CPA, while at the same time leave the members of the people's militia with a free hand to interrogate suspects to obtain their oral confessions, as they please.

In the circumstances of the instant appeal where the voluntariness of the oral confession was not determined, we consider that it is unsafe to rely on the oral confession to convict the appellant for the offence of murder.

The two decisions of the Court, **The Director of Public Prosecutions vs. Nuru Mohamed Gulamrasul** (supra) and **Mathei Fidoline Haule vs. R** (supra); which the learned State Attorney cited to

us are not applicable to the circumstances of the instant appeal where determination of voluntariness of oral confession is at issue. In **The Director of Public Prosecutions vs. Nuru Mohamed Gulamrasul** (supra) the decision of the trial court was not based solely on oral confession made out to witnesses. There was other pieces of which were taken into account. These included, the physical evidence of the respondent being found in actual possession of elephant tusks. There was also the oral statement which the respondent made in the presence of witnesses when the tusks were discovered from their concealment. Thirdly, there was the respondent's cautioned statement where the respondent revealed how he came to possess the tusks.

Although in **Mathei Fidoline Haule vs. R.** (supra) the Court sustained a conviction that was based on oral confession made by the appellant to his village chairman one Cotride Msangu (P.W.1), the Court was not presented with an opportunity to address itself on the issue of voluntariness of oral confessions.

Next, we propose to address the ground of appeal contending failure to consider the defence evidence. On this, the two learned counsel are on

common ground that the evidence for the defence was not considered by the learned trial Judge. This is confirmed by the record of appeal on pages 124 and 125, where the trial Judge addressed herself to the issue whether it was the appellant who killed the deceased without so much as considering the defence evidence on the issue:

> *"...The only issue left is whether it is the accused that did it. There is no eye witness who witnessed the incident. The prosecution evidence consists of a confession made by the accused person to PW1 and PW2 which confession has been repudiated by the accused person in court. The accused has put forward a defence of alibi..."*

But looking back at the record of appeal, we agree with Mr. Kidumage that the appellant testified on many facts which could potentially create doubt whether he made any oral confessions or whether if made, the confessions were voluntarily made to PW1 and PW2.

In his defence evidence, the appellant denied the offence, and he denied ever visiting PW1's house during the time of supper as claimed. Instead, the appellant testified that it was PW1 who actually visited his

house that night and soon thereafter, PW2 arrived to arrest him from his own home. The appellant also testified on how the police searched his house and took away his shorts, a piece of cloth he used as a mattress and his machete. In the Preliminary Hearing, the machete was listed as one of the exhibits to be tendered during trial.

There is no doubt that the appellant was charged with a capital offence that carries mandatory death sentence by hanging. He was entitled to expect the trial Judge to consider his defence. In **Yustin Adam Mkamla vs. R.,** Criminal Appeal No. 206 of 2011 (unreported) the Court restated the consequences of failing to consider the evidence for the defence:

> *"...The failure on the part of courts below to consider the evidence offered by the defence featured in an earlier decision of the Court in* ***Moses Mayanja @ MSOKE vs. R.,*** *Criminal Appeal No. 56 of 2009 (unreported). After citing several earlier decisions of the Court, concluded that the failure by courts below to consider objectively the evidence of prosecution and that of defence entitles this Court to interfere with resulting concurrent finding of facts. We emphasized that the law is settled on the*

proposition that failure to consider the defence case is fatal and usually vitiates the conviction."

In the final analysis, we find that the conviction of the appellant cannot safely be left to stand. We shall allow his appeal. The conviction of the appellant for murder is hereby quashed and the sentence of death by hanging is set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

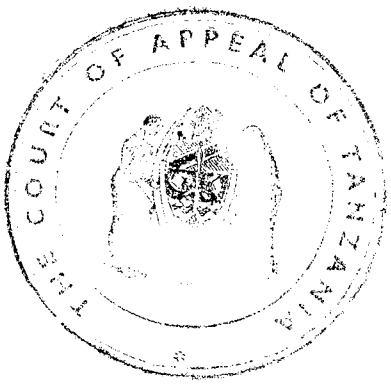
DATED at **DODOMA** this 16th day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL