IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CRIMINAL APPEAL NO. 427 OF 2018

BUJIGWA JOHN @ JUMA KIJIKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mallaba, J.)

dated the 23rd day of October, 2018
in
Criminal Sessions Case No. 76 of 2014

.....

JUDGMENT OF THE COURT

2nd & 10th December, 2019

KWARIKO, J.A.:

The appellant, Bujigwa John @ Juma Kijiko, was charged before the High Court of Tanzania sitting at Bukoba with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E 2002] (the Penal Code). The particulars of the offence were that, on the 21st day of May, 2014, at Bisore village within Muleba District in Kagera Region, the appellant murdered one Fausta Geofrey (the deceased).

The appellant denied the charge in which a full trial was conducted. At the end of the trial, the appellant was convicted and sentenced to a mandatory punishment of death by hanging.

The appellant was not satisfied by the conviction and sentence, hence this appeal before the Court.

The facts of the case leading to the prosecution of the appellant can be recapped as follows. On 21/5/2014, in the morning, the deceased who was a STD I pupil at Kitunga Primary School, was heading to school in the company of her classmates including Lameck Deus (PW2), Lucia Vicent and Edna Endlaid. According to PW2, when they passed through a certain house, a man called them to go and take some sweets. Others declined the offer except the deceased. The deceased entered into the man's house but she did not come out soon. Her colleagues waited in vain and they decided to go ahead to school. The deceased was not seen again that day.

When on evening hours of that day the deceased's parents did not see their child, her father Geofrey Raphael (PW1), reported to the hamlet

chairman one Odilo Mlindwa (PW3). The two searched for the child in vain and decided to continue with the exercise the following day.

In the course of the search in the following day, one Yasin Abas pointed out that a certain new comer in the village could be responsible with the disappearance of the child. This new comer happened to be the appellant herein, a local medicine man. He was apprehended and upon interrogation he said he was capable of showing where the child was. He led the search team to the house he had rented from one Anita Amos. By that time the Police had been informed of the incident and had arrived in the village. They included No. D 4079 D/Sgt Apolinary (PW5) and No. E5219 D/Cpl. Ally (PW6). In that house, the appellant revealed that in fact he had killed the child. In one of the rooms he removed a net, mattress and grasses in one location where the deceased had been buried after being killed.

The appellant dug the ground and the deceased was found buried head down, legs up and was in her school uniform. The deceased had her left hand cut off, both ears chopped, private parts including the uterus completely removed and back bone flesh severed. The appellant said the

missing body parts were in the kitchen and when they went there, the deceased's hand was found with some flesh in the palm, being grilled in the cooking stones (mafiga). The appellant's explanation was that he was drying the body parts for use in the local medicine to make people rich.

Meanwhile, the deceased's body was examined by Dr. Leonine Rwamulaza (PW4). In his evidence, PW4 said that he found the deceased's both ears and left hand cut off, private parts including the uterus removed and back bone muscles cut. He said that the cause of death was suffocation due to strangulation. PW4 tendered a postmortem report which was admitted in court as exhibit P2. Earlier, during preliminary hearing on 08/9/2015, photographs of the deceased's body was admitted as exhibit P1.

Further, a sketch map of the scene of crime was drawn by PW6 which was admitted in court as exhibit P3. The appellant gave his confession before the justice of the peace, the Ward Executive Officer, Adolf Cyrilo (PW7). However, during the trial, the appellant raised an objection against the confession statement claiming that, PW7 did not read over the same to him and he also threatened him. However, upon a trial

within trial, the objection was overruled and the appellant's extra-judicial statement was admitted as exhibit P4.

In his defence, the appellant testified as DW1. He did not call any other witness on his behalf. The appellant's testimony was that, he came from Mwanza and was a casual labourer in the farms at Bisore village since 23/5/2013. He said he was living in one Maatelesia's house.

The appellant went on to testify that, he was arrested by two policemen on 23/5/2013 and there were many civilians. He was beaten and taken in the police vehicle where he found the deceased's body and some people he could not recognize. The appellant further testified that from Kisore, he was taken to Kiagala Hospital while being beaten. At that hospital he was transferred to another police vehicle and taken to Muleba police station. He recorded his police statement and was taken to PW7, the justice of the peace, where his statement was recorded. The appellant denied the murder allegations and said he had never killed in his life. He denied to have been living in any other house in Bisore.

In the end, as indicated earlier, the appellant was convicted and sentenced as such.

On 01/2/2019, the appellant lodged his five-ground memorandum of appeal. On 27/11/2019, Mr. Lameck John Erasto, learned advocate for the appellant, lodged a three-ground supplementary memorandum of appeal. At the hearing of the appeal, Mr. Erasto appeared for the appellant and opted to abandon the first, second, third and fifth grounds in the appellant's memorandum of appeal, thus argued the fourth ground thereof together with the three grounds in the supplementary memorandum of appeal. The four grounds of appeal are as follows: -

1. *That, the Honourable trial judge when delivering the judgment misdirected himself by failure of considering the non-production of the cautioned statement by the prosecution side to support the appellant's voluntariness and confession alleged to be made before the justice of peace.*

2. *That, having observed the discrepancies made by the prosecution witnesses the trial court erred in law by convicting the appellant basing on such contradicting evidence.*

3. *That, in totality the trial court did not take account the defence raised by the Appellant including the imposed threats.*

4. *That, the prosecution evidence was not credible, unreliable and contradictory.*

At the hearing, Mr. Shomari Haruna, learned State Attorney represented the respondent/Republic.

In his submission, Mr. Erasto argued the 1st, 2nd and 4th grounds of appeal together. He thus argued that the trial court erred when it did not consider the appellant's defence, in which the appellant said he was threatened and forced to confess, also that his confession statement was not read over before he signed it.

Mr. Erasto argued further that, the trial court believed the confession statement because it led to the discovery of the body of the deceased. However, the trial court ought to consider the appellant's complaint that he was tortured before he was sent to the justice of the peace and when he got there PW7 threatened him with a club (rungu), argued Mr. Erasto. The learned counsel contended that, to lend credence to the appellant's

confession, his cautioned statement before the police ought to be tendered in evidence.

Additionally, Mr. Erasto argued that the trial court ought to resolve the issue of the residence of the appellant. This is because, while on one hand, the appellant said he was arrested in Maatelesia's house and on the other hand, the prosecution said the appellant was living in two different houses. The trial court ought to be satisfied as to which was exactly the appellant's residence and which among the two residences the deceased's body was found. The learned counsel contended that the prosecution failed to discharge their duty to prove the case beyond reasonable doubt. Reference was made to the case of **Leonard Mwanashoka v. R (2016) TLS LR 41**. He urged us to allow the appeal.

On being prompted by the Court, Mr. Erasto submitted that PW2's evidence was taken contrary to law because *voire dire* test is no longer a requirement in respect of a witness of a tender age. He said that, what PW2 ought to have done was to promise before the court to tell the truth and not to tell lies. The learned counsel was of the view that, PW2's evidence is illegal which deserves to be expunged from the record.

Further, Mr. Erasto said the appellant did not cross-examine the prosecution when they said he was living in Anita's house where the incident occurred.

In reply to the grounds of appeal, Mr. Haruna argued the second and fourth grounds of appeal together as follows. He submitted that, the prosecution evidence by PW1, PW2, PW3, PW4, PW5, PW6 and PW7 together with exhibits P1, P2 and P4, proved the case against the appellant beyond reasonable doubt and established the motive for the killing as the appellant said he intended to use the body parts for local medicine.

Mr. Haruna went on to argue that PW1, PW3, PW5, PW6 and PW7 and exhibit P4 proved that it was the appellant who killed the deceased. Whereas PW1, PW3, PW5 and PW6 proved that, the appellant's oral confession led to the discovery of the deceased's body in the room where he had buried it. To bolster his argument, Mr. Haruna cited the case of **Mabala Masasi Mongwe v. R,** Criminal Appeal No. 161 of 2000 (unreported), which quoted with approval the cases of **Mboje Mawe and 3 Others v. R,** Criminal Appeal No. 86 of 2010 and **Osolo Wilson @ Mwalyego v. R,** Criminal Appeal No. 613 of 2015 (both unreported).

As regards the appellant's claim that he was tortured, Mr. Haruna argued that, because the appellant volunteered to show the deceased's body, he cannot say that he was at all tortured. Mr. Haruna argued that the appellant's defence did not discredit the prosecution evidence and in that respect, he made reference to the case of **Goodluck Kyando v. R** (2006) T.L.R 363.

In relation to the objection against the appellant's confession which he made before PW7; Mr. Haruna argued that the same was overruled by the trial court in a trial within trial after ascertaining that the confession was voluntarily made. He made reference to the cases of **Dickson Elia Nsamba Shapwata and Another v. R,** Criminal Appeal No. 92 of 2007, **Ndalahwa Shilanga and Another v. R,** Criminal Appeal No. 247 of 2008 (both unreported) and **Hatibu Gandhi v. R** [1996] T.L.R 12.

Further, the learned State Attorney argued that, if the appellant was beaten in prison as he said in his defence, it was not the prosecution's fault and after all he said that during re-examination in the trial within trial that he was only threatened and not beaten.

Mr. Haruna went on to contend that, the appellant had malice aforethought when he killed the deceased. This is so because the evidence show that the deceased was suffocated by strangulation before she was butchered and dismembered. To cement this contention, the counsel referred to section 200 (a) of the Penal Code and the cases of **Enock Kipela v. R,** Criminal Appeal No. 150 of 1994, **Masudi Said Suleiman v. R,** Criminal Appeal No. 162 of 2013 and **Charles Bode v. R,** Criminal Appeal No. 46 of 2016 (all unreported). Further, the learned counsel argued that, although motive is irrelevant in the killing, PW3 and PW5 explained the appellant's motive in the killing when they said he intended to use the body parts for local medicine. This, he argued, strengthened the prosecution case as it was said in the case of **Amiri Mohamed v. R** [1994] T.L.R 138.

Arguing the second ground of appeal, Mr. Haruna submitted that, it is trite law that, only contradictions which go to the root of the case are material, reliance being the case of **Masudi Said Suleiman v. R** (supra). That, minor contradictions are normal especially due to lapse of time. For instance, this incident occurred in 2014 while the trial was conducted in

2018. The learned counsel contended that the High Court addressed the contradictions at page 107 to 108 of the record of appeal and found them to be minor ones.

As regards the first ground of appeal, it was Mr. Haruna's contention that, there is no law which oblige the tendering of the cautioned statement simply because the extra judicial statement has been tendered in evidence. He argued that, the appellant denied the allegations before the police but confessed before the justice of the peace, which shows that he was a free agent. He argued that, the important thing was that the confession was voluntary. In that respect, the learned counsel relied on the case of **Vicent Ilomo v. R,** Criminal Appeal No. 337 of 2017 (unreported).

On whether the appellant's defence was considered which forms complaint in the third ground of appeal, Mr. Haruna argued that the appellant generally denied the allegations. He submitted that the appellant's defence was considered at pages 106, 109 and 112 of the record of appeal and the defence of threat was also considered. He made refence to section 29 of the Evidence Act [CAP 6 R.E 2002] (the Evidence Act), which provides that, a confession cannot be rejected on allegation of

threat unless the court is satisfied that the threat led to untrue admission of guilty. The case of **Mabala Masasi v. R** (supra) was also referred in this respect.

Mr. Haruna agreed that, because the amendment to section 127 of the Evidence Act removed the requirement of the *voire dire* test, the trial court erred in law when it conducted it before receiving the evidence of PW2. He referred the Court to the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported), in that respect. However, he contended that, PW2 made promise to tell the truth. The learned State Attorney urged us to dismiss the appeal for lack of merit.

In his rejoinder, Mr. Erasto insisted that, the contradictions in the prosecution evidence were major and the trial court ought to have addressed the same, because this is a capital offence. Further, he maintained that in practice, the tendering of the cautioned statement precedes the extra judicial statement.

In the light of the grounds of appeal and the submissions from the counsel for the parties, the issue which calls for our decision is whether the

appeal has merit. We shall deal with the grounds of appeal in the manner they have been argued by the learned counsel.

However, before we embark on deliberation of the grounds of appeal, we find it apposite to resolve the legal issue that we raised *suo motu* during the hearing of the appeal. This is in relation to the evidence of PW2 who was of a tender age. When we invited the counsel to address us on this issue, they commonly agreed that, the trial court erred to conduct *voire dire* test in respect of PW2. They said that in view of the amendment of section 127 of the Evidence Act vide **the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016,** *voire dire* test is no longer a requirement. We hold that view. According to the amendment, a witness of tender age may give evidence without taking an oath or affirmation but before giving evidence he/she shall promise to tell the truth to the court and not to tell lies. We are therefore of the view that, PW2's evidence which was taken contrary to law lacks evidential value and we hereby expunge it from the record.

Coming to the grounds of appeal, we shall begin with the second and fourth grounds where the appellant's complaint is that the prosecution evidence was contradictory, unreliable and not credible.

Upon consideration of the prosecution evidence, we are in agreement with Mr. Haruna that, there is no dispute that the deceased died a violent death as shown in exhibits PI and P4 together with the witnesses who saw her body namely, PW1, PW3, PW4, PW5 and PW6. What is in dispute is who killed the deceased. Upon arrest, the said five witnesses heard the appellant confessing that he killed the deceased and led them where he had buried her body in the house where he was living. In that house he led to the room where he buried the deceased's body, he dug the ground and the body was found. The appellant showed the witnesses where the chopped body parts were kept. It was in another room where they found the body parts being grilled. The appellant said he was preparing the body parts to be used in the local medicine to make people rich. Thus, the appellant's oral confession led to the discovery of the deceased's body. In the case of **Posolo Wilson @ Mwalyego v. R** (supra), the Court said thus: -

"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect."

As correctly found by the trial court, the prosecution witnesses who heard the appellant's oral confession were reliable and there is no reason whatsoever to doubt their credibility. The appellant complained that the trial court did not resolve the issue as in which house he was living and who was the owner because he had himself mentioned a different house which was not mentioned by the prosecution. We are of the view that, when the prosecution witnesses said the appellant lived in the house owned by Anita Amos, they were not cross-examined by the defence side. Hence, to raise this issue at this stage amounts to an afterthought.

The appellant also complained that, the prosecution was not certain as to which sub-village the incident occurred and how he was arrested. It is our view that the prosecution witnesses explained that the incident occurred at Bisore village, Mshonda sub-village and the appellant said in his defence that he was living in Bisore village. PW3, the hamlet chairman said when the appellant arrived in their locality, he was taken to him for

introduction, which evidence tallied with the appellant's defence. The witnesses also explained how the appellant was arrested. The trial court addressed the contradictions and found that they were normal which did not go to the root of the case and we uphold that finding. See also the cases of **Dickson Elia Nsamba Shapwata & Another v. R,** (supra), **Lusungu Duwe v. R,** Criminal Appeal No. 76 of 2013 and **Emmanuel Josephat v. R**, Criminal Appeal No. 323 of 2016 (both unreported). The second and fourth grounds of appeal fail.

As regards the first ground of appeal, we are in agreement with Mr. Haruna that, there is no law which provides that, tendering of extra-judicial statement should be preceded by the tendering of the cautioned statement. If the appellant denied the allegations before the police and confessed before the justice of the peace (PW7), it was his choice. The important thing was for the confession to be voluntarily made. Although the appellant retracted his confession on allegations that he was threatened, the trial court found it to be voluntarily made after a trial within trial. See also **Dickson Elia Nsamba Shapwata and Another v.**

R (supra). After all, not every threat may invalidate a confession. Section 29 of the Evidence Act provides that: -

> *No confession which is tendered in evidence shall be rejected on the ground that a promise or a threat has been held out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made.*

The appellant's confession before PW7 tallies what PW1, PW3, PW5 and PW6 said in court. The trial court therefore did not err to believe this evidence. We are of the same view. On the other hand, assuming the appellant did not confess before PW7, the rest of the evidence is sufficient to find him responsible with the murder. This ground too fails.

The appellant complains in the third ground of appeal that, the trial court did not consider his defence evidence. We are of the view that this complaint lacks merit. This is because, upon going through the trial court's judgment, we found that the appellant's defence was considered from pages 106 to 112 of the record of appeal. The trial court said the appellant gave a general denial and did not contradict the prosecution evidence and

did not give an account on how the deceased's body was found in his house. That court went on to analyze all issues that were raised by the defence during the trial, including the value of the retracted confession and found that the same did not cast any doubt on the prosecution case. The third ground of appeal flops.

At this juncture, we are satisfied that the prosecution evidence proved that, it was the appellant who with malice aforethought killed the deceased. On malice aforethought section 200 (a) of the Penal Code provides that: -

> *Malice aforethought shall be deemed to be established by evidence proving any one nor more of the following circumstances–*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

Malice aforethought can also be inferred from various factors. In the case of **Enock Kipela v. R,** (supra), the Court said thus: -

> *"Usually an attacker will not declare his intention to cause death or grievous harm. Whether or not he*

had that intention must be ascertained from various factors, including the following: (1) the type and size of weapon, if any, used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow or blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

In the instant case the evidence proved that, the deceased died by suffocation, her body was dismembered in that, her left hand, ears, private parts were completely cut off and some flesh cut from the back bone muscles. The deceased's body was buried and completely sealed. The appellant also tried to hide when he saw the search party. With all this evidence, one cannot fail to see that the appellant had malice aforethought in killing the deceased.

In a nutshell, we entertain no doubt that the prosecution case was proved beyond reasonable doubt against the appellant. We thus find the appeal without merit and we accordingly dismiss it in its entirety.

DATED at **BUKOBA** this 9th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of Mr. Erasto John Lameck, learned Counsel for the appellant and Mr. Shomari Haruna, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL