IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., MKUYE, J.A., AND KITUSI, J.A.)

CRIMINAL APPEAL NO. 176 OF 2017

GEOFREY SICHIZYA.. APPELLANT

VERSUS

D.P.P .... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Mbeya]

(Ngwala, J)

Dated on 30th day of October, 2017
in
Criminal Sessions Case No.27 of 2015

....

JUDGMENT OF THE COURT

17th & 30th March, 2020.

MKUYE, J.A.:

The appellant Geofrey Sichizya, was charged and convicted of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R. E. 2002 by the High Court of Tanzania sitting at Mbeya (Ngwala, J.) and was sentenced to death by hanging. It was alleged that the appellant on the 19th day of November, 2012 at Sakamwela Village within Mbozi District, Mbeya Region, did murder one Labson Sichizya.

The brief facts leading to this appeal are that:

The accused and the deceased lived in the same village of Sekamwela. On 19th day of November, 2012 morning the appellant went to the house of the deceased who was his paternal grandfather. He found him alone as his grandmother was not there. It would appear that when he realized that the deceased was alone, he took that opportunity to strangle him to death and tie a rope made of mosquito net on his (the deceased's) neck. Meanwhile, Measi Rabson Sichizya (PW1) who was working in the shamba heard some noises coming from his homestead. He rushed to find out as to what happened and it is then that the appellant's wife informed him that the appellant had killed his grandfather and that she had locked him inside their house.

Thereafter, PW1 called his children Mashaka Sichizya and Sikitu Sichizya who came and tied the appellant with ropes. PW1 then went to verify whether the deceased was really dead and he, indeed, found him lying dead outside, near the door of his kitchen. The incident was reported to the village Chairman (PW2) who then informed the police. Later on, the Police arrived at the scene of crime with a doctor who examined the deceased's body whereby it was revealed that the deceased's death was due to asphyixia (suffocation). Thereafter the family members were allowed to

proceed with their burial arrangements. Eventually, the appellant was arrested by the police.

Upon interrogating the appellant, he admitted killing the deceased after being instructed by his paternal uncle, one, Adamu Sichizya to do so. The said Adamu was also arrested at the scene of crime in connection with the same offence. However, he was later released on a *nolle prosequi* entered by the Director of Public Prosecutions. Meanwhile the appellant recorded his caution statement to F.4112 Cpl. Abdulkarim (PW4) and was later taken to the justice of peace Aidan Sebastian Mnyokanyoka (PW3) where his extra judicial statement was recorded. The extra judicial statement was tendered and admitted as Exh P3 and the caution statement was admitted as Exh P4. The prosecution fielded five witnesses to prove its case whereas on the defence side only the appellant testified. At the end of the trial, the appellant was found guilty, convicted and sentenced as we have alluded to earlier on.

Aggrieved by both the conviction and sentence, the appellant has come to this Court on appeal. He initially lodged a memorandum of appeal comprising six (6) grounds of appeal of which at the hearing, the learned counsel for the appellant consolidated grounds number 1,2,3,4 and 6

together and split ground No.5 into two grounds thereby forming three grounds of appeal as hereunder:

1) *That, the prosecution failed to prove the offence against the appellant beyond reasonable doubt.*
2) *That, the High Court wrongly relied on the repudiated or retracted caution statement of the appellant.*
3) *That, the High Court wrongly relied on the extra judicial statement which was repudiated/retracted.*

When the appeal was called on for hearing, the appellant was represented by Mr. Kamru Habibu, learned advocate; whereas the respondent/DPP had the services of Ms. Zena James, learned State Attorney.

Submitting in support of the 1st ground of appeal that the case was not proved beyond reasonable doubt, Mr. Habibu contended that, **one,** the trial court relied on uncorroborated confessions and that it did not satisfy itself whether they contained nothing but the truth. **Two,** the prosecutions' evidence relating to the appellant's arrest was contradictory in material particulars in that, while PW1 testified that he was told by the appellant's

wife that she locked the appellant inside the house after telling her that he had killed the deceased; PW2 said he found the appellant locked inside the house. Yet, the appellant in his caution statement said he was arrested by his brothers Mashaka Sichizya, Sikitu Sichizya and his mother Fidiness Msongole; while in his extra judicial statement said he was arrested by his father who tied him with ropes. **Three,** the appellant's wife and his brothers were not brought to testify in court, while she was the one who told PW1 that she was informed by the appellant that he had killed the deceased; and the said brothers tied him with ropes. He was of the view that failure to call these witnesses had adverse effect on the case for the prosecution.

With regard to the 2nd ground of appeal relating to repudiated and retracted confession (caution statement), the learned advocate argued that though the trial judge directed herself properly on the possibility of mounting conviction on the basis of a repudiated or retracted confession without corroboration, she did not warn herself on the danger of convicting on such uncorroborated retracted or repudiated confession. It was his view that the trial judge ought to have evaluate the said confession to satisfy herself that the same contained nothing but the truth.

On prompting by the Court whether PW1 and PW2 evidence did not offer corroboration, he was adamant that it could not do so since their evidence was hearsay evidence.

In relation to the complaint relating to the extra judicial statement, the learned counsel attacked the trial judge in relying on it while it was recorded in contravention of the law. He said in taking the extra judicial statement, the Justice of the Peace did not comply with the Guide for Justices of the Peace. In particular, he pointed out that, PW3 who recorded the appellant's extra judicial statement did not comply with paragraphs (v) and (vi) of the Guide (paragraphs 5 and 8 (iii) of the extra judicial statement). To emphasize the compliance of the Guide, he referred us to the cases of **Petro Teophan v. Republic,** Criminal Appeal No.58 of 2002; and **Japhet Thadei Msigwa v. Republic,** Criminal Appeal No.367 of 2008 (both unreported) in which the Court stressed the need to comply with it to the letter. For failure to comply with such Guide, he prayed to this Court to expunge the extra judicial statement.

In the end, Mr Habibu urged the Court to find that the prosecution failed to prove the case against the appellant beyond reasonable doubt and

we should allow the appeal, quash the conviction, set aside the sentence and release the appellant forthwith unless held for other lawful reason(s).

In reply, Ms. James, in the first place, declared her stance that she does not support the appeal and she opted to argue the appeal generally. She said, the offence against the appellant was proved by circumstantial evidence as there was none who saw when the offence was committed. She argued that, **one,** there was evidence of PW1 that the appellant confessed orally to his wife that he killed the deceased. **Two**, the appellant confessed to PW2 that he had done so under instructions from his uncle Adamu Sichizya. **Three**, the appellant also confessed to PW4 to have killed the deceased. While citing the case of **Ndalahwa Shilanga and Another v. Republic** Criminal Appeal No.247 of 2008 (unreported), she argued that oral confessions are admissible in certain circumstances. Again, while relying on the case of **Paulo Maduka and others v. Republic, Criminal Appeal No.110 of 2007** and **Selemani Hassan v. Republic**, Criminal Appeal No. 364 of 2008 (both unreported), she urged the Court to find that the appellant's confession particularly to PW2 and PW4 was sufficient to mount a conviction against the appellant.

With regard to the complaint against reliance on the caution statement, Ms. James argued that, that was not the only evidence relied upon by the trial judge. She also relied on the extra judicial statement as shown at pages 65-66 of the record of appeal together with the evidence of PW1 and PW2. In that regard, she argued that the case of **Hemed Abdallah v. Republic,** [1995] TLR 172, cited by her learned friend was distinguishable as unlike in that case in this case the caution statement was corroborated by the evidence of PW1 and PW2.

As to the admissibility of the extra judicial Statement, she initially contended that it was properly admitted. However, on prompting by the Court, she, on reflection admitted that items (v) requiring the suspect to admit to give his statement on his own free will; and item (vi) requiring the Justice of Peace to inform the suspect that the statement will be used against him, were not complied with. With such shortcomings she advised the Court to expunge it from the record of appeal. Nevertheless, she was quick to add that even if the extra judicial statement is expunged, still the evidence of PW1, PW2, PW4 and the caution statement is sufficient to sustain the conviction.

As to why the appellants' wife and brothers were not called to testify in Court, she relied on section 143 of the Evidence Act, Cap 6 R.E. 2002 in that it does not require a specific number of witnesses to prove a fact. She said, what was required was the quality of evidence, and credibility of witnesses. At any rate, she added, the appellants' wife was a mere competent but not a compellable witness.

On the complaint that the prosecution evidence relating to the appellants' arrest was contradictory, the learned State Attorney argued that though there may be discrepancies on the evidence on the appellant's arrest, such contradictions are minor as they do not go the root of the matter. What is important is that the appellant was arrested. She rested her case by urging the Court to find the appeal unmerited and dismiss it in its entirety.

In rejoinder, Mr. Habibu stressed that the trial judge relied on oral confession without taking extra care on PW2's evidence as per the case of **Ndalahwa Shilanga** (*supra*).

Having examined and considered the arguments from either side, we think, the burning issue for the Court's determination is whether the prosecution proved its case beyond reasonable doubt.

There is no doubt that the prosecution relied on circumstantial evidence as there was nobody who witnessed when the offence was committed. In convicting the appellant the trial court relied on the oral confessions by the appellant to PW1 and PW2, caution statement and extra judicial statement.

The appellant's complaint is that the oral confession by appellant to PW1 was not reliable since his evidence was a mere hearsay evidence told to him by appellant's wife. The learned state attorney insisted that the appellant confessed to him (PW1).

In the case of **Posolo Wilson @ Mwalyego** (*supra*) the Court gave guidance as to when oral confession can be reliable. In that case the Court stated as follows:

> *"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. See for example* ***Director of Public Prosecutions v. Nuru Mohamed*** *(1988) TLR 82."*

Also in **Ndalahwa Shilanga's** case (*supra*), it was stressed that the oral admissions or confessions are admissible in certain circumstances if extreme care is taken before taking them on their face value. It is also

important to note that such oral confession would be valid if at the time when the suspect stated such words /or made such confession imputed to him, he was a free agent. (See **Martin Manguku v. Republic,** Criminal Appeal No.194 of 2004 (unreported).

In this case, according to PW1 the appellant confessed to his wife to have killed the deceased. PW1 said, he just rushed to his home to see what was happening after hearing noises coming from that side. When he arrived at his home, he found the appellant's wife crying and on asking her she told him that the appellant informed her that he had killed his grandfather, the deceased. From PW1's evidence it is clear that the appellant did not confess directly to him. He confessed to his wife who later conveyed the massage to PW1. In this regard, we agree with Mr. Habibu that the alleged oral confession to PW1 cannot be valid due to the fact that it was not made directly to him. Worse enough, the wife of the appellant did not testify in court. It was a hearsay evidence.

As to PW2, his testimony was that on 19/11/2012 at about 8:00 am he was informed by the VEO that Labson Sichizya was killed. He rushed to the scene of crime and found that indeed, Sichizya was dead and his body was lying on the floor near the door to his kitchen while the appellant was

tied with ropes and locked in the house. PW2 said the appellant told him that it is him who killed his grandfather *"...ni mimi niliyemuua babu..."* and that he was sent by his uncle Adamu Sichizya to do so. This evidence was not materially controverted by the appellant. Neither was there any evidence that at the time the appellant gave the admission he was not a free agent. To the contrary we find that he made such statement while his mind was still fresh to the incident and it was made to a reliable witness whose credibility cannot be questioned.

If we may add, there was evidence of PW4, Insp. Lameck Chimika who visited the scene of crime after being assigned by his boss. On reaching at the scene of crime, he did among other things, see the appellant who was by then locked inside the house. PW4 said, on asking him he said he was the one who had done so and mentioned another suspect by the name of Adamu whereupon they looked for the said Adamu and arrested him.

Much as PW4 also recorded the appellant's caution statement which was admitted after a trial within trial had been conducted, the appellant did not challenge the witness on this evidence.

After having examined the said oral confessions made to PW2 and PW4 it is our finding that they were valid confessions as it was stated in

Martin Manguku's case (*supra*). We, thus, agree with the learned state attorney that the trial judge properly relied on the oral confessions.

That notwithstanding, there was also the evidence of the caution statement (Exh. P2) in which the appellant confessed to have killed the deceased. In the said caution statement, the appellant stated as follows:-

> *"... tulikubaliana na baba mdogo Adamu Sichizya kuwa mimi nimuue halafu atanipa nauli niondoke ndipo nilikwenda kwa babu nilimkuta akiwa peke yake bibi hakuwepo ndipo nilimkuta pale nje nilimkamata nikamkaba shingo nilimwangusha chini hakupiga kelele nilipoona amekwisha kufa..."*

Though the caution statement was initially, objected to be tendered in the trial court, it was admitted after trial within trial had been conducted. It was however, the appellant's concern that it was unsafe to rely on it as it was retracted.

We are aware that in the case of **Hemed Abdallah** (*supra*) it was held that:

> *"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court after full*

consideration of the circumstances, is satisfied that the confession must be true; and that once the trial court warns itself of the danger of basing a conviction on uncorroborated retracted confession and having regard to all the circumstances of the case it is satisfied that the confession is true, it may convict on such evidence without any further ado." (See also **Bombo Tomola v. Republic,** [1980] TLR 254).

However, in this case, we agree with Ms. James that the trial judge did not rely on the caution statement alone but she also relied on the evidence of PW2 and PW4 which we have found to be reliable. So the above cited cases are distinguishable to the circumstances of this case.

As regards the complaint relating to the reliability of the extra judicial statement, both learned counsel are at one that it was taken in contravention of the Guide to Justices of Peace particularly in recording the same.

The importance of compliance of the said Guide was reiterated in the case of **Japhet Thadei Msigwa** (*supra*) where the Court stated as follows:-

"...when Justices of the Peace are recording confessions of persons in the custody of the police,

they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms. Before the Justice of peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed."

In the same case the Court went on to state that:-

> *"The Justice of Peace ought to observe, interlia, 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 bought to him.*
>
> *(iv) Whether any person by threat or promise or violence has persuaded him to give the statement.*
>
> ***(v) Whether he really wishes to make the statement on his own free will.***
>
> ***(vi) That if he makes a statement, the same may be used as evidence against him."*** –
>
> (See also **Petro Teophan's** case (*supra*)
>
> [Emphasis added]

Compliance with the above conditions is crucial to enable the Court ascertain if the suspect was willing at the time of making his confession and

knew the implications of his making the statement or not, and to enable the Court know the circumstances which prevailed at the time the statement was taken and be in a position to determine if the said statement was made voluntarily or not. If the criteria is not observed it may lead to a finding that the same was not voluntarily made and hence inadmissible.

In this case, two conditions as was rightly observed by both learned counsel, were conspicuously not complied with. In paragraph 5 of the extra judicial statement under discussion (which relates to item (v) of the Guide), the Justice of Peace indicated that:-

> *"Mshtakiwa ameelezwa kuwa yupo mbele ya Mlinzi wa Amani na* ***ameelezwa kama anataka kutoa maelezo.*** *Mshtakiwa anajibu "ndio nipo* ***tayari kutoa maelezo."***

[Emphasis added]

In relation to paragraph 8 (iii) of the same extra judicial statement (which relates to item (vi) of the Guide), the Justice of Peace recorded as follows:-

> *"8 (iii) Je umefahamu kuwa ukitoa maelezo yataandikwa na yanaweza kutumiwa kama ushahidi*

baadaye wakati wa kusikilizwa shauri lako? Jibu, Ndiyo."

Applying the conditions set out in **Japhet Thadei Msingwa's** case (*supra*), we agree with both counsel that PW3 failed to comply with the Chief Justice's Guide for Justices or Peace. In paragraph 5 of extra judicial statement Form, he did not show that the appellant wished to make his statement **on his own free will.** As it is, he just asked the appellant if he wanted to give his statement and he replied that he was ready to give his statement. He did not go further to state that he wanted to do so on his own free will.

As regards the requirement under paragraph 8 (iii) of informing the suspect that the statement to be taken may be used as evidence against him, PW3 did not inform him as such but he asked him if he knew that it will be used in evidence and the appellant answered "yes".

This, in our view, was not proper. It cannot be said that the appellant really confessed the commission of the offence voluntarily or rather on his own free will and that he understood the consequences of the statement he was about to make to PW3 that it may be used as evidence against him. Failure to comply with the Guide for Justices of Peace was, in our considered

view, fatal with a consequence of rendering the said statement being inadmissible in evidence. We thus expunge it from the record.

As regards the complaint against the contradictory evidence relating to the appellant's arrest, it is true that PW1 said he found the appellant locked in the house by his (appellant's) wife. What he did was to call Mashaka and Sikitu who came and tied his hands with ropes. PW2 testified that he found him already arrested. In his caution statement, the appellant stated that he was arrested by his brothers, Mashaka Sichizya, Sikitu Sichizya and his mother Fidiness Msongole. It is our view that, though their evidence may seem to be contradictory, it may be due to the personal capacity to comprehend things or the time within which each witness arrived at the scene of crime. We say so, because, the record does not show that PW1 and PW2 arrived at the scene of crime simultaneously (at the same time). It clearly shows that each arrived at the scene of crime alone.

But again, PW1 and the appellant seem to account a similar story about the appellant being arrested by Mashaka and Sikitu though PW1 does not mention the appellant's mother and appellant does not mention his wife to have locked him inside the house. However, be it as it may be, even if there are such contradictions, we agree with the learned State Attorney that

they do not go to the root of the matter that the appellant killed the deceased. At any rate, such contradictions were not raised in the trial Court. (See **Dickson Elia Msamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 CAT; **Lusungu Duwe v. Republic**, Criminal Appeal No. 76 of 2013; and **Emmanuel Josephat v. Republic**, Criminal Appeal No. 323 of 2016 (all unreported).

As to the failure to call the appellant's wife who would have cleared the dust on the issue of the appellant's arrest, we agree with the learned State Attorney that according to section 143 of Evidence Act there is no specific number of witnesses required to prove a fact. What is required is the quality of evidence and the credibility of witnesses. (See **Yohanis Msigwa v. Republic,** [1990] TLR 148; and **Hassan Juma Kanenyera v. Republic,** [1992] TLR 100). We also take note that the appellant's wife was a competent witness to testify against her husband but not a compellable witness as such she could as well refuse to cooperate. All in all, it is our considered view that the available witnesses sufficiently proved that the appellant was arrested for the offence of murder he stood charged with.

When the whole evidence is taken in its totality, we agree with the learned State Attorney that the case against the appellant was proved

beyond reasonable doubt. For that reason, we find the appeal devoid of merit. We, thus, dismiss it in its entirety.

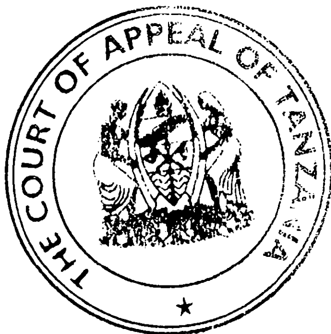
DATED at **MBEYA** this 28th day of March, 2020.

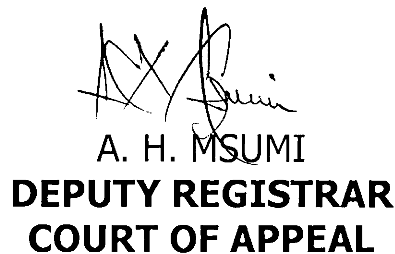
S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 30th day of March, 2020 in the presence of Mr. Kamru Habibu, learned counsel for the Appellant and Ms. Prosista Paul Minja, learned State Attorney for the Respondent is hereby certified as a true copy of the original.





A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL