IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: JUMA, C.J., MKUYE J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO 205 OF 2017

1. **MICHAEL MGOWOLE**
2. **SHADRACK MGOWOLE.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)

(Feleshi, J.)

dated the 25th day of May, 2017

in

Criminal Appeal No. 08 of 2014

JUDGMENT OF THE COURT

19th August & 30th September, 2019

JUMA, C.J.:

The two siblings, MICHAEL S/O MGOWOLE and SHADRACK S/O MGOWOLE, hereinafter referred to as **the first** and **second appellants** respectively, were tried, convicted and sentenced to death by the High Court sitting at Iringa (Feleshi J, as he then was) for the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that they murdered the first appellant's wife NURU D/O CHAFUMBWE, hereinafter referred to as **the deceased**.

The chain of the prosecution evidence linking the appellants with the commission of the offence is as follows. The deceased, and her

mother Anna Ngole (PW1), were both at home in Nyololo village when at around 20:00 hrs the second appellant paid them a visit. PW1 was in her sitting room while her daughter was busy cooking in the out-door kitchen. The second appellant asked the deceased to accompany him to where his elder brother was stranded somewhere with some luggage following the breakdown of the bicycle he was riding on from Madibira. The first appellant wanted his wife to go and pick up the luggage.

The deceased did not return home that night. The following morning PW1 went to the Village Executive Officer (Paul Msovela—PW2) and reported her daughter's failure to return back home. PW2 advised PW1 to spend a few more days searching within the village. When her search proved fruitless, PW2 gave her an introduction letter to enable her to extend her search to Madibira in Mbarali district of Mbeya Region where the appellants' parents lived. When she arrived at Madibira, PW1 first sought out one Musa Kiundo, who was the first appellant's best-man during his wedding to her daughter. Musa Kiundo took PW1 to the appellants' parents homestead. It turned out that, even the appellants' parents, YUDA S/O MGOWOLE and ELITA D/O MHAGULE, did not know the whereabouts of their sons and their daughter-in-law.

Ten days had passed after the deceased's disappearance when on 29/7/2011; the first and second appellants were arrested at Madibira

Mbarali District of Mbeya Region. They were transferred to Mafinga Police Station in Iringa Region where E.3937 Corporal Gregory (PW4) recorded their cautioned statements (exhibits P4 and P5). In their respective cautioned statements, the appellants highlighted the motive for the murder of the deceased. That, it was the first appellant's lover, Zaituni d/o Tosi, a traditional healer with mystical powers, who had directed the first appellant to kill his wife and marry her instead.

On 1/8/2011, which was three days following their arrests; the first appellant led a team of police officers and other witnesses to a place where the dead body of the deceased was discovered and exhumed. He recorded an additional cautioned statement (exhibit P3) on the aspect of the discovery of the body of the deceased. On 9/8/2011, the first appellant recorded a further extra-judicial statement (exhibit P6) before a justice of the peace.

In his sworn defence the first appellant denied any extra-marital affair with the traditional healer, Zaituni d/o Tosi. He did not conspire with the second appellant to kill his wife as alleged by PW3, but it was the police who forced him to implicate the second appellant. He denied sending the second appellant to fetch his wife from her mother's homestead to the place where she was killed. He blamed his mother-in-law (PW1) for incriminating him simply because she did not like a poor

person like himself to marry her daughter. The first appellant insisted that the contents of the cautioned statement and those in the extra-judicial statements he made to the Justice of the Peace are both untrue, and they were procured by torture. He also denied the prosecution evidence that he had led the police to a place where the deceased was killed, buried and later her body was exhumed.

The second appellant gave sworn evidence denying that the first appellant had sent him to collect the deceased and take her to where she was killed. He denied that he had confessed about his involvement in the killing the deceased as alleged by Detective Corporal Gregory who recorded his cautioned statement (exhibit P5).

Aggrieved with their conviction and sentence the appellants brought this first and final appeal.

Before the date of hearing, Mr. Rwezaula Kaijage learned counsel for the first appellant had filed a supplementary memorandum of appeal which had two grounds of appeal. At the hearing, he abandoned the first ground of appeal, and retained the second ground alleging that there was no evidence which implicates the first appellant with the death of the deceased.

On the second appellant's behalf Mr. Jally Willy Mongo learned Advocate, filed a supplementary memorandum of appeal containing five grounds of complaints. The **first ground** faults the learned trial Judge for what Mr. Mongo described as "pre-determining the guilt" of the second appellant to the offence of murder before the trial court heard his defence. The **second ground** faults the learned trial Judge for admitting, and relying on, the cautioned statement of the second appellant (Exhibit P5), which was not only recorded out of time, but the time was also not extended as is required under the provisions of sections 50 and 51 of the Criminal Procedure Act, Cap 20 **(the CPA)**.

The **third ground**, the second appellant's learned counsel faults the trial Judge for admitting, and acting upon, exhibits P3, P4, P5 and P6, which, instead of being tendered by the prosecution witnesses, they were tendered by the trial Judge. The **fourth ground** of appeal faults the trial Judge for basing the conviction of the second appellant solely on the evidence of the prosecution, without so much as evaluating, and taking into account, the defence evidence. The **fifth ground** alleges that as against the second appellant, the prosecution did not to prove its case beyond reasonable doubt.

In his expounding of the ground that there was no direct evidence to prove that the first appellant caused the death of the deceased, Mr.

Rwezaula, urged us to disregard the confessional statements (exhibits P3, P4 and P6) which he claims were not only recorded outside the period prescribed by section 50(1) of the CPA, but they were also procured under torture. Mr. Rwezaula insisted that the police at Madibira, who had first arrested the appellants, should have recorded the first appellant's cautioned statement within four hours. He urged that the counting of the basic period of four hours should begin from the arrest of the first appellant at Madibira Police Station but not from the time he was handed over to the custody of Mafinga Police Station.

Mr. Rwezaula also faulted the learned trial Judge for failing to discern torture. He submitted further, that torture was inflicted on the two appellants as well as to their parents.

In elaborating his complaint that the second appellant's guilt was pre-determined well before the trial court received the evidence in his defence, Mr. Mongo took exception to the words the trial Judge used when determining whether the appellants had a case to answer on pages 190 and 191 of the record of appeal which stated: "*Those confessional statements* [i.e. exhibits P3, P4, P5 and P6] *generally presents both accused persons' participation in a way in plotting and murdering of the deceased.*" These words, he submitted, amounted to the predetermination of the appellants' guilt, thereby infringing the

appellants' respective rights to be presumed innocent. For support, Mr. Mongo referred us to the case of **FRANCIS ALEX V. R.,** CRIMINAL APPEAL NO. 185 OF 2017 (unreported) where this Court had nullified the proceedings on ground of pre-determination of an accused person's guilt where the Court had stated that: "*...there is no gainsaying that, the act by the learned trial judge to hold that the appellant was guilty before he was heard In his defence evidence, was indeed a violation of his constitutional right and rendered the trial against him to be flawed."*

On the second ground, Mr. Mongo explained why he thought that the second appellant's cautioned statement (Exhibit P5) was recorded out of time. He insisted that recording on 29/7/2011 at 12:07 was unlawful because the basic period of within four hours after being placed under restraint as prescribed by section 50(1) (a) of the CPA had passed and there was no lawful extension. The learned counsel placed reliance on the decisions of the Court in **MNYELE VS. R.,** [2010] T.L.R. 315 and **BAHATI MAKEJA VS R.,** CRIMINAL APPEAL NO. 118 OF 2006 (unreported) to urge us to draw inference that since there is no proof of any extensions of periods for recording the second appellant's cautioned statement beyond the basic period of four hours, we should take that the law limiting the period available for interview was not complied with. Mr. Mongo also referred us to the cases of **BAKARI VS R.,** [2015] 1 EA

62 and **LUBINZA MABULA & 2 OTHERS VS R.,** CRIMINAL APPEAL NO. 226 OF 2016 (unreported). In **BAKARI VS R** (supra) the Court had reiterated that non-compliance with the periods prescribed under the provisions of sections 50 and 51 of the CPA is a fundamental irregularity that goes to the root of the matter which renders any illegally obtained evidence inadmissible.

With respect to the third ground of appeal blaming the decision of the trial Judge to tender exhibits P3, P4, P5 and P6; Mr. Mongo referred us to the case of **ALEX MGUMBA VS R.**, CRIMINAL APPEAL NO. 222 OF 2008 (unreported) to reiterate that after trial within trial prosecution witnesses should have been re-summoned to tender exhibits.

On the fourth ground of appeal, the learned counsel for the second appellant referred to pages 316 to 320 of the record where the trial Judge only evaluated the prosecution evidence without according the defence evidence similar evaluation. He urged us to be guided by our earlier decision in **SADICK KITIME VS R,** CRIMINAL APPEAL NO. 483 OF 2016 (unreported) where the Court sitting on a second appeal, had faulted the trial magistrate for rejecting defence evidence without analysing it. Mr. Mongo referred to a string of other cases, including— **MAGABE VS R.** [2010] 2 E.A. 278; **LEONARD MWANASHOKA VS. R.,** CRIMINAL APPEAL NO. 226 OF 2014 (unreported) to urge us to find

that failure to analyse defence evidence condemned the second appellant without affording him a hearing.

Submitting on the fifth ground of appeal alleging that the case against the second appellant was not proved beyond reasonable doubt, Mr. Mongo down played the weight of the evidence of PW1 which he submitted is deflated by its inconsistencies and contradictions especially her alleged visual identification and voice recognition of the second appellant who the prosecution alleged visited her homestead. He urged us not to believe the conclusion reached by the trial Judge that the second appellant was the last person who left PW1's homestead together with the deceased.

Next, as is expected of us, being the first appellate court, before coming to our own conclusions we shall re-hear and re-evaluate the entire evidence touching each appellant separately and severally.

Ms Pienzia Nichombe learned State Attorney agreed with Mr. Rwezaula that there were no eye-witnesses to the murder. The learned State Attorney was however quick to point out that there were other pieces of evidences which circumstantially linked the appellants to the murder of the deceased. She submitted that these pieces of evidence include the evidences of PW1, PW2, PW3, PW4, PW5 together with the

cautioned statement of the first appellant (exhibit P4), cautioned statement of the second appellant (exhibit P5) and extra-judicial statement of the first appellant (exhibit P6).

Ms Nichombe brushed off the claim that the first appellant's cautioned statement was taken outside the period prescribed by section 50 (1) of the CPA. She referred us to the evidence of E.5541 D/Cpl Athuman (PW3) who testified that the appellants arrived at Mafinga on the morning of 29/7/2011, and that same morning PW3 was assigned to investigate the case. She insisted that when PW3 arrived at Mafinga Police Station the appellants were still under the custody of the police officers from Madibira. The learned State Attorney similarly referred to the evidence of PW4 who arrived at Mafinga Police Station around 08:00 hrs for that day's work. PW4 began to interview the first appellant at 08:30 after the police officers from Madibira had formally handed the appellants over to the Mafinga Police Station. The learned State Attorney urged us to discount the period from when the appellants were first arrested by the police officers at Madibira Police Station, until when they were formally handed over to the Mafinga Police Station. The learned State Attorney referred us to the case of **YUSUPH MASALU @ JIDUVI AND THREE OTHERS VS. R.,** CRIMINAL APPEAL NO. 163 OF 2017 (unreported) where this Court had construed the provisions of section

50(2) (a) of the CPA as providing for discount of the time when suspects are moved from one police station to another as part of the investigations.

The learned State Attorney submitted that confessional statements were voluntary. She argued that the appellants' father was not tortured but they freely volunteered to go back to Madibira to look for the appellants whose whereabouts were then not known. She submitted further that the appellants were arrested by their own father, who handed them over to the police at Madibira. The truthfulness and voluntariness of the confessional statements of the appellants, she submitted, is given more credence from the way the information the appellants provided, led to the discovery of the place where the deceased was killed, buried and exhumed. To support the proposition that the confessional statements of the appellants which led to discovery of the body of the deceased are relevant under section 31 of the Evidence Act and can independently sustain convictions, the learned State Attorney referred us to **MABALA MASASI MONGWE VS. R.,** CRIMINAL APPEAL NO. 161 OF 2010 (unreported).

Moving next to the complaint that the trial Judge had pre-determined the guilt of the second appellant, learned State Attorney argued that nowhere in the Ruling of the trial Judge does he use the

words "guilty" or "convicted" to justify this complaint. She argued that at that stage of determination of whether there was a case to answer, the trial Judge was merely looking at the evidence from the prosecution witnesses, especially exhibits P3, P4, P5 and P6. The words which the trial Judge used, she submitted, did not impute any bias, nor did they imply that the appellants had been convicted at that stage of the trial where the trial court was only considering whether from the evidence of the prosecution, the appellants had any case to answer.

Responding to the submission alleging that the cautioned statement of the second appellant was recorded beyond the period of four hours, Ms Nichombe asserted that E. 3937 CPL Gregory (PW4) recorded the first appellant's statement within four hours. He next recorded the statement of the second appellant and ensured that it was done within four hours. She conceded that because PW4 was assigned to record two statements, he had to record them separately. The two cautioned statements were recorded within eight hours which is permissible under the provisions of section 51 (1) (a) and (b) which empowered PW4 to record them within eight hours without seeking further extensions. She urged us to consider the fact that because PW4 was assigned to record statements of both appellants; he had to interview the first appellant, then move on to the second appellant. She referred us to proceedings

during trial within trial on page 124, where PW4 explained to the two appellants that he would initially pick the first appellant for interview, and then the interview of the second appellant would follow. The learned State Attorney referred us to the part of the record of appeal which shows that PW4 interviewed the first appellant from 08:30 to 10:15 HRS, and the second appellant was interviewed from 12:07 to 13:56 HRS. She submitted that as long as the two interviews were recorded within 8 hours, they were taken in accordance with section 51(1) (a) of the CPA.

The learned State Attorney disputed the complaint that exhibits P3, P4, P5 and P6 were not tendered by the prosecution witnesses. She pointed out that when objections were raised after prosecution witnesses asked for permission to tender these exhibits, trial within trial followed. It was only proper for the trial judge, she submitted, to allow admission of these exhibits after the trial Judge had overruled the objections. She referred us to the pages on the record of appeal, which show that witnesses who had offered to tender those exhibits, were later on examined-in-chief when the main trial resumed in the presence of the assessors.

The learned State Attorney urged us to disregard the fourth and fifth grounds of appeal because they relate to the alleged failure by the

trial court to evaluate the defence evidence, and whether prosecution evidence proved the case beyond reasonable doubt. She argued that these two grounds of appeal will in any case be dealt with by the first appellate Court under its mandate to re-evaluate the entire evidence.

From submissions of the learned counsel on the grounds of appeal, three issues arise which call for consideration in this appeal. **Firstly,** is the issue whether in his ruling at conclusion of the evidence of the prosecution; the learned trial Judge had decided that the appellants were guilty of murder before hearing the evidence of the witnesses for the defence. The **second** issue relates to the confessional statements (exhibits P3, P4, P5 and P6), whether they were tendered by the trial Judge instead of the prosecution witnesses. The **third** issue centres on circumstantial evidence; in particular whether the cautioned and extra-judicial statements (exhibits P3, P4, P5 and P6) irresistibly prove the guilt of the appellants beyond reasonable doubt.

On the issue of pre-determination of guilt, we have looked at the decision of the Court in **FRANCIS ALEX V. R** (supra) where the trial Judge had used the words: *"With the available evidence, **I am satisfied that there is evidence that the accused committed the charged offence of murder**. This finding is made under subsection (2) of section 293 of the Criminal Procedure Act. [Emphasis added]."*

And the Court stated that: "*...the act by the learned trial Judge to hold that the appellant was guilty before he was heard in his defence evidence was indeed a violation of his constitutional rights.*"

It is quite apparent to us that the above words employed by the trial Judge in **FRANCIS ALEX V. R** (supra) are distinct and distinguishable from the following words which Feleshi, J. (as he then was) employed in the appeal before us:

> "*Apart from the evidence adduced by PW1 and PW2, the prosecution through D/CPL Athumani (PW3), D/CPL Gregory (PW4) and Zakaria Solomon Mushi (PW5) adduced evidence that they recorded the 1st and 2nd accused persons cautioned statements and extra-judicial statements respectively, which were tendered and admitted as Exhibit "P3", "P4", "P5" and "P6".* ***Those confessional statements generally presents both accused persons' participation in away in plotting and murdering of the deceased.***
>
> ***In view that the prosecution evidence though not conclusive at this juncture to warrant the court to make her final findings I find it presenting a lot warranting both accused persons to counter.*** *For them to do so,* ***the only way available under the law is to give each of the accused person a right to enter a defence****. All considered, I hereby find each accused persons with a case to answer under section 293 (2) of the Criminal Procedure Act...."*[Emphasis added].

It seems clear to us that the words: "*Those confessional statements generally presents both accused persons' participation in a way in*

plotting and murdering of the deceased," were not in any way determinative that the two appellants had been found guilty and accordingly convicted. The learned trial Judge was clear that he had at that stage only heard the evidences of PW3, PW4 and PW5, together with exhibits P3, P4, P5 and P6. In fact the trial Judge goes so far reiterating that the prosecution evidence at that stage was not conclusive to prove the guilt of the appellants beyond reasonable doubt when he stated: *"...prosecution evidence though not conclusive at this juncture to warrant this court to make her final findings."* In fairness to the trial Judge, he invited the defence to bring its defence evidence when he stated that: *"...the only way available under the law is to give each of the accused person a right to enter defence."*

We do not therefore discern any pre-determination of guilt of any of the two appellants as alleged by the learned counsel for the second respondent.

In urging us to allow this appeal on the ground that cautioned and extra-judicial statements (exhibits P3, P4, P5 and P6) were improperly tendered by the trial Judge the learned counsel cited to us the decision of the Court in **ALEX MGUMBA VS R.**, CRIMINAL APPEAL NO. 222 OF 2008 (unreported). We have determined that these exhibits were offered to be tendered as evidence by prosecution witnesses well before

they were subjected to trials within trials. It was after overruling of objections following trial within trial when the trial Judge, for each exhibit, ordered their admission. The common pattern which followed was that the trial Judge ordered the return of the assessors back to the court, and the same witness who had offered the exhibit before being objected to, was subjected to the continuation of examination-in-chief, followed by cross-examination and re-examination in chief.

The decision of this Court in **ALEX MGUMBA VS R** (supra) which the learned counsel relied on to argue that it was the trial Judge, and not the prosecution witnesses, who tendered exhibits is distinguishable. It is distinguishable because the witness in that case who tendered an exhibit was not recalled back after completion of the trial within trial to allow the accused person to cross-examine him on the cautioned statement as required by sections 147 and 148 of the Law of Evidence Act. It is therefore our finding that in the instant appeal before us, it was the prosecution witnesses and not the trial Judge; who tendered exhibits P3, P4, P5 and P6.

After our finding that exhibits P3, P4, P5 and P6 were properly tendered by the prosecution witnesses, we next agree with the learned trial Judge and the three learned counsel that the evidence before the trial court was entirely circumstantial. This Court has invariably

counselled great caution should always be taken before convicting on the basis of circumstantial evidence. The Court stated so in **SAIDI BAKARI V. R.,** CRIMINAL APPEAL NO. 422 OF 2013 (unreported):

> *"...In determining a case cemented on circumstantial evidence, the proper approach by a trial court and appellate court is* ***to critically consider*** *and* ***weigh all the circumstances established by evidence in their totality****, and* ***not to dissect and consider it piecemeal or in cubicles of evidence or circumstances****."* [Emphasis added].

A similar caution on conviction on basis of circumstantial evidence was voiced by the Supreme Court of India in **TANVIBEN PANKAJKUMAR DIVETIA VS STATE OF GUJARAT,** (1997) 7 SCC 156 which persuasively stated:

> *"The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled* ***that each and every incriminating circumstance must be clearly established by reliable and clinching evidence*** *and the* ***circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis***

> ***against the guilt is possible***. *This Court was clearly sounded a note of caution that in a case depending largely upon circumstantial evidence,* ***there is always danger that conjecture or suspicion*** *may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that* ***the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times,*** *unconsciously it may happen to be a short step between moral certainty and legal proof"* [Emphasis added].

From the above perspectives, we shall re-evaluate the incriminating circumstances in the chain of circumstantial evidence to determine whether they irresistibly point at the guilt of the appellants. We shall also determine whether the incriminating circumstances are incompatible with the innocence of the appellants, and incapable of

explanation upon any other reasonable hypothesis than that of their guilt.

The evidence of the mother of the deceased (PW1) offers the first link in the chain of incriminating circumstance. We have scrutinized the evidence of PW1, taking into account Mr. Mongo's assertion that this witness gave conflicting and contradicting account as to whether she spoke to, or even saw the second appellant that fateful evening. Upon our re-evaluation, we are prepared to accept PW1's account that her daughter (the deceased), who was busy cooking outside the house when the second appellant showed up that evening, at very least her daughter must have informed her why she had to abandon her cooking in order to go out into the night in the company of the second appellant.

Evidence of PW1 was corroborated in material particulars by the evidence of the village executive officer (PW2). The evidence of PW2, which was strengthened by his cautioned statement (exhibit D1), confirmed that the following morning PW1 reported at the village office about the failure of the deceased to return back home after leaving home in the company of the second appellant. Taken the evidence of PW1 and that of PW2 together, we are inclined to believe that PW1 was a witness of truth, and that the second appellant was the last person who walked away with the deceased that fateful evening around 20:00

before her decomposing body was discovered two weeks later on 1/8/2011.

The next pieces of incriminating circumstantial evidence which the learned trial Judge relied on are the appellants' cautioned statements (exhibits P3, P4 and P5); extra-judicial statement of the first appellant (exhibit P6); information the police received from the appellants, which led to the discovery of the body of the deceased; post-mortem examination report (exhibit P1); and the sketch map of the scene where the body of the deceased was discovered.

On the issue regarding the basic period of four hours available to the police to interrogate or interview suspects, there is no dispute that the two appellants were arrested at Madibira where they were first restrained before they were transferred to the custody of the Mafinga Police Station. What are disputed are the time and the day when the counting of the basic period of four hours should. We do not agree with Mr. Rwezaula that the officers in charge of Police Station at Madibira should have assigned an investigation officer to interview the appellants over an offence of murder which was committed and first reported to a different police district and different regional police commands. We think that Detective Corporal Gregory is correct; when during re-examination in chief on page 105, stated that since the complaint over the offence of

murder was opened at Mafinga Police Station; it was only right for the Madibira Police Station to transfer the case to Mafinga where the offence of murder was committed.

Upon our re-evaluation of evidence and the surrounding circumstances, we found that the two appellants confirmed in their cautioned statements that they were initially arrested at 02:00 hrs on 29/7/2011 by their father, YUDA S/O MGOWOLE who was assisted by members of people militia to take them to Madibira Police Station. This date and time of their arrest was confirmed by D/Cpl Athumani who, on page 89 of the record of appeal, stated that: *"I was not there when the accuseds were arrested. I said they were arrested on 29/7/2011 meaning the day they were brought to Mafinga police station by Madibira officers."*

The period after their arrests at Madibira and the time they were transported and formally handed over to the Police at Mafinga does not count in reckoning the basic period of four hours. This period is excluded under sections 50(1) (a) read together with section 51 (1) of the CPA. This is the period described under sections 50 (2) (a) of the CPA as the period *"after being taken under restraint [at Madibira], being conveyed to [Mafinga Police Station"]*:

"(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, ***there shall not be reckoned as part of that period****.....*

(a) while the person is, ***after being taken under restraint, being conveyed to*** *a police station or* ***other place for any purpose connected with the investigation****;"* [Emphasis added].

It is also our finding that the basic period of four hours began to counter immediately after the appellants had been handed over to the Mafinga Police Station on 29/7/2011. After the handing over, E.3937 Detective Corporal Gregory had at his disposal the initial basic period of four hours to interview the two appellants. We accept as plausible explanation that when D/Cpl Gregory found that he could not complete the interview of two appellants within the basic period of four hours, he was allowed under section 51 (1) (a) of the CPA to continue with the interview as long as the interview remained within a total of eight hours. We are satisfied that D/Cpl Gregory completed the interview of both appellants within the eight hours which is allowable under section 51(1) (a) of the CPA. Because D/Cpl Gregory was able to complete the interviews of the two appellants within the maximum of eight hours that was available to him, he had no reason to seek the permission of a

magistrate under section 51 (1) (b) of the CPA for further extension of the period beyond the eight hours which was at his disposal.

We are as a result fully satisfied that the cautioned statements of the first appellant (exhibit P4) and that of the second appellant (exhibit P5) were taken from the appellants within the period prescribed by the provisions of the CPA cited above.

It is appropriate to point out that neither Mr. Rwezaula, learned counsel for the first appellant, nor Mr. Mongo, learned counsel for the second appellant; specifically touched the question whether the specified basic periods under sections 50 and 51 of the CPA available to the police for the interview of suspects, should also regulate the recording of extra-judicial statement (exhibit P6) which the first appellant made to the justice of the peace (PW5). The position of the law is clear that the time limits under sections 50 and 51 of the CPA do not extend to the extra-judicial statements which persons accused of offences make to the Justices of the Peace. This Court has restated that there is no law that prescribes the time limit within which an accused person may be taken before a Justice of the Peace to record his extra-judicial statement:--See **JOSEPH STEPHEN KIMARO & ROBERT RAPHAEL KIMARO VS. R.,** CRIMINAL APPEAL NO. 340 OF 2015, and

STEVEN S/O JASON AND TWO OTHERS VS. R., CRIMINAL APPEAL NO. 79 OF 1999 (both unreported).

Regarding the aspect of the confessional statements which the appellants made, which they invariably repudiated and retracted during the trial, the learned trial Judge concluded that the confessional statements were voluntary and were made in free atmosphere and allegations of torture were all but afterthoughts. The test to determine whether a confessional statement was involuntary is provided under subsection 27(3) of the Evidence Act. This test is to the effect that a confession shall be regarded as involuntary where the court believes it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by any other person in authority. Despite this statutory outline of what amounts to an involuntary confession, there are no hard and fast rules of circumstances when a confession can readily be considered to be involuntary. A persuasive decision of the Supreme Court of Canada in **R. *V.* OICKLE,** [2000] 2 S.C.R. 3, correctly suggests that the issue of involuntariness depends on context and special circumstances of each case:

> *"The application of the confessions rule is of necessity contextual. Hard and fast rules simply cannot account for*

the variety of circumstances that vitiate the voluntariness of a confession. When reviewing a confession, a trial judge should therefore consider all the relevant factors. The judge should strive to ***understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness****, taking into account all the aspects of the rule... "*[Emphasis added].

The learned counsel for the first appellant has not shown how the way the appellants' father (Yuda s/o Mgowole) asked the Village Executive Officer (PW2) for permission to return back to Madibira to search for the appellants created the circumstances of threat, or promise or other prejudice to the appellants when several days later they recorded their cautioned and extra-judicial statements. It is clear to us that when Yuda s/o Mgowole returned back to Madibira to look out for his sons, the police were still considering the deceased as a missing person, and even if there were any threat, or promise or prejudice at that time, the same could not have operated in the minds of the appellants when they finally recorded their statements several days later before Detective Cpl Gregory. We did not find any matter of facts from the surrounding circumstances, to suggest involuntariness of cautioned and extra-judicial statements.

There is yet another consideration regarding their elaborate details, which makes it unlikely that the appellants' confessional statements were involuntary. The cautioned and extra-judicial statements of the appellants contain many details and elaborate circumstances which only those directly responsible for the death of the deceased would know. These details range from the earlier planning in Madibira, how the first appellant sent his wife back to her parents, how the mission to kill the deceased left Madibira carrying an axe and a hoe, how the second appellant was sent to lure the deceased to a spot where she was killed, the disappearance of the deceased, how an axe was used to kill her, her burial and the ultimate discovery of her dead body. These facts fit into a complete picture and oblige us to conclude that their appellants' confessional statements were truthful and voluntary. In **EMMANUEL LOHAY & UDAGENE YATOSHA VS. R.**, CRIMINAL APPEAL NO. 278 OF 2010 (unreported) the Court restated that detailed narrative and elaborate account in confessional statements lend credence to their truthfulness:

> *"This brings us to the cautioned and extra-judicial statements.* ***The statements have one common feature. All of them describe the circumstances and the manner in which the deceased met his death. They are so detailed that the events***

described therein could have only been given by people who had the knowledge of how the deceased met his death. *The statements also show the role played by each one of them."*[Emphasis added].

The appellants' cautioned and extra-judicial statements gained further credence from the information which the appellants separately gave the police, leading to the discovery of the deceased body. We respectfully agree with the learned State Attorney that confessions and facts, which the two appellants gave the police, which led to discovery of the body of the deceased, are relevant under section 31 of the Evidence Act, Cap. 6. In addition, the same information lent credence to the detailed incriminating facts the two appellants made in their cautioned and extra judicial statements believable. Section 31 of the Evidence Act states:

> *31. When any* ***fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information****, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.* [Emphasis added].

The phrase "*whether it amounts to a confession or not*" in section 31 implies that the relevance and admissibility of information leading to

the discovery can be obtained from a confession or through oral conversation, as long as that information distinctly leads to the discovery of any subject matter of the offence like in the instant case, the discovery of the body of the deceased. The provision qualifies that the police must not have had a prior knowledge of where the body of the deceased was. The evidence of E.5541 Detective Corporal Athumani on page 66 of the record of appeal illustrates how the first appellant led a team of police officers to the discovery of the body of the deceased:

> *"Then led by Michael we drove to the place they buried the deceased. We drove up to the Ruaha River's bridge where Michael* ***[first appellant]*** *asked us to stop. We then drove ahead of the bridge and he said we should turn and drive back and after driving for a short distance we stopped and he showed us the direction where the deceased's grave was. He went ahead of us and we followed him from behind. We went up to the spot where he said* ***'mwill wa marehemu, tumeuzika hapa'*** *meaning that here is where we buried the deceased's body. The grave was covered by grasses."*

The police officers were not alone when the first appellant led them to the discovery of the body of the deceased. The deceased's mother (PW1) and the village executive officer (PW2) were also present. PW2 stated that the naked body of the deceased was discovered on 01/08/2011 at 11:00HRS. He also stated that it was the deceased's mother who identified the body of her daughter to the police:

"Mimi niliongozana na askari hao na mtuhumiwa huyo aliongoza askari polisi nikiwemo na mimi hadi eneo alipomuulia mke wake na alipomzika na maiti hiyo ilifukuliwa na kukuta ni kweli ni marehemu NURU D/O CHAFUMBWE na ndugu zake waiimtambua. Mwill wa marehemu huyo uiikuwa uchi yaani alikuwa na chupi tu na nguo zake zingine hazijuiikani zilikowekwa. Na niliona jeraha kubwa kichwani."

In **IBRAHIM YUSUPH CALIST @ BONGE AND THREE OTHERS VS. R.,** CRIMINAL APPEAL NO. 204 OF 2011 (unreported) the Court restated the position that information leading to discovery of subject matter of the offence serves to assure the truthfulness of facts contained in confessional statements:

*"**There are several ways in which a court can determine whether or not what is contained in a statement is true**. **First, if the confession leads to the discovery of some other incriminating evidence.** (See **PETER MFALAMAGOHA v R,** Criminal Appeal No. 11 of 1979 (unreported) **Second**, if the confession contains a detailed, elaborate relevant and thorough account of the crime in question, that no other person would have known such details but the maker (See **WILLIAM MWAKATOBE v R,** Criminal Appeal No. 65 of 1995 (unreported). **Third**, since it is part of the prosecution case, it must be coherent and consistent with the testimony of other prosecution witnesses, and evidence generally. (**SHABAN DAUDI v R,** Criminal Appeal No. 28 of 2001 (unreported) – especially with regard to the central story (and not in every detail) and the chronology of events. And,*

lastly, *the facts narrated in the confession; must be plausible."* [Emphasis is added].

In the final result, we are not in any doubt that the two appellants were properly convicted and sentenced to death for the murder of the deceased. We see no reason whatsoever for interfering with the conviction and sentence. The appeal is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 10th day of September, 2019.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 30th day of September, 2019 in the presence of the Appellant in person and Mr. Alex Mwita learned State Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.

L. M. CHAMSHAMA
A.G:DEPUTY REGISTRAR
COURT OF APPEAL