IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 161 OF 2018

1. **ANETH FURAHA**
2. **JUDITH ROBERT**
3. **EDSON NDUHIYE**
4. **SHABANI YAHYA @ LIHENGE**

.....APPELLANTS

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

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

(Bongole, J.)

dated the 18th day of May, 2018
in
Criminal Session No. 47 of 2014

JUDGMENT OF THE COURT

29th April & 3rd May, 2019

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania sitting at Bukoba (Bongole, J.) in Criminal Sessions Case No. 47 of 2014. In that case, Aneth Furaha, Judith Robert, Edson Nduhiye who are the 1st – 3rd appellants herein (the appellants) and Shabani Yahaya @ Lihenge were jointly charged with and convicted of offence of murder contrary to section

196 of the Penal Code [Cap. 16 R.E. 2002]. They were found guilty of having murdered one Shabani Furaha on 20/7/2013 at Ngudusi village within Ngara district in Kagera region. They were aggrieved by the decision of the High Court hence this appeal.

At the hearing of the appeal, the Court was informed by Mr. Shomari Haruna, learned State Attorney who appeared for the respondent Republic, that Shabani Yahaya @ Lihenge who was the 4th appellant, has passed away. The learned State Attorney produced a burial permit issued on 28/4/2019. According to that document, the said person died on 28/4/2019. Under Rule 78(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), where an appellant dies, his appeal abates unless the appeal is against a sentence of fine, compensation or forfeiture. In the circumstances, since this matter does not fall under any of the exceptions stated under that provision, we accordingly marked the appeal abated.

As stated above, the appellants were convicted of having murdered one Shabani Furaha. The facts giving rise to their arraignment and conviction can be briefly stated as follows: The 1st appellant and Furaha Salum (PW1) were until the material date of the demise of the deceased, a

wife and husband. They entered into marriage in 1999. Before he got married to the 1st appellant, PW1 had another wife, Belina Furaha with whom he begotten one child, the said Shabani Furaha (the deceased). At the time of PW1's second marriage with the 1st appellant, the deceased was aged 2 years. She stayed with him until he met his unnatural death on 20/7/2013 while at the age of 16 years.

On 21/7/2013, PW1 received an information from one Jane Sekinjoli that the deceased had been killed at Mkilani area in Ngundu Village. PW1 went to that area where he found the deceased's body lying there and immediately reported the incident to police. Some police officers arrived at the scene and called a doctor who examined the deceased's body. After examination, the police handed the body to PW1 for burial arrangements and proceeded to carry out investigations. Consequently, the appellants were arrested and charged as stated above.

At the trial, the prosecution relied on the evidence of eight witnesses and four documentary evidence including the postmortem report of the deceased (exhibit P.2) and the 1st appellant's extra-judicial statement (exhibit P.4). Jane George (PW4) was among the persons who testified for

the prosecution. It was her evidence that on 21/7/2013, she was informed of the death of the deceased by one Jafet Mswelu. She conveyed that information to her hamlet chairman. Consequently, the incident which she encountered on 20/7/2013 came to her mind. It was her evidence that on that date, while she was going to a river, she met the deceased who was known to her because they attended school together at Nzasa Primary School. The deceased, she said, was in the company of four persons and were heading to a forest. They greeted each other and upon being asked, the deceased said that he was going to Mkilani area, the place at which he said, was residing. According to her evidence, she did not identify any of the four persons who were with the deceased. She went on to state that, later on, while she was returning from the river, she met the four persons. The deceased was not with them. They asked her twice whether she knew them and she replied that she did not know them.

Later on 30/7/2013, she was summoned to police where she was required to identify from an identification parade, the persons she met on 20/7/2013. She identified the 3rd appellant as one of those persons.

With regard to PW1, in his evidence, he implicated the 1st appellant with the death of the deceased. When he was being cross-examined by the learned State Attorney who prosecuted the case, PW1 stated that the 1st appellant stole his money and used it to facilitate the killing of the deceased by paying his killers. He testified further that there was a sour relationship between the 1st appellant and the deceased, the fact which, according to him, supports the evidence of her involvement in the killing of the deceased.

Following the implication of the 1st appellant with the crime, the police arrested and interrogated her and later took her before the justice of the peace to record her extra-judicial statement. According to the evidence of PW8 No. E.2136 D/Cpl Dickson Hassan Masondole who arrested the 1st appellant, after having interrogated her, he handed her to WP 7871 Martina who took the 1st appellant to the justice of the peace, Andrew Wade Kabuka (PW5). In his evidence PW5 stated that upon being questioned, the 1st appellant expressed that she was willing to give her statement. He then recorded her extra-judicial statement which, according to him, was given by the 1st appellant voluntarily. Despite the objection by

the learned counsel for the 1st appellant that the statement, which was repudiated by the 1st appellant, should not be admitted on account that the same was not made voluntarily, the learned trial judge ruled out that the same was admissible. It was thus admitted as exhibit P.4.

In their defence, the appellants disputed the prosecution evidence. They denied any involvement in the killing of the deceased. In her evidence, the 1st appellant (DW1) denied having voluntarily stated the events contained in exhibit P.4. She denied that the deceased was killed by the 3rd appellant and other persons upon an agreed plan made by the 2nd appellant and executed by hiring the 3rd appellant and other persons for that purpose. She also denied the tendered evidence to the effect that she stole PW1's money and used it to pay the deceased's killers.

She complained that after her arrest, she was severely tortured at the police station from the date of her arrest on 24/7/2013 to 28/7/2013 with a view of forcing her to sign a cautioned statement. She said that she finally signed involuntarily a document (which the trial court declined to admit in evidence). It was her evidence that she was also told of what she should state before the justice of the peace and that if she disobeyed that

instruction, she would continue to be tortured. It was her defence that she did not record the extra-judicial statement voluntarily.

On her part, the 2nd appellant (DW2) also denied that she participated in the killing of the deceased in collaboration with the 1st appellant and others as stated in exhibit P.4. She testified that after her arrest on 26/7/2013, she was detained in police lock-up until on the second day when she was taken out and required to admit that she was given some money by the 1st appellant so as to facilitate the killing of the deceased. When she refused, she said, she was tortured by being beaten with a club on several parts of her body including her knees and shoulders. She was returned in the lock-up until on 29/7/2013 when, upon further denial, the torture continued to the extent that she had to be taken to hospital for treatment. She was later charged in court.

The 3rd appellant gave a story which is almost similar to that which was given by his co-appellants. It was his evidence that, after his arrest on 27/7/2013 he was taken to Kabanga police station. Upon being informed of the offence for which he was arrested, he denied any involvement in its commission. It was then that he was severely tortured to the extent that

he bled profusely from his knee and fingers. It was his further evidence that despite repeated beatings between 28/7/2013 and 2/8/2013, he denied the offence. On 30/7/2013 identification parade was arranged and he was one of the persons who was lined up in the parade. He was identified by PW4 who, he said, is well known to him as they are neighbours and all members of his family are known to her. He maintained that he was not involved in the killing of the deceased.

In convicting the appellants, the learned trial judge acted on the extra-judicial statement of the 1st appellant which he found to have been made voluntarily. He applied that evidence to convict the 2nd and 3rd appellants under section 33(1) of the Evidence Act [Cap. 6 R.E. 2002]. Although the statement was repudiated, the learned trial judge found that the same was sufficiently corroborated by independent evidence. He relied on the evidence of PW8 which he found to be credible, and found that the 1st appellant's possession of 10,000 Francs which according to the prosecution, was stolen from PW1, corroborated the evidence of extra-judicial statement. The trial court relied also on the evidence of PW4 and the 1st appellant to the effect that they identified the 3rd appellant at the

identification parade. With regard to the appellants' defence, the learned trial judge found that the same did not raise any reasonable doubt against the prosecution case.

The appellants filed separate memoranda of appeal. The 1st and 2nd appellants raised seven grounds each. The grounds are similar in content. On his part, the 3rd appellant raised eight grounds, the contents of which are also similar to those of the 1st and 2nd appellants. The appellants are in essence challenging the decision of the High Court on the following paraphrased grounds of appeal:

1. That the High Court erred in law and fact in basing the appellants' conviction on the evidence of extra-judicial statement of the 1st appellant (exhibit P.5) while that evidence is unreliable as the same was not only obtained illegally but was uncorroborated.

2. That the High Court erred in law and fact in relying on the evidence of identification parade which was conducted in breach of the laid down procedure.

3. That the High Court erred in law and fact in acting on the evidence of PW4 to found the appellants' conviction while that witness did not give the description of the suspects immediately after the incident.

4. That the High Court erred in law and fact in believing the evidence of PW1 that the 1st appellant stole his money while the alleged theft was not proved.

5. That the High Court erred in law and fact in convicting the appellants while the offence was not proved beyond reasonable doubt.

Whereas, as stated above, the respondent Republic was represented by Mr. Shomari Haruna, learned State Attorney, on their part, the 1st and 2nd appellants where represented by Mr. Josephat Rweyemamu, learned counsel. The 3rd respondent had the services of Mr. Christian Byamungu, learned counsel.

Mr. Rweyemamu argued the grounds of appeal generally basing his arguments mainly on the 1st, 2nd and 4th grounds stated above. The learned counsel argued **firstly**, that the extra-judicial statement was

wrongly admitted in evidence and **secondly**, that even if it was properly admitted, that evidence which was repudiated, required corroborative evidence, which evidence was lacking.

On the first point, Mr. Rweyemamu submitted that, from the record, when PW5 sought to tender the extra-judicial statement, the advocate for the 1st appellant (the 1st accused at the trial) raised an objection contending that the statement was not obtained voluntarily and thus not admissible. The learned judge proceeded to hear both the appellant's advocate and the learned State Attorney who was prosecuting the case and eventually made a ruling that the document was made voluntarily and was for that reason, admissible. According to Mr. Rweyemamu, the proper procedure which the learned trial judge should have adopted was to order a trial-within-a trial to determine whether or not the statement was made voluntarily. The learned counsel argued further that the procedure, after the document is admitted, is for the contents to be read over before being acted upon in evidence. He cited the case of **Robinson Mwanjisi and Three others v. Republic** [2003] TLR 218 to bolster his argument.

In the present case, Mr. Rweyemamu went on to argue, exhibit P.4 was admitted in evidence and acted upon without following the two requirements stated above, the effect of which is to render the statement invalid for having been improperly admitted. He prayed therefore, that the same be expunged from the record.

Since the prosecution case was hinged on the 1st appellant's extra-judicial statement, it was Mr. Rweyemamu's submission that if the document is expunged, the remaining evidence will be insufficient to prove the offence charged. He argued that the evidence of PW4, (which is independent from the evidence of extra judicial statement), is not credible because **firstly**, the said witness did not identify any of the persons she met in the company of the deceased and **secondly**, her identification of the 3rd appellant at the identification parade was superfluous because she purported to identify the person who is well known to her. According to the learned counsel, that act casts doubt on the credibility of PW4.

In the same vein, the learned counsel challenged the 1st appellant's evidence of identification of the 3rd appellant. Mr. Rweyemamu argued that, the persons who were intended to be identified were named to her

before she went to the identification parade to identify the suspects, among them being the 3rd appellant, 1st appellant's close neighbour who is well known to her.

On his part, Mr. Byamungu supported the submission of the counsel for the 1st and 2nd appellants. He concentrated on the point that the evidence of extra-judicial statement lacked corroboration and that it could not therefore, be acted upon to found the appellants' conviction. With regard to the evidence of PW4, Mr. Byamungu agreed with Mr. Rweyemamu that the said witness is not credible. He stressed that from the evidence on record, the statement by PW4 that she did not know the 3rd appellant is nothing but a lie because according to the evidence, they have been close neighbours and at the time of the incident she was of the age of 12 years. He argued further that the evidence of identification relied upon by trial court was not supported by identification register as the one which was tendered (exhibit P.3), was in respect of different suspects, none of whom was identified by PW4.

In his response to the appeal, Mr. Haruna made his stance clear that the respondent Republic did not support the appellants' conviction.

Submitting in support of the appeal, he agreed with both learned counsel for the appellants that the extra-judicial statement of the 1st appellant was not properly admitted in evidence. Apart from the irregularities stated by the appellants' advocates, the learned State Attorney added another infraction; that the witness (PW5) was allowed to testify on the contents of the document before the statement was admitted in evidence.

On the evidence of identification parade, Mr. Haruna argued that the same was conducted in breach of the provisions of the Police General Orders (P.G.O.) in that the police officer, PC Kassim who arrested the 3rd appellant participated in the parade. For that reason, he said, the identification parade was null and void. In support of his argument, the learned State Attorney cited the decision of the High Court in the case of **R. v. XC 7535 PC Venance Mbuta** [2002] TLR 449.

Mr. Haruna submitted also that, even if it would be found that the extra-judicial statement was properly admitted in evidence, the other piece of evidence which was found by the learned trial judge to have corroborated that evidence, was insufficient. He argued that, whereas the allegation that the 1st appellant stole PW1's money was not proved, the

evidence of PW8 that the 1st appellant wrote a cautioned statement could not be relied upon as a corroborative evidence because the cautioned statement was rejected at the trial thus rendering the evidence of PW8 a mere hearsay. With regard to the evidence of PW5, PW6 and PW7 to the effect that the 3rd appellant was identified in the parade, Mr. Haruna argued that, since according to exhibit P.3, none of the persons who were lined up in the parade was identified, the testimony of the said witness was of no evidential value.

We have duly considered the submissions made by the learned advocates for the appellants and the learned State Attorney. It is indeed a correct position that the appellants' conviction was based on the evidence of the 1st appellant's extra-judicial statement which was recorded by PW5. That evidence which was repudiated by the 1st appellant, was found by the trial High Court to have been sufficiently corroborated. The appellants have contended **firstly**, that the statement was improperly admitted in evidence and **secondly**, that in any case, the confession which was repudiated, was not corroborated.

To begin with the first contention, the error complained of by the appellants is, from the record, glaringly certain. When PW5 sought to tender the 1st appellant's extra-judicial statement as an exhibit, the 1st appellant's counsel, Mr. Zeddy Ally objected to the prayer contending that the statement was not made by his client voluntarily. The learned trial judge proceeded to hear the issue of admissibility of the document in the form of a preliminary objection and finally made a ruling that the statement was admissible.

With due respect to the learned trial judge, the procedure which he adopted in determining the admissibility of the 1st appellant's extra-judicial statement was erroneous. As submitted by the learned counsel for the parties, when an objection is raised against admission of a confession statement on the ground that the same was not made voluntarily, the trial court is enjoined to conduct a trial-within a trial. In the case of **Morris Agunda and Two others** (supra) [2003] TLR 449 cited by Mr. Rweyemamu, like in the present case, the extra-judicial statement of one of the appellants in that case, one Paul Lubende was admitted by the trial

court without conducting a trial-within-a trial. Having considered that irregularity, the Court held as follows:

> *"There can be no doubt that the trial judge grossly misdirected himself. For, upon the objection (of admissibility of the extra-judicial statement) the proper procedure was for him to hold a trial-within-trial and then rule on the matter."*

Faced with a similar situation, the Court stated as follows in the **Robinson Mwanjisi case**.

> *"The issue as to the voluntariness of the statement was not resolved in the appropriate manner since the Trial Court did not conduct a trial-within-a-trial"*

There was yet another irregularity in the procedure which was adopted to admit in evidence, the 1st appellant's statement as submitted by the learned State Attorney. We agree with him that it was wrong for the witness (PW5) to testify on the contents of the extra-judicial statement before the statement was admitted in evidence. The proper procedure is that the document must first be cleared for admission before it is used in

evidence. In the same case cited above, the Court underscored the requirement of abiding by that procedure. It stated as hereunder:

> *"Where it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, or otherwise it is difficult for the Court to be seen not to have been influenced by the same."*

On the basis of the above stated procedural irregularities, we agree with the learned advocates for the appellants and the learned State Attorney that the evidence of the 1st appellant's extra-judicial statement was rendered invalid. That being the position, the need for considering whether or not there was evidence which corroborated that repudiate confession does not arise. We are supported in that view by the decision of the Court in the case of **Morris Agunda** (supra) where the Court held as follows:

> *"The consequence thereof* [of admitting an objected confession statement without conducting a trial-within-a trial] *is to discount or disregard completely the appellant's alleged confession, in which case the*

question of requiring evidence to corroborate a retracted or repudiated confession does not arise."

Apart from the evidence of the alleged confession by the 1st appellant, the High Court relied also on the evidence of identification of the 3rd appellant. The learned counsel for both parties have submitted that the said evidence was not credible. We agree with them. According to the evidence of PW4, she identified the 3rd appellant in the identification parade which was arranged by PW3. It was also the evidence of PW8 that the said appellant was also identified by the 1st appellant. The identification parade register in respect of that parade was however, not admitted in evidence on account that it was tainted with unexplained alterations of its contents. The evidence of PW3 and PW8 was not therefore, supported by a register. As for the register which was put in evidence (exhibit P3), it shows that the 3rd appellant was not one of the persons who were lined up for identification. That exhibit shows further that none of the lined up persons was identified. Without considering the other factors raised by the learned counsel for both parties, on this point, the position stated above is enough to raise doubt on the credibility of the identification evidence relied upon to convict the appellants.

On the basis of the foregoing, we find that the appellants were wrongly convicted on the basis of insufficient evidence. In the event, we hereby allow the appeal. Consequently, the appellants' convictions are hereby quashed and the sentence imposed on them is set aside. They shall be released from prison forthwith unless they are otherwise lawful held.

DATED at **BUKOBA** this 3rd day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL