IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 355 OF 2015

1. **MELKIAD CHRISTOPHER MANUMBU**
2. **YOHANA MADUKA KABADI @ MWANAMARUNDI**
3. **REGINA MASHAURI NYANDA @ LUGWISHA @ MAMA SOFI**

.... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

Dated the 15th day of June, 2015
in
Criminal Sessions Case No. 80 of 2011

.....

JUDGMENT OF THE COURT

28th March & 21st May, 2019

MWAMBEGELE, J.A.:

The three appellants together with another person going by the name Issa Makoye Buziba whose case abated upon his death, were arraigned before the High court of Tanzania at Mwanza for the offence of murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on 21.06.2009, at Kishiri, Igoma area within Nyamagana District in of Mwanza Region, the four did jointly and

together murder one Jessica Charles; a person with albinism. They pleaded not guilty to the information after which a full trial ensued. After the full trial, the appellants were found guilty as charged, convicted and each awarded the mandatory death sentence. Aggrieved, they have come to this Court on first appeal complaining their innocence through several grounds of complaint that will become apparent in the course of this judgment.

The appeal was argued before us on 28.03.2019 during which all the appellants had the services of learned advocates. It is the law in this country that in offences that attract capital punishment, accused persons must be represented by advocates. In that spirit, a team of three renowned lawyers represented the appellants; each representing one appellant. Messrs. Salum Amani Magongo, Deocles Rutahindurwa and Kassim Gilla, all learned counsel, represented the first, second and third appellants, respectively. Mr. Castus Ndamugoba and Paschal Marungu, learned senior state attorneys, joined forces to represent the respondent Republic.

Before getting down to the nitty-gritty of the determination of this appeal, we find it apropos to narrate, albeit briefly, the factual background setting to the present appeal before us as brought to the fore by the prosecution. It is this. On 21.06.2009, the deceased Jessica Charles, a young lady with albinism, went to Church and later, after lunch, to Kishiri centre to attend a Christian crusade where the gospel was being spread. Her sister Misoji Charles (PW2) also went but PW2 went first leaving behind the deceased who remained behind preparing lunch. After lunch, the deceased also went leaving behind her mother Esther Rutahila (PW1) who, ostensibly, did not know she was seeing alive her daughter Jessica for the last time.

PW2 did not see the deceased at the crusade. After the crusade, she returned home at about 18:00 hours. The deceased was not at home when PW2 returned in the evening. She did not return on that day. Not even the following day. She went missing since then. Her whereabouts were unknown. On 02.07.2009, her body was found by a search party in Kishiri Hills with her legs and palms amputated.

The prosecution case has it that the deceased Jessica was lured to go to the house of Melkiad Christopher Manumbu; the first appellant, who was her boyfriend. There; at the house of the first appellant, the deceased was strangled by the first appellant in company of one Mussa Mpina; a witchdoctor and a certain Mwanamalundi. They amputated the deceased's legs, skinned them and took the bones to Regina Mashauri Nyanda @ Lugwisha @ Mama Sofi; the third appellant who allegedly knew the prospective buyers to give them riches. As bad luck would have it, the cat was let out of the bag before they could get the illusionary intended riches, for, the first appellant confessed upon arrest and led the police to a cave in Kishiri Hills which was about one hundred metres from his home where they found a parcel wrapped in a nylon whose contents were two palms of a human being and some pieces of human flesh, among others. The first appellant allegedly told them that they were from the body of the deceased.

In the meantime, upon arrest of the third appellant and the said Issa Makoye Buziba, they led Asst. Inspector Esther (PW4) and other policemen to a sisal plantation where a parcel containing bones wrapped in a white

cloth and later identified by Gloria Tom Machuve (PW15); from the office of the Government Chemist, to be from the body of the deceased.

The prosecution fielded fifteen witnesses and several exhibits to prove the case against the appellants. In their respective defences, the three appellants dissociated themselves from the charges levelled against them.

We first gave the floor to Mr. Magongo to address us on the grounds of appeal in respect of the first appellant. Mr. Magongo started by abandoning the grounds of appeal filed by the first appellant in terms of rule 73 (2) the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules), and consolidated the second and third grounds of appeal. For the avoidance of doubt, the grounds of appeal by the first appellant are:

1. That the continuation of the trial by the successor judge without any reasons for non-completion of the trial by her predecessor and by purporting to comply with the provisions of Section 299(1) of Criminal Procedure Act having already conducted part of the trial, rendered the proceedings conducted by the successor judge illegal;

2. That the trial judge erred in law to find that it was proper to make an oral confession before a police officer and the public during investigations while the same is contrary to and prohibited by the law;

3. That in view of the evidence of torture which was not disproved and the prior oral confession, the extra-judicial statement (Exh. P1) and cautioned statement (Exh. P.10) have no evidential value;

4. That in the circumstances of the case the evidence leading to discovery in respect of the Appellant is not reliable; and

5. That as a whole there is no cogent evidence to support conviction against the 1st Appellant.

On the first Ground of Appeal, Mr. Magongo submitted that the case was presided over by two judges and the successor judge did not give reasons why the predecessor judge did not proceed with presiding over the case. He clarified that Mwangesi J. (as he then was) presided over the case and four prosecution witnesses testified before him as well as conducted the first trial within the trial. After that, Bukuku, J. (hereinafter referred to as the successor Judge) took over, delivered a ruling on the trial within trial reserved by Mwangesi, J. (hereinafter referred to as the predecessor Judge) on 07.11.2011. No reasons were assigned by the

successor Judge why she took over from the predecessor Judge. That, Mr. Magongo argued, was a blatant disregard of the mandatory provisions of section 299 (1) and (2) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (hereinafter referred to as the CPA) and made the proceedings before a successor Judge a nullity. He argued that the successor Judge ought to have given reasons why she took over as dictated by section 299 (1) of the CPA. On the authority of our unreported decisions in **Kinondoni Municipal Council v. Q Consult Limited**, Civil Appeal No. 70 of 2016 and **Emmanuel Malobo v. R.**, Criminal Appeal No. 356 of 2015, Mr. Magongo urged us to nullify the proceedings from where the successor Judge took over and, in exercise of the powers bestowed upon us by section 4 (2) of the Appellate Jurisdiction Act, Cap 141 of the Revised Edition, 2002 (hereafter referred to as the AJA), order a retrial therefrom as was the case in **Fatehali Manji v. R.** [1966] EA 343. Prompted on the existence of the overriding objective brought into our laws by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018, Mr. Magongo submitted that the same cannot confer jurisdiction on that jurisdictional issue. He insisted that the ailment was fatal as it lacked transparency and, certainly, prejudiced the first appellant.

In arguing the second and third grounds of appeal in the alternative to the first ground, Mr. Magongo submitted that the testimony of PW4 at p. 49-50 is to the effect that the first appellant confessed before people and the Judge at pp. 345 - 346 used that evidence to convict the appellant. He submitted that, that evidence was not appropriately taken because it offended the provisions of sections 52 (1), 53 (c), 57 (2) (d) and 58 (1) (b) of the CPA. He went further to argue that at the alleged oral confession, there were persons in authority. In the circumstances, he argued, when the first appellant allegedly started to confess, the persons in authority should have stopped him and should thereafter have warned him and should have proceeded to take the confession in writing according to law. Alternatively, he argued, the persons in authority should have left and leave the first appellant to confess to the persons without authority. He thus submitted that the oral confession was illegally taken and prayed that the same be expunged from evidence.

Mr. Magongo also complained against the cautioned and extra judicial statements of the first appellant which were tendered and admitted in evidence as Exh. P10 and P1, respectively. Against Exh. P10, Mr. Magongo argued that the first appellant complained that he was tortured.

He went on to argue that the court did not rule that the cautioned statement was admissible and did not rule whether or not it was voluntarily made but admitted at page 138F and G (in the ruling) that admissibility was a different thing and the weight to be attached to it was different altogether. He argued that the court should have addressed the question whether the two statements were voluntarily made. He went on to submit that the Court used section 29 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (hereinafter referred to as the Evidence Act) which was wrong. To buttress this proposition, the learned counsel referred us to **Richard Lubilo and Mohammed Seleman v. R.** [2003] TLR 149 wherein it was held that it is incorrect to say that involuntary confessions are admissible, under section 29 of the Evidence Act, when they are true. He also referred us to our decision in **Morris Agunda & Two Others v. R.** [2003] TLR 449, at 451 on the same proposition. On the strength of these arguments and authorities cited, the learned counsel prayed that the cautioned and extra judicial statements be expunged from evidence.

With regard to the fifth ground of appeal (now the fourth) Mr. Magongo submitted that the evidence used to convict the first appellant was his oral confession, cautioned statement and extra judicial statement.

If expunged, he argued, there will be no evidence to connect the first appellant with the charges levelled against him. Prompted with regard to; one, the extra judicial statement which he did not submit on except for the prayer that it should also be expunged and two, the DNA evidence which implicates him, Mr. Magongo submitted that the first appellant was still under fear that he would be tortured by the Police on return if he did not narrate the story they forced him to in Exh. P10. He was not free even before the Justice of the Peace, he argued. Mr. Magongo remained mum on the second limb of our question. He concluded by praying that the first appellant be released from prison as the case was not proved against him beyond reasonable doubt.

Next in the line was Mr. Rutahindurwa for the second appellant. The grounds of appeal in respect of the second appellant are paraphrased as under:

1. THAT, the trial Proceedings by the Successor Judge commencing with her Ruling dated 28.04.2015 and the Judgment resulting therefrom are a nullity for contravening section 299 (1) of the Criminal Procedure Act;

2. THAT, the Successor trial Judge erred in law and in fact in convicting and sentencing the 2nd Appellant herein basing on the alleged corroborative documentary evidence not only that which does not implicate the Appellant but also that the same were illegally obtained and wrongly admitted; and

3. THAT, the Successor trial Judge misdirected her mind by doctoring her own facts while composing the Judgment, facts which are not reflected in the proceedings.

With regard to the first ground of appeal on successor Judge not complying with the provisions of section 299 (1) of the CPA, Mr. Rutahindurwa, quite rightly in our view, subscribed to and adopted Mr. Magongo's submissions and prayers.

On the second ground of appeal, Mr. Ruthahindurwa submitted that in the cautioned statement (Exh. P10) and extra judicial statement (Exh. P1), Mussa Mpina and Paul Daud are mentioned in those documents. Yohana Maduka Kabadi @ Mwanamarundi; the second appellant is not mentioned anywhere in those documents. In the circumstances, the trial Judge was therefore not correct at pp. 363 - 365 to say that he was mentioned, he argued. Even if he was mentioned, he submitted, the cautioned statement of the first appellant which purports to implicate the

second appellant was taken against section 50 (1) (a) of the CPA. He clarified that the first appellant was arrested on 26.06.2009 and his cautioned statement was taken eight days later; that is, on 03.07.2009 and there was no extension of time sought and obtained in terms of section 51 of the CPA. In the premises, Mr. Rutahindurwa prayed that the cautioned statement of the first appellant be expunged and after that there will be no evidence to implicate the second appellant with the killing of the deceased. Upon being probed by the Court on the evidence of DNA which also implicated the second appellant, Mr. Rutahindurwa submitted that the DNA evidence did not touch the second appellant. The alleged white cloth was retrieved from an unknown place. With regard to the extra judicial statement of the first appellant which also implicated the second appellant, Mr. Rutahindurwa submitted that the statement should have been taken within reasonable time. It was taken after ten days. Mr. Rutahindurwa referred us to the decision of this court in **Mashimba Dotto @ Lukubanija v. R.**, Criminal Appeal No. 56 of 2009 (unreported) in which six days were found to be unreasonable. He beckoned upon us to follow suit and declare the ten days to be unreasonable and expunge the extra judicial statement of the first appellant.

Mr. Rutahindurwa abandoned the third ground of appeal and urged us to set the second appellant free.

It was then the turn of Mr. Gilla for the third appellant to address us. In respect of this appellant, we also wish to paraphrase the grounds of appeal:

1. That, the trial court erred in law by relying on **Exhibit P2** to convict the Appellant while the said **Exhibit P2** was illegally obtained and wrongly admitted during trial in contravention of Sections 50(1)(a) and 51(1)(a) and (b) of the Criminal Procedure Act, Cap. 20. [R.E 2002].
2. That, the trial proceedings commencing from 28/04/2015 and the judgment thereof are null for failure of the successor judge to assign reasons for the take-over of the matter in contravention of the section 299(1) of the Criminal Procedure Act, Cap. 20 [R.E 2002].
3. That, the learned trial judge failed to fully sum up to the assessors on the ingredients of the offence facing the Appellant hence rendering the whole judgment a nullity.

Before he addressed us on the grounds of appeal, on the strength of rule 73 (2) of the Rules, Mr. Gilla dropped the first, eleventh and twelfth grounds of appeal in the memorandum of appeal filed by the third

appellant. He combined the remaining grounds of appeal by the third appellant with his first ground of appeal. He dropped the third ground he filed and subscribed to his colleagues' submissions in respect of the second ground.

With regard to the consolidated ground of appeal, Mr. Gilla submitted that at p. 57 of the record of appeal, the third appellant objected to Exh. P2 being tendered in evidence. At pp. 91 - 92, the Judge said PW1 gave reasons why the statement was taken out of time and yet agreed with the state attorney that the period used in investigations ought not to be reckoned in computation of time in terms of section 50 (2) of the CPA. Mr. Gilla added that the third appellant was arrested on 16.10.2009 and the cautioned statement taken on 19.10.2009 and there was another interrogation on 18.10.2019 without being recorded anywhere. That, he submitted, violated section 50 (1) of the CPA. He argued that as no extension of time was sought and obtained in line with section 51 (1) and (2) of the CPA, the statement was illegally obtained and wrongly admitted; it ought to have been expunged as was the case in our unreported decision in **Masumbuko Charles @ Kema v. R.**, Criminal Appeal No. 180 of 2017. After that, he submitted, there will be no evidence to implicate the third

appellant and therefore a retrial will be inappropriate. In addition, he submitted, the trial Judge did not rule on whether the third appellant was coerced on not.

On the strength of the above, Mr. Gillla sought the indulgence of the Court to release the third appellant from custody.

Responding, Mr. Marungu, clustered his response in three clusters; the complaints in the memoranda of appeal of all three appellants; one, noncompliance with section 299 (1) of the CPA, two, cautioned statements, extra judicial statement and oral confession, three, general ground that the prosecution did not prove the case against the appellants beyond reasonable doubt.

On the first cluster, Mr. Marungu submitted that section 299 (1) of the CPA was not violated. In that provision, he submitted, it is shown nowhere that a successor Judge should give reasons for taking over. What is required is to give the right to accused person to recall witnesses. He went on to submit that the authority cited by Mr. Magongo is distinguishable because there, unlike here, the successor judge proceeded

to take evidence of witnesses without asking the accused persons if they needed to recall witnesses who had already testified or not. Here, he stated, the successor judge complied at page 95 of the record of appeal where she asked the appellants if they wished to recall any of the witnesses and all appellants answered that they wished to proceed without recalling any prosecution witnesses who had testified.

On violation of the first condition in **Emmanuel Malobo** (supra) cited by Mr. Magongo; that is, the successor Judge to give reasons for taking over, Mr. Marungu submitted that the ailment, if at all, did not prejudice the appellants. After all, he charged, that is not the requirement of the law; that is section 299 (1) of the CPA does not require a successor Judge to assign reasons why the take over. He thus argued that the proceedings before the successor judge were not a nullity as argued by the advocates for the appellants.

On the cautioned statements of the first and third appellants, he submitted that section 50 (1) CPA was complied with. He submitted that the third appellant was arrested on 16.10.2009 and her cautioned statement was taken on 19.10.2009. He added that at p. 53-5 of the

record of appeal, PW4 stated why the evidence was not taken within the four hours prescribed by section 50 (1) of the CPA; that she was still going on with investigation and the third appellant was revealing some information which made her go to Ukerewe and Nzega in search for Mussa Mpina and Paulo. She was taken to where the body was dumped on 19.10.2009 and after recovery; the cautioned statement of the third appellant was taken. He argued that because investigation was going on, section 50 (2) of the CPA is therefore inapplicable.

Regarding torture, the learned senior state attorney argued that the third appellant testified that she was tortured and one of the fingers broken. She brought a PF3 to that effect and at p. 91 of the record of appeal, the trial Judge said the PF3 did not show that the appellant was injured anyhow. The Court found out that the complaint was unjustified and the cautioned statement was ruled to have been taken without torture and admitted in evidence, he submitted.

Regarding the cautioned statement of the first appellant, the learned senior state attorney submitted that there was a complaint to the effect that section 50 (1) of the CPA was violated. A trial within the trial was

conducted if it was involuntarily made and why there was a delay. He submitted that despite the fact that there was no need to go to the trial within the trial in respect of the violation of section 50 (1) of the CPA, there was explanation why there was a delay at p. 130-2 of the record of appeal. Prompted, the learned conceded that as the cautioned statement of the first appellant had started being recorded, there was need to apply for extension; Section 50 (1) of the CPA was therefore violated; it may be expunged, he conceded.

With regard to the extra judicial statement, Mr. Marungu submitted that the first appellant was free before the Justice of the Peace. He was not tortured there. If there was any torture, he submitted, it was at the Police. He was free before the Justice of the Peace that is perhaps the reasons why she even disclosed at p. 35 of the record of appeal that she was "squeezed" at the police. The learned counsel referred us to the case of **Joseph Stephen Kimaro and Another v. R.**, Criminal Appeal No. 340 of 2015 (unreported) wherein the Court held at pp. 15 - 19 that there is no law that puts a time limit in taking an accused person to a Justice of the Peace. The learned counsel urged us to follow **Joseph Stephen Kimaro** (supra) which is more recent than **Mashimba Dotto Lukubanija** (supra)

cited by Mr. Magongo. He stated that except for cautioned statement of the first appellant, the extra judicial statement of the first appellant and cautioned of statement of the third appellant should not be expunged.

In respect of the second appellant, Mr. Marungu submitted that he is not touched by the confessions but by Asst. Inspector Emmanuel (PW5) who testified that the first appellant confessed that he killed the deceased with the help of Mwanamarundi. Prompted by the Court, Mr. Marungu admitted that there was doubt as to the names of the second appellant in the charge sheet *vis-à-vis* the name Mwanamarundi mentioned by the first appellant. However, the learned senior state attorney was quick to state that the doubt is cured by the DNA Report Exh. P13 (c) which is to the effect that the impossibility of the second appellant not being connected to the white cloth in which the bones of the deceased were wrapped was one to a billion. Admittedly, he argued, the white cloth in question implicated the second appellant. He added that the fact that the white cloth was found at the house of the first appellant and implicated the second appellant was not in evidence but was not disputed at the trial.

Regarding the oral confession, Mr. Marungu submitted that the same was made by the first appellant in the presence of PW4, PW5, No. PF 16824 Inspector Emmanuel (PW6), Charles Lucas Joshua Maruma (PW8), Eliaminin Ismail Mkenda (PW10) and No. E 6489 D/Sgt Julius (PW12). PW8 and PW10 are not Police men, he said. They all heard the first appellant confess. The first appellant volunteered to confess, no one pressed him to. That oral confession led to retrieval of some other items. He submitted that the procedure on confessions before the police is different from the procedure on oral confessions, as such, he argued, the oral confession should not be discredited. He referred us to our decision in **Patrick Sanga v. R.,** Criminal No. 213 of 2008 (unreported) wherein it was observed that confession need not necessarily be in writing, it may be made before anybody provided that it is voluntarily made. He prayed that the oral confession should not be taken to have been illegally obtained.

Regarding the general ground that the case was not proved beyond reasonable doubt, Mr. Marungu submitted that the case was proved beyond reasonable doubt against all appellants. For this stance, he relied on the extra judicial statement of the first appellant, the oral confession of the first appellant and the DNA Report [Exh. P.13 (c)] and other evidence

that was challenged in the course of hearing the appeal; the poem by the first appellant; Exh. P11, in which he stated to have killed the deceased; his lover and circumstantial evidence as a whole, connect the appellants with the offence. He concluded that the appeal has no merit; it should be dismissed entirely.

Rejoining, Mr. Magongo submitted that **Emmanuel Malobo** (supra) interpreted section 299 (1) of the CPA and is part of the law. On section 50 (2) (a – d) of the CPA, he rejoined that even when investigation is going on, there must be sought extension. He clarified that extension cannot be sought on specific instances mentioned in section 50 (2) (a) and (b) (i) – (iv) to (c) of the CPA. On the extra judicial statement, he submitted that at p. 35 he testified that if he would not state what he said at Police the torture would resume. So he was not a free agent before the justice of the peace as claimed. On oral confession, Mr. Magongo agreed that it can be made to any person but that in the instant case, persons in authority were present. In those circumstances, he argued, we could borrow a leaf from the procedure under section 58 (2) of the CPA that when an accused person wants to confess he must be cautioned. He submitted that the persons with authority should have taken over and followed the procedure

or should have left the first appellant to proceed confessing before the persons without authority.

Mr. Rutahindurwa submitted that Mwanamarundi as a name of the second appellant was refused since the Preliminary Hearing stage. On section 50, Mr. Rutahindurwa urged us to read the decision of the Court in **Mpemba Mashenene v. R.**, Criminal Appeal No. 557 of 2015 (unreported). Regarding the white cloth, he submitted that there is no evidence as to how it was retrieved. He reiterated that if the Court was minded to order a retrial, the second appellant should be set free as a retrial will occasion injustice to him.

Mr. Gilla, in rejoinder, subscribed to what his two learned brothers submitted and to our minds rightly so.

So much for the background factual setting of the material facts of the case and submissions of the learned advocates for each appellant on the one hand and the learned senior state attorney's for the respondent Republic on the other. We should now be in a position to confront the contending issues in this appeal. The ball is now in our court.

In our determination, we propose to adopt the style taken Mr. Marungu, learned senior state attorney. That is, we shall discuss and determine on the complaint on noncompliance with section 299 (1) of the CPA, the complaint over admissibility of the cautioned statements, extra judicial statement and oral confession and the general ground that the prosecution did not prove the case against the appellants to the required standard; that is, beyond reasonable doubt.

With regard to the noncompliance of section 299 (1) of the CPA the learned advocates for the respective appellants have urged us to nullify the proceedings before the successor Judge on the ground that, on the authorities cited, she did not assume jurisdiction having failed to comply with the mandatory provisions of section 299 (1) of the CPA. On the other hand the learned senior state attorney is of the view that the provisions of 299 (1) of the CPA were not offended as the successor Judge did not mention that she was complying with section 299 (1) of the CPA but asked the appellants if they wish to recall the witnesses who had already testified and none of the appellants wished to recall any witness. Indeed, the provisions of section 299 (1) of the CPA impose a duty upon the successor

Judge to inform the accused person of his right to recall any witness who had already testified if he so wishes. Let the subsection speak for itself:

> *"Where any judge, after having heard and recorded the whole or any part of the evidence in any trial, is for any reason unable to complete the trial or he is unable to complete the trial within a reasonable time, another judge who has and who exercises jurisdiction may take over and continue the trial and the judge so taking over may act on the evidence or proceedings recorded by his predecessor, and may, in the case of a trial re-summon the witnesses and recommence the trial; save that in any trial the accused may, when the second judge commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard* ***and shall be informed of such right by the second judge when he commences proceedings.***"
> [Emphasis supplied].

The bolded expression in the quote above makes it mandatory for the successor Judge to inform the accused person of his right to have the witnesses who had already testified recalled to re-testify. This, as rightly submitted by Mr. Marungu, was complied with by the successor Judge. We

wish to reproduce what transpired in court when the successor Judge took over as appearing at p. 95 of the record of appeal:

> *"**Court:** Asked if any of the accused person wishes to recall any of the witnesses and they reply:*
>
> ***1st Accused:** Let us proceed. There is no need to recall any of the witnesses.*
>
> ***2nd Accused:** Let us proceed. There is no need to recall any of the witnesses.*
>
> ***3rd Accused:** Let us proceed. There is no need to recall any of the witnesses".*

It is no gainsaying therefore that the successor Judge complied with the requirement under of section 299 (1) of the CPA to inform the appellants of their right to have the witnesses who had already testified re-summoned. The fact that section 299 (1) of the CPA was not mentioned was not fatal provided that its contents were compiled with.

Admittedly, case law has interpreted section 299 (1) of the CPA and added the requirement that a successor Judge must assign reasons for taking over failure of which he will not be clothed with jurisdiction to

proceed with the case. The cases cited by the advocates for the appellants are among many. While Mr. Magongo, on behalf of the rest of the advocates for the appellants argued that this was a jurisdictional issue which must be complied with to the letter, Mr. Marungu strenuously argued that, that was not the requirement of section 299 (1) of the CPA and after all, the appellants were not prejudiced. We seriously doubt if failure to assign reasons for taking over by a successor Judge amounts to an issue of jurisdiction. If anything, we think, it is an issue of procedure. Be that as it may, we, like Mr. Marungu, are unable to see how the appellants were prejudiced for the successor Judge failing to assign reasons why she took over from the predecessor Judge. With the advent of the overriding objective recently introduced in our laws, the AJA inclusive, we think, the ailment was innocuous.

We were confronted with an akin situation in the recent past in **Origenes Kasharo Uiso v. Jacqueline Chiza Ndirachuza**, Civil Appeal No. 259 of 2017 (unreported). In that case, we grappled with a sister provision in civil proceedings; the provisions of Order XVIII rule 10 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. There, like

here, a party asked us to nullify proceedings for failure by the successor Judges to assign reasons why they took over. We observed:

> *"... with the advent of the overriding objective injected into the AJA by section 4 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018, the Court is required to see to it that matters to which the AJA applies are decided on their merits regard being had to the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of all matters governed by it."*

Having observed as above, we dismissed the prayer and ordered the appeal to proceed to hearing on its merits.

We are bound by the position we took in **Origenes Kasharo Uiso** (supra), we think the appellants were not prejudiced with the successor Judge's failure to assign reasons why she presided over the case in place of the predecessor Judge. If anything, that ailment was innocuous. The authorities referred to by the learned counsel for the parties and a lot others falling in the same basket were good law at the time they were rendered, however, now that the overriding objective (also referred to as

the oxygen principle) is in place, the same have been overtaken by events. Now, unlike then, the relevant question to ask oneself in such an eventuality is whether or not the omission prejudiced the parties or anyone of them. This complaint is therefore without merit.

Next for consideration is the complaint over the admissibility of the cautioned statements, extra judicial statement and oral confession and the general ground that the prosecution failed to prove the case against the appellants beyond reasonable doubts. We will start with the complaint over the cautioned statements.

The statements under discussion are those made by the first and third appellants. It is not in dispute that the statements were made outside the four hours prescribed by section 50 (1) of the CPA. The advocates for the appellants are of the view that the ailment was fatal. The learned senior state attorney is of the view that in respect of the cautioned statement for the third appellant section 50 (1) of the CPA were not violated while it was violated in respect of first appellant and the learned senior state attorney had no qualms if the same; the cautioned statement of the first appellant, was expunged. We must confess that this

issue has taxed our minds greatly. Having considered the peculiar facts of this case, we find ourselves disinclined to agree with the learned senior state attorney on his conclusion with regard to the cautioned statement of the first appellant. We shall demonstrate.

Regarding noncompliance with section 50 (1) of the CPA in respect of the third appellant which we propose to deal with first, we are in agreement with the learned senior state attorney that investigation was going on which led to discovery of implicating evidence against the appellants. That investigation involved PW4 going to Ukerewe and Nzega in search for Mussa Mpina and Paulo. PW4 testified that she wrote the statement of the third appellant immediately after completing investigation on 19.10.2009. That period falls within the exception referred to in section 50 (2) of the CPA. Let the subsection speak for itself:

> *"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 any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to*

do any act connected with the investigation of the offence ..."

For the avoidance of doubt, our reading and interpretation of the subsection does not go along with the interpretation subjected to it by the advocates for the appellants; that extension ought to have been sought and obtained. We are of the considered view that time used in investigation in this case in respect of the third appellant falls within the scope and purview of section 50 (2) of the CPA. No extension was required to be sought and obtained.

Regarding the cautioned statement in respect of the first appellant, we have already shown our disinclination to agree with the learned senior state attorney. Admittedly, the cautioned statement might have been taken in contravention of the law; in this case section 50 (1) of the CPA and no extension was sought and obtained. However, we think, as the confession therein led to the discovery of important evidence which connected the appellants with the death of the deceased, the ailment can be overlooked. We find it apt at this juncture to associate ourselves with the decision of the High Court in **John Peter Shayo and 2 others v. R.** [1998] TLR 198 wherein the court held:

"(i) Confessions that are otherwise inadmissible are allowed to be given in evidence under s.31 of the Evidence Act 1967 ***if, and only if, they lead to the discovery of material objects connected with the crime, the rational being that such discovery supplies a guarantee of the truth of that portion of the confession*** *which led to it;*

(ii) As a general rule, oral confessions of guilt are admissible though they are to be received with great caution, and ss. 27(1) and 31 of the Evidence Act 1967 contemplate such confessions;

(iii) While it is true that s.50 of the Criminal Procedure Act 1985 prescribes four hours as the basic period for interrogating a person under restraint, a process described in that Act rather euphemistically as interview, s.51 (c) permits extension of such interview for a period of 8 hours where circumstances reasonably demand it, and regard must also be had to the provisions of s. 50(2) by which certain periods are to be excluded from the computation of the basic period;

(iv) ***Even if there was any breach of the law in regard to interrogations, the fault would amount to a mere irregularity and the issue would be the weight to be attached to the statement rather than the admissibility of the document ...***"

[Emphasis supplied].

We think the foregoing position is the correct exposition of the law. We followed the position taken in **John Peter Shayo** (supra) in our decision in the case of **Tumaini Daud Ikera v. R.**, Criminal Appeal No. 158 of 2009 (unreported). We subscribe to the position taken by the High Court in **John Peter Shayo** and the position we took in **Tumaini Daud Ikera** (supra) – see also: **Hadija Salum and Another v. R.**, Criminal Appeal Nos. 11 and 32 of 1996, **Mboje Mawe & 3 Others v. R.**, Criminal Appeal No. 86 of 2010 **Mabala Masasi Mongwe v. R.**, Criminal Appeal No. 161 of 2010; all unreported decisions of the Court. On this stance, we also wish to associate ourselves with the position we took in **Nyerere Nyague v. R.**, Criminal Appeal No. 67 of 2010 (unreported). In that case, like in the present, the confession of the appellant was taken in contravention of section 50 (1) of the CPA. Having discussed at some

considerable length the import of section 169 of the CPA, the Court observed:

> *"It follows in our view therefore that the admission of evidence obtained in the alleged contravention of the CPA is in the absolute discretion of the trial court and that before admitting or rejecting such evidence, the parties must contest it, and the trial court must show that it took into account all the necessary matters into consideration and is satisfied that, if it admits it, it would be for the benefit of public interest and the accused's rights and freedom are not unduly prejudiced. In other words there must be a delicate balancing of the interests of the public and those of the accused. It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question. The decision of the trial court on such matters can only be faulted if it can be shown, that the admission or rejection of such evidence was objected to and that it did not properly exercise its judicial discretion, or at all, in rejecting or admitting it."*

[See also: **Chacha Jeremiah Murimi & 3 others v. R.**, Criminal Appeal No. 551 of 2015 (unreported)].

In the case at hand, it cannot be gainsaid that the cautioned statement of the first appellant, as rightly conceded by Mr. Marungu, was taken in contravention of section 50 (1) of the CPA. The trial court considered the first appellant's objection and after a trial within the trial ruled that it was admissible in evidence. In the light of **John Peter Shayo**, **Tumaini Daud Ikera** and **Nyerere Nyague** (both supra) and bearing in mind the public interest in this case, we do not think the contravention is such that it can lead to the exclusion of the confessions in the cautioned statements of the first and third appellants.

We now consider the extrajudicial statement of the first appellant. Mr. Magongo for the appellant is of the view that the first appellant was still under threat when he made the statement before Ainawe Asili Moshi; the justice of the peace who testified as PW3. With utmost respect, we agree with Mr. Magongo that indeed, the first appellant complained from the outset that he was tortured at the police. With equal utmost respect, we are unable to agree with him that before PW3, he was not a free agent.

A trial within the trial was conducted to verify if the statement was admissible at the end of which the trial court ruled that it was admissible and admitted it as Exh. P1. We find nowhere to fault the trial court on the admissibility of the extra judicial statement of the first appellant. We agree with the trial judge that Exh. P1 was voluntarily made before PW3 and rightly admitted in evidence.

We now advert to the oral confession. We start with the premise that an oral confession is as good as a written confession provided that it is voluntarily made. In **Patrick Sanga** (supra), the case referred to by Mr. Marungu, there arose a similar argument to the effect that an appellant was alleged to have orally confessed to have raped the victim without providing any document in proof of the confession. In answer to the argument, we observed at p. 7 of the typed judgment:

> *"Under section 3 (1) (a), (b), (c) and (d) of the Evidence Act, Cap. 6, a confession to a crime may be oral; written, by conduct, and/or a combination of all of these or some of these. In short, a confession need not be in writing and can be made to anybody provided it is voluntarily made".*

In **Patrick Sanga** (supra), like in the present case, the appellant did not claim to have been forced to make the confession. The appellant only repudiates it. The repudiation will stand or fall depending on the credibility of the witnesses. We find PW4, PW5, PW6, PW8, and PW12 as credible witnesses. The first appellant volunteered, on his own volition, to give such oral confession. We dismiss the first appellant's complaint to this effect.

As if to clinch the matter, it is in evidence that the first appellant orally confessed before a multitude of people at which PW4, PW5, PW6, PW8, and PW12 were present. Among those present, PW8 was among many civilians, the rest mentioned above were policemen. We interpose here to state that PW10, unlike what Mr. Marungu told us, was not present when the first appellant confessed. PW10 is from the Zonal Office of the Government Chemist who works there as a chemist and who transmitted the samples to the Government Chemist in Dar es Salaam. It is out of this confession which led to the discovery of the items at Kishiri Hills. These items included two palms and a human flesh which later DNA technology revealed that they were from the body of the deceased. As good luck would have it, this situation is not a virgin territory. We were confronted

with an akin situation in **Posolo Wilson @ Mwalyego v. R.**, Criminal Appeal No. 613 of 2015 (unreported). In that case, we relied on our previous decisions in **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] TLR 82 and **Mohamed Manguku v. R.**, Criminal Appeal No. 194 of 2004 (unreported) to observe:

> *"... 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".*

We are bound by the above position. We are alive to the caution we made in **Mohamed Manguku** (supra) to the effect that such oral confession would be valid as long as the suspect was a free agent when he so orally confessed. In the case at hand, the first appellant volunteered, on his own free will, to give such oral confession having realized that there was nothing to hide as the cat had been let out of the bag. We are certain that the first appellant was but a free agent when he made the oral confession before a multitude of people; policemen and civilians alike. We have failed to go along with Mr. Magongo on the assertion that the provisions of section 58 of the CPA ought to have been followed

immediately when the first appellant started to confess or that, alternatively, the persons in authority ought to have left the scene to give room to the first appellant to orally confess before civilians. We pause here to think and ask ourselves if this was practically possible. We have serious doubts. We are of the view that this oral confession of the first appellant was rightly given and rightly relied upon by the trial court to convict the appellants.

We now turn to the last issue; whether the case was proved against the appellants beyond reasonable doubt. We will discuss this issue in respect of each appellant.

We start with the first appellant. The evidence which implicates him is the oral confession, his cautioned statement, his extra judicial statement, the DNA Report, his poem and the cautioned statement of the third appellant. In all these the first appellant is implicated to the hilt. He confessed before a multitude of people how he killed the deceased with the help of two others; Mussa Mpina and a certain Mwanamalundi. His confession led to the discovery of some items; the palm and human flesh which the DNA profile unveiled to be from the body of the deceased. The

same story is narrated in his cautioned statement and the extra judicial statement as well as connecting episode in the cautioned statement of he third appellant all of which we have observed above to be rightly admitted in evidence.

As if the foregoing is not enough, the first appellant implicates himself in a poem he composed and asked PW12 a paper on which he could scribble on 05.07.2009. The poem (Exh. P11) rhymes in part:

"UBETI WA KWANZA

Utajili wa alaka uliniponza (Mungu wangu) (Mungu wangu)
Nikafanya jambo mbele zako bila kufikili (Mungu wangu) (Mungu wangu)
Nilimuua lafiki yangu kipenzi (Jescer) (ooo) (Jescer)
Zote hizo ni anasa za dunia zilizoniponza kumuua (Jescer)
Ninatubu mbele zenu enyi wazazi wake (mnisamehe)
Ninatubu Mbele zako ewe mwenyezi mungu (unisamehe) X 2
Shetani kaniingia

Ndugu wamenichukia

Polisi wamenishikilia

Na Jescer ananililia"

That poem was not seriously challenged at the trial and nothing much was said of it at the hearing of the appeal before us. We are of the considered view that given the evidence above, the case against the first appellant was proved beyond reasonable doubt.

With regard to the second appellant, the evidence which implicates him in the commission of the offence is that of the first and third appellants as well as the DNA Report. The first appellant orally confessed that he strangled the deceased with the help of Mussa Mpina; a witchdoctor and one Mwanamalundi. In the cautioned statement the first appellant state that the plan to kill the deceased was hatched by others including Yohana Maduka @ Mwanamarundi @ Mjeshi. Likewise, the third appellant implicates him in her cautioned statement in which she referred to him as Baba Limbu Ng'wanamalundi. We have considered this evidence against the second appellant. Despite the somewhat variance of names – Mwanamalundi in the oral confession of the first appellant and Yohana Maduka @ Mwanamarundi @ Mjeshi in the cautioned statement of the first

appellant as well as Baba Limbu Ng'wanamalundi in the cautioned statement of the third appellant, we have no scintilla of doubt that all the names refer to none other than Yohana Maduka Kabadi @ Mwanamarundi mentioned in the information; the second appellant herein. We therefore have failed to go along with Mr. Rutahindurwa's averment to the effect that the second appellant is not mentioned anywhere in the confessions.

The evidence referred to in the preceding paragraph; of the first and third appellants, who are accomplices, is corroborated by the DNA Report Exh. P13 (c) which shows the buccal swab of the second appellant was related to the white cloth and the bones. The report goes on to show that the impossibility of the buccal swab of the second appellant in relation to the white cloth and the bones diagnosed by DNA technology to be from the body of the deceased, was one to a billion. With this evidence we are satisfied that the prosecution proved the case against the second appellant beyond reasonable doubt.

We now turn to the case against the third appellant. This is implicated by the first appellant in his cautioned statement and the extra judicial statement. The third appellant also shows her participation in the

crime in her own cautioned statement. She narrated well how they planned the killing with Baba Limbu Ng'wanamalundi and Melkiad. That Mussa Mpina brought her bones to keep and that she was told that they had killed Jessica of Shamaliwa Igoma who was a person with albinism and a girlfriend of the first appellant. Mussa Mpina even narrated to her where and how they killed her. She took the bones and hid them in a nearby sisal plantation. On 19.10.2009 she, together with Issa Buziba who was the fourth accused at the trial but passed away before witnesses testified, went to show the police where it was hidden in the sisal plantation. On the extra judicial statement of the first appellant, the cautioned statement of the first appellant, her cautioned statement, we are of the view that the prosecution case also proved the case against the third appellant beyond reasonable doubt.

The above said, on the strength of the cautioned statement of the first appellant, the extra judicial statement of the first appellant, the oral confession of the first appellant, the cautioned statement of the third appellant and the DNA Report as well as the poem which was not challenged at all on appeal, we are of the view that the prosecution case proved the case against all the appellants beyond reasonable doubt.

In the upshot, we find no basis upon which to fault the decision of High Court to convict the three appellants as charged. The sentence meted out to the appellants is the only one provided by the law. This appeal is without merit. It is hereby dismissed entirely.

Order accordingly.

DATED at **DAR ES SALAAM** this 2nd day of May, 2019.

M. S. MBAROUK
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

O.H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL