IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 337 OF 2017

VICENT ILOMO ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kihwelo, J.)

dated 22nd day of June, 2017
in
Criminal Sessions No. 20 of 2013

JUDGMENT OF THE COURT

26th August, & 30th September, 2019

KITUSI, J.A.:

Before the High Court of Tanzania sitting at Iringa, Vicent Ilomo was charged with and convicted of Murder contrary to section 196 and 197 of the Penal Code, [Cap. 16 R.E. 2002]. It was alleged that on 2nd May 2010 at Boimanda village within the District and Region of Njombe he murdered one Loveness Mwakatumbula. There was no dispute at the trial that the said Loveness Mwakatumbula was Vicent Ilomo's wife and that she met an unnatural death. The trial court's finding that it was Vicent Ilomo who had caused the death of the deceased was based on the statements of Hildegat Mgani and Reginald Msemwa (collectively marked as Exhibit P6) as well as the extra judicial statement allegedly

made by Vicent Ilomo before a justice of the peace. Following the conviction, the trial court sentenced Vicent Ilomo to the mandatory death sentence. In this appeal which is against both the conviction and sentence, we shall be referring to Vicent Ilomo as the appellant.

The story as to what happened therefore, begins with Hildegat Mgani, the appellant's mother who was residing about 100 paces from the appellant's residence. At the time of the trial, Hildegat Mgani was reported dead. Hildegat Mgani's statement earlier recorded by PW4 a police officer, was tendered by him at the trial as Exhibit P6. In that statement Hildegat Mgani stated that the appellant and the deceased had an existing conflict, each accusing the other of extra marital affairs, specifically the deceased accusing the appellant of having an affair with one Fortunata Mgani. She went on to state that on the fateful night the appellant called at her residence at around 4.00 a.m and gave her startling information that he was going to join God. When Hildegat Mgani wanted him to explain the meaning of that statement he told her that he had killed his wife.

Hildegat Mgani walked to the appellant's residence where she confirmed what the appellant had told her because she found the deceased's mutilated body lying in a pool of blood, with her one-month

old infant lying beside it, wailing. She picked the infant and proceeded to report the matter to the local leaders. It was further her statement that the appellant, one Onesmo Mligo and Alto Mlowe were drink mates and used to drink at the latter's pombe club and that in the afternoon of 2nd May 2010 she had seen them drinking together. The appellant and Onesmo Mligo were wearing coats which she later came to see at the scene of crime bearing blood stains.

PW4 recorded another statement made by Reginald Msemwa which he produced collectively with that of Hildegat Mgani as Exhibit P6. In this statement Msemwa introduced himself as the Village Executive Officer (V.E.O) of Boimanda village in which capacity he received from Onesmo Mligo a report that the appellant had killed the deceased. Upon arrival at the scene, he was shown the murder weapon being a machete and a hammer. This was on 3rd May 2010 at around 6.30 a.m. He and one Herman Mgaya, the hamlet leader, reported the matter to the police who arrived at the scene accompanied by a medical doctor, Dr. Patrick Edmund Msigwa (PW1). After the latter had examined the body, the police allowed burial arrangements to proceed. In the statement, Msemwa stated further that later on 3rd May 2010, the appellant turned himself over to him and disclosed that he was the one who killed his

wife with the assistance of Alto Mlowe and Onesmo Mligo. Reginard Msemwa placed the appellant under custody in the village cell until the next day when he took him to Njombe Police station.

In his testimony, PW1 stated that he examined the deceased's dead body which had multiple wounds on different parts of the head and his conclusion was that death resulted from severe bleeding. He tendered before the trial court a Post Mortem Report as Exhibit P3. We have said earlier in this judgment that the fact that the deceased died an unnatural death is not a subject of any controversy.

PW3 testified on how she recorded the appellant's statement on 4th May 2010 from 12.00 noon after giving him the necessary caution and upon informing him of all his rights as per the letter of the law. Initially, Mr. Batista Mhelela, learned advocate, who acted for the appellant at the trial, indicated that he was objecting to the admissibility of the cautioned statement but later he withdrew the objection. The statement (Exhibit P5) contains some revelations which we shall refer to later. Relevant at the moment is that the appellant went to his mother's residence and told her that he and his colleagues, had killed. He asked his mother to go to his home and take care of his child.

According to this statement, the appellant was taken to Njombe Police station on 4th May 2010 having spent the previous night in a village cell after his arrest, and PW3 stated that it was Reginald Msemwa who delivered him to that station.

Although, as already indicated, Mr. Mhelela did not object to the admissibility of the cautioned statement, he raised issue, by way of cross-examination, with the law under which that statement was recorded. At the foot of that statement the police officer who recorded it purported to have done so under section 10 (3) of the Criminal Procedure Act, [Cap 20 R.E. 2002] hereafter, the CPA. When cross-examined by Mr. Mhelela, PW3 conceded that the cited provision was irrelevant and that the proper provision to be cited ought to have been section 57 of the CPA.

It was also in PW3's statement that the statement was recorded in the presence of a person known as Dismas Mwenga, after the appellant had requested presence of a person at the time of making his statement. This man testified as PW5 and confirmed to have been picked from within the police station where he had gone to make a follow up of his stolen property that had been recovered by the police. He testified that he was invited in the interrogation room in which only

the appellant and PW3 were. He then heard the appellant confess to have killed the deceased with the assistance of two other people, using a machete and a hammer. Then he saw the appellant sign the recorded statement by a thumb print, of his own free will.

During the time material to this case, PW2 was stationed at Njombe Urban Primary Court as a Magistrate. On 7th May 2010 at around 9.00 a.m, PW4 arrived at PW2's office accompanied by the appellant. After being informed by PW4 that the appellant wished to confess, PW2 asked PW4 to leave the room and he remained with the appellant. PW2 testified on how he went through the preliminaries of checking the appellant's body for any signs of torture on him and how he informed the said appellant of the legal consequences of what he was about to say. PW2 stated that the appellant's body bore no signs of torture and that he made his statement as a free agent.

Admissibility of the Extra Judicial Statement was objected to by Mr. Mhelela for the appellant, it being argued by him that the statement contravened section 169 (1) of the CPA and section 27 of the Evidence Act [Cap 6 R.E 2002] and also for not citing section 58 (1) of the Magistrates' Court Act, [Cap 11 R.E 2002]. This objection was overruled, clearing the statement to be admitted as Exhibit P4. Exhibit P4 contains

revelations substantially similar to those in Exhibit P6 whose contents we have already referred to. We shall now refer to those disclosures appearing on Exhibit P4.

According to the statement, there was a misunderstanding between the appellant and the deceased caused by subtle infidelities, apparently committed by both. The appellant shared with Onesmo Mligo and Alto Mlowe, the alleged flirting of his wife, as the two men were his close friends and persons he used to hang out with at a place referred to as "kijiwe". This was in the afternoon of 2nd May 2010 and the two friends offered to help the appellant out. Then the trio continued to drink until night when they proceeded to the appellant's home.

So, at the appellant's home, the statement says, Alto Mlowe's duty was to keep watch outside for assurance that no one was coming by. The appellant and Onesmo Mligo were the ones who got into the house and executed the deceased, the latter hitting the deceased on the head by the hammer and the former finishing her up with the machete. These attacks caused the deceased's instant death.

The case for the prosecution therefore, is that it is the appellant who caused the death of his wife. This is based on the contention that the appellant confessed to the killing before WP Sgt Rachel (PW3) by a

cautioned statement (Exh. P5) and also before Cyprian Joseph Mwananzumi (PW2) a Primary Court Magistrate who recorded his Extra Judicial Statement (Exh. P4). It is also based on the two statements (Exhibit P6) already referred to above.

In defence, the appellant denied killing his wife and narrated how he stumbled onto his wife's dead body. Appellant's version of the matter is that on 2nd May 2010 he was at a nearby village of Kitula until midnight when he got home, only to find the door closed. He went to his brother to ask for the whereabouts of his wife (the deceased) but his said brother had no clue. The appellant went back to his home and retrieved the key from the place he normally hid it. When he opened the door and entered the house, alas, his wife was lying dead. The appellant said he was epileptic so the shock of seeing his wife's dead body sent him down and he was seized with fits as a result of which he passed out. When he gained consciousness at around 6.00 a.m., he found people around him, and he was immediately arrested.

The appellant stated that he was taken to Njombe Police Station on 5th May 2010 and his statement was recorded on 6th May 2010 after threats from the police. He testified that despite the threats, he maintained his story that he did not kill the deceased. He also stated

that it was PW4 who took down his statement, not PW3 as stated by her.

He also stated that he was taken to the Justice of the Peace before whom he denied killing his wife. The appellant was subjected to a lengthy cross-examination by Mr. Mabrouk, learned Senior State Attorney during which he admitted that most of the things he was raising in his defence were new even to his own advocate. He associated that to lapse of time and his unreliable memory caused by his epileptic condition. He denied knowing Alto Mlowe and Onesmo Mligo and said he did not know their whereabouts. He kept repeating that he found his wife dead.

At this stage we wish to say, in digression, that the trial High Court had earlier ruled out the defence of insanity which the appellant had raised, accepting the report which the Psychiatrist had transmitted to it from Isanga Mental Institution. In that Report (Exhibit P2), the Psychiatrist's conclusion was that the appellant was sane at the time of the alleged killing.

In its ruling, the High Court stated that the defence was at liberty to raise the issue of insanity again at a later stage bearing in mind that it had the duty to prove it on a balance of probabilities. However, this

issue was never raised again during the trial nor is it a ground of appeal, the appellant's counsel having dropped ground 4 of appeal, as we shall later see.

Despite that, the learned High Court Judge still considered the defence of insanity in his judgment. After accepting the evidence for the prosecution, the trial judge rejected the defence of alibi that had been raised as well as that of insanity. In relation to the defence of insanity, here is what the learned Judge said about the appellant: -

> *"He has not demonstrated any sign of being abnormal in the contrary he presented to me as a person in his appropriate mental framework alert and well-coordinated in his reasoning and answers as such this defence is also given no weight at all."*

Earlier, the appellant filed a memorandum of appeal containing 9 grounds to challenge the conviction and sentence. However, the advocate who was assigned to represent him filed a supplementary memorandum of appeal containing 5 grounds which are:-

1. *That the Hon. trial Judge erred in law by admitting Exh P. 6 contrary to S. 34 (B) of the Evidence Act Cap 6 R.E. 2002.*

2. *That the Hon. trial Judge erred in law by convicting and sentencing the appellant whereas the prosecution totally failed to prove the charge to the required standard.*
3. *That the Hon. trial Judge greatly erred in law by convicting the appellant partly relying on the extra judicial statement which was involuntarily made.*
4. *That the trial Judge erred in fact by totally disregarding the fact the appellant was sometimes an addict.*
5. *That the trial Court erred in law by totally disregarding the defence of alibi put forward by the appellant.*

At the hearing of the appeal, Mr. Rwezaula Kaijage, learned advocate, appeared for the appellant and as earlier said, he dropped ground 4 and combined ground 2 and 3. When we drew the learned counsel's attention to page 207 of the record showing how the defence of alibi was considered and resolved, the learned counsel abandoned ground 5 too, midway. In the end Mr. Kaijage argued only two grounds, that is, ground 1 and ground 2 combined with ground 3. He completely discarded the nine grounds of appeal which had been raised by the appellant in the original Memorandum of Appeal.

Ms. Blandina Manyanda, learned State Attorney, represented the respondent Republic and she resisted the appeal.

Arguing the first ground of appeal, Mr. Kaijage submitted that the prosecution did not comply with the preliminary legal requirements that precede tendering of a statement under section 34B of the Evidence Act, [Cap 6 R.E 2002]. He submitted, for the statement to be validly admissible, the prosecution must prove that the maker is dead and must issue to the defence, notice of an intention to tender it in evidence. The learned counsel cited the case of **Priscus Kimario v. Republic**, Criminal Appeal No. 301 of 2013 [CAT] (unreported). It was submitted further that Exhibit P6, should be expunged because it was admitted wrongly without the prosecution having cleared it. The case of **Robison Mwanjisi v. Republic** [2002] TLR 218 was cited in support of the argument that an exhibit must first be cleared for admission before the same is admitted.

The combined second and third grounds of appeal was ultimately that the trial Judge erred in convicting the appellant while the prosecution had not proved the offence beyond reasonable doubt. In this respect, Mr. Kaijage attacked the cautioned statement (Exh. P4) the

Extra Judicial Statement (Exh. P5) and the statements of Hildegat Mgani and Reginard Msemwa (Exh. P.6 collectively).

Beginning with the cautioned statement, Mr. Kaijage submitted that although the appellant's counsel who appeared during the trial did not object to its admissibility, we could still consider the fact that it was taken under section 10 (1) of the CPA, a wrong provision, and also taken outside the time. Learned counsel submitted that although the appellant was handed over to PW3 at 10.00 a.m. and she began to record his statement at 12.00 noon, it is not known as to the time when the appellant arrived at Njombe Police Station.

In relation to the Extra Judicial Statement Mr. Kaijage pointing out that it was recorded on 7th May 2010 from 9.00 a.m., submitted that there is no explanation why it took so long for the appellant to be taken to the Justice of the Peace. The learned counsel submitted that the law requires the suspect to be taken to a Justice of the Peace "as soon as possible" and the phrase should be looked at within the meaning ascribed to it in the case of **Mashimba Doto @ Lukubanija v. Republic**, Criminal Appeal No. 317 of 2013 (unreported).

Mr. Kaijage further submitted on the extra Judicial Statement, that the delay in taking the appellant to the Justice of the Peace must have

removed his voluntariness, in support of which he cited the case of **Mashimba Doto @ Lukubanija V. Republic** (supra).

Counsel addressed what he referred to as doubts that the trial court ought to have resolved in favour of the appellant. He submitted that in the summing up to the assessors, the trial Judge directed them to consider the circumstances of the case and asked them to find the appellant guilty if all five fingers pointed to his guilt. Mr. Kaijage submitted in relation to circumstantial evidence that in order for conviction to be based on such evidence it must meet the standards set in the case of **Republic v. Kerstin Cameron,** [2003] TLR 85 (HC). This is that the evidence must not lead to any hypothesis other than the appellant's guilt.

At our prompting, Mr. Kaijage addressed the issue of the voluntaries of the cautioned statement and whether the wrong citing of section 10 (1) of the CPA prejudiced the appellant. The learned counsel submitted that despite the fact that voluntaries was not raised as an issue, this being the apex Court has the duty to look into it. He even wondered why the defence counsel who appeared at the trial withdrew the objection he had earlier raised. As for the wrong citing of the law under which the statement was recorded, Mr. Kaijage submitted that it

goes to show that PW3 was negligent and she could have been negligent in other things too.

Responding to these submissions, Ms. Manyanda, learned State Attorney, submitted in relation to the first ground, that Exhibit P6 was admitted under Section 34 B of the Evidence Act which requires that notice be issued before the tendering. She submitted that during ten days after being served with the notice the defence is expected to raise or prepare an objection. She went on to submit that in the instant case the record is silent on the service of notice but that there was no objection from the defence counsel. Thus, she submitted, it was correct for the trial Judge to rely on Exhibit P6 in his judgment.

Coming to the second ground, Ms. Manyanda drew our attention to the fact that the cautioned statement (Exh. P5) which Mr. Kaijage has attacked in his submissions was discarded by the trial court for the reason, among others, that it was witnessed by PW5 who was a stranger to the appellant. She therefore moved us not to consider it in our deliberations.

Turning to the extra judicial statement Ms. Manyanda submitted that the issue of voluntariness in making that statement was not raised and that the case of **Mashimba Doto @ Lukubanija** (supra) is

distinguishable because in that case the suspect had been in custody for six days unlike in the instant where he was in custody for three days. The learned State Attorney concluded by submitting that the extra Judicial statement and Exhibit P6 are cogent evidence and the learned trial judge rightly found conviction on them.

In a short rejoinder, Mr. Kaijage reiterated the error on the part of the trial court admitting and considering Exhibit P6 when no copy of that statement had been served on the appellant neither was death of the makers proved. On the issue of the cautioned statement, Mr. Kaijage maintained that although the trial Judge did not take it into consideration in his final decision, he had, during summing up, directed the assessors, to consider it. Lastly, he submitted that the extra judicial statement would have been valid had it been recorded immediately after recording the caution statement, and that would have meant that it was recorded "as soon as possible".

These grounds of appeal and the arguments for and against them require us to decide on the following issues: -

(1) *Whether the appellant's cautioned statement despite being discarded by the trial Judge influenced the decision of the High Court because of the Judge's summing up to assessors.*

(2) Whether the appellant's extra judicial statement was not recorded within reasonable time and it affected voluntariness on the part of the maker; and,

(3) Whether admissibility of the statement of Hildegat Mgani (part of Exhibit P6) complied with the law.

We have taken upon ourselves to give the first issue a quick glance, if anything, only for completeness of our decision. This is because from the very outset it appeared very plain that the decision of the High Court was based on Exhibit P6 (statement of Hildegat Mgani and Reginard Msemwa) and Exhibit P4 (Extra Judicial Statement). Mr. Kaijage's concern is that the cautioned statement may still have informed the assessors' opinions. With respect, we think that is a very long shot and clearly an unjustified one in view of the learned judge's remarks which we reproduce: -

"It is not insignificant to say that even if PW5 appeared to be a witness of truth, it would be a grave mistake to our Criminal Justice system to convict an accused person relying upon a cautioned statement which was taken by the accused under the circumstances like the one in the instant case. This is likely to invite injustice on the part of the accused person who will be subjected to taking a cautioned

statement in the presence of a stranger in the guise of showing that the cautioned statement was freely and voluntarily taken."

What more assurance do we need for us to conclude that the cautioned statement did not form part of the decision against the appellant? Certainly, we need no more than that, and we think Mr. Kaijage's concern is unwarranted, so our answer to the first issue is in the negative.

Next for consideration is Mr. Kaijage's attack on Exhibit P6, the statements that were taken under section 34 B (2) of the Evidence Act. Counsel's attack has two edges, namely; that no notice was served before tendering the statements and that there was no proof that the makers were dead.

*Section **34 B** (1) and (2) of the Evidence Act [Cap. 6 R.E. 2002] provides: -*

"In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written statement may only be admissible under this section-

(a) where the maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be signed by the person who made it;

(c) if it contains declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings,

(e) *if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;*

(f) *if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.*

The letter of the foregoing provisions makes it incumbent upon the prosecution to prove that the maker of the statement cannot be called to the witness box and also to serve the defence with a notice of the intention to use that statement. Ms. Manyanda submitted that the notice was issued as required but she did not specifically respond to the complaint about lack of proof that the makers were dead.

To begin with the issue of proof of death, we think that is not a statutory requirement although in practice, where the maker is said to be dead, the one who wishes to tender the statement must satisfy the court and the other party that the make thereof is dead. However, each case must be decided upon its own peculiar facts. In this case, did the appellant need proof that Hildegat Mgani, his own mother, was dead? Or

that Regnard Msemwa, the Chairman of his village, was dead? We think proof of these uncontested facts was uncalled for and need not arise at this stage.

Besides that, our position is strengthened by what transpired at page 99 of the record: -

> ***"Mr. Mallya:-***
>
> *We wish to refer to the notice filed on 31/5/2017 seeking to produce the statement of the witness under section 34 B (1) and (2) (a) of the Evidence Act, Cap 6 R.E. 2002. The notices were for two witnesses HILDEGAT MGANI and REGNARD MSEMWA. We pray to tender the witnesses' statements as exhibits.*
>
> ***Mr. Mhelela, Advocate:*** *-*
>
> *My Lord I have no objection to the admissibility of the two witnesses' statements."*

Can it be said validly, in view of the foregoing, that the objection being raised now by Mr. Kaijage is maintainable? We are afraid it is not, because it seems the notice was issued and served on the appellant who, knowing that the makers were indeed dead, did not object. Further to that, our position stems from settled law. In **Emmanuel Lohay and**

Udagene Yatosha v. Republic, Criminal Appeal No. 278 of 2010, (unreported) we said: -

> *"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross-examination or during defence – **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case the appellants "missed the boat" by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

We think in this case the appellant missed the boat long before he came here. The above principle is also not without rationale as it is based on another principle that an appellate court cannot decide on matters that were not raised nor decided during trial. [See: **Abedi Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 and **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013 (both unreported)]

However, as this is the first appeal, we have resolved to re-evaluate the issue, legal issue in our view, regarding compliance with the law in relation to the statement of Hildegat Mgani, and this is because she signed her statement by a thumb print, which connotes

that she was illiterate. The question we ask is whether in signing the statement, the illiterate maker knew the contents thereof. Admissibility of statements under Section 34 B (2) of the Evidence Act was discussed at length in the case of **Elias Melani Kivuyo V. Republic**, Criminal Appeal No. 40 of 2014 (unreported) in the course of which the Court observed that conditions (a) to (f) under Section 34 B (2) of that Act must be met cumulatively. Then it tested compliance with condition (f) which relates to illiterate makers of statements under that provision. The Court held, inter alia: -

> *'The last condition, condition (f) requires the statement, if made by an illiterate person, to be read over to the illiterate person, and for the person who has read over the statement to the maker to certify that he has read over the statement".*

The statement of Hildegat Mgani, though shown to have been illiterate, does not bear the certification by PW4 who allegedly recorded it, that the same was read over to her, the maker.

On the strength of the foregoing therefore, we are constrained to conclude that the statement of Hildegat Mgani, part of Exhibit P6, was taken down and tendered in evidence in violation of Section 34 B (2) of the Evidence Act [Cap 6 R.E 2002]. It only remains for us to expunge it.

However, we are of the decided view that the relevant law was complied with in admitting in evidence Reginard Msemwa's statement which is the remaining part of Exhibit P6. In that statement as we have earlier indicated, it is stated that the appellant confessed to have killed the deceased and surrendered himself to Reginard Msemwa, the Village Executive Officer. Lastly on this point, considering that admissibility of Reginard Msemwa's statement was not objected to by the appellant's counsel during trial, we think Mr. Kaijage's objection at this eleventh hour offends the settled principle in **Emmanuel Lohay and Eugen Yatosha V. Republic** (supra).

The last issue relates to the complaint that the appellant's extra judicial statement was not voluntarily made for the reason of lapse of time. Admittedly the appellant's extra judicial statement was recorded about three days from the date he was put under police custody. To the learned counsel for the appellant this was too long a period for the appellant to resist making an involuntary confession. He sought to support this with the decision in the case of **Mashimba Dotto @ Lukubanija v. Republic** (supra). On the other hand, Ms. Manyanda submitted that the case cited by Mr. Kaijage is distinguishable in terms

of the number of days the appellant spent in custody before being taken to the Justice of the Peace.

In the case of **Mashimba Dotto @ Lukubanija V. Republic** (supra) this Court held that the period of six days during which the appellant remained in custody before being taken to a Justice of the Peace could not be said "*as soon as possible*" within the meaning of section 32(2) of the CPA. However, we have to observe immediately that what prompted the Court to consider the period of incarceration in that case was a complaint by the appellant that before being taken to the Justice of the Peace he was tortured at the police lock up. And we need to add that the appellant was not contradicted on that complaint.

And what do we have in this case? There is no complaint in this case that the appellant was tortured while in police custody. But in addition, we do not think in **Mashimba Dotto @ Lukubanija V. Republic**(supra) it was intended what was pronounced to be a principle of general application. Far from it. We think it is enough if recording of extra judicial statements substantially conforms to the Chief Justice's instructions.

In **Japhet Thadei Msigwa v. Republic**, Criminal Appeal No. 367 of 2008 (unreported) the following was said in relation to the exercise of power by Justices of the Peace in recording extra judicial statements: -

> *"Before the Justice of the Peace records the confession of such person, he must make sure that aii eight (sic) steps enumerated therein are observed. The Justice of the Peace ought to observe, inter alia the following: -*
>
> *(i) The time and date of his arrest.*
>
> *(ii) The place he was arrested.*
>
> *(iii) The place he slept before the date he was brought to him.*
>
> *(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement.*
>
> *(v) Whether he really wishes to make the statement on his free will.*
>
> *(vi) That if he makes a statement the same may be used as evidence against him."*

Then the Court went on to summarize those conditions, as hereunder:-

> *"We think the need to observe the Chief Justice's Instruction are twofold.* ***One****, if the suspect decided to give such statement, he should be aware of the implications involved.* ***Two****, it will enable the trial*

Court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily."

We have given Mr. Kaijage's arguments unreserved consideration. When they are considered along the Chief Justice's Instructions as summarized in **Japhet Thadei Msigwa V. Republic** (supra), we have no doubt that the key factor is voluntariness. We take voluntariness to be the key factor even when it comes to the decision whether and when a suspect should be taken to a justice of the peace. We say so because not in every case do suspects record extra judicial statements, and this, in our view, is a healthy situation tending to confirm that only when the suspects freely make up their minds to have confessions recorded, are they taken before Justices of the Peace to record such statements. In the end, we agree with Ms Manyanda that this case is distinguishable from the case of **Mashimba Dotto @ Lukubanija** because here there was no allegation of torture which might have lingered in the mind of the appellant at the time he appeared before the Justice of the Peace. We emphatically add that for this process to be voluntary, it should not have anyone worrying about the time ticking.

It is useful, we think, to make it clear that there is no statutory requirement to observe time in having one's extra judicial statement recorded. Section 32(2) of the CPA that was referred to in the case of **Mashimba Dotto @ Lukubanija** requires a suspect to be taken **to a court** "as soon as possible". This is about the same as what we said in **Joseph Stephen Kimaro and Robert Raphael Kimaro V. Republic,** Criminal Appeal No. 340 of 2015 (unreported). In that case it was held inter alia: -

> *"In other words, unlike cautioned statements whose time to be recorded is prescribed under sections 50 and 51 of the CPA, no such limitation is imposed in extra-judicial statements recorded before Justices of the Peace whose concern is to make sure that an accused person before him is a free agent and is not under fear, threat or promise when recording his statement".*

We are of the opinion that the above disposes of the last issue, and we answer it in the negative.

There is one small and last point of interest which won our curiosity and which we find it apt to address as a postmortem. This is in relation to the appellant's defence that he unexpectedly came upon his wife's dead body when he got home. If we go by his story, he had been

away and returned at night only to find the door to his house locked, we suppose from outside. According to him there was a place he used to hide the key to the house, but on this night instead of simply opening the door, he went to his brother's residence to enquire about his wife's whereabouts. And that when the brother had no idea of the wife's whereabout the appellant went back home and opened the door, and thereby came upon his wife's dead body.

It is a rule that an accused person has no duty to prove his innocence. However, this does not mean that he can tell any story of his imagination even when it is incapable of appealing to sense. For instance, we cannot figure out who locked the door from outside and then kept the key at the hiding place which, presumably, only members of the appellant's family knew. This line of defence was fanciful and untrue so we do not believe that the appellant stumbled onto his wife's dead body as he would have us do. We feel compelled to echo what was said in **Chandrankant Joshubhai Patel V. Republic**, Criminal Appeal No. 13 of 1998 (unreported);

> *"As this court said in Magendo Paul and Another v. R[1993] TLR 2,9 quoting Lord Denning's view in Miller v. Minister of Pensions 1947 2 All E.R 372, also quoted by the learned trial judge in the*

instant case, remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add, fanciful possibilities are limitless, and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inference".

In the end, we find no merit in this appeal and dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 17th day of September, 2019

R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 30th day of August, 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