IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 399 OF 2018

GODY S/O KATENDE @ GODFREY KATENDE..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Shangali, J.)

dated the 1st day of August, 2018
in
Criminal Session No. 36 of 2014
.....

JUDGMENT OF THE COURT

11th & 17th August, 2020.

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE: 2002. It was alleged by the prosecution that on 13/4/2011 at Hagafilo Village, within the District and Region of Njombe, the appellant did murder one Dainess d/o Katende a six-months old baby.

The appellant did not plead guilty and subsequently, in order to prove its case, the prosecution lined up eight prosecution witnesses and

tendered four documentary exhibits namely: The report on post mortem examination Exhibit P1; extra judicial and cautioned statements of the appellant Exhibits P2 and P3 respectively, and the sketch map of the scene of crime Exhibit P4.

A brief account of what led to the conviction of the appellant is as follows: the deceased was conceived and born following a marital relationship between the appellant and Zena Sagala who testified as PW2. Prior to the said relationship, PW2 had already given birth two children namely, **NURU** and **GODPHREY**. During the subsistence of the said marital relationship the couple stayed apart since PW2 continued to reside at her parent's house until on 12/4/2011 when she joined the appellant at his homestead. Also the two children were taken to the appellant's homestead by their uncle one Jackson Sigala. The presence of the two children seemed not to go along with the appellant and a misunderstanding cropped up with PW2. Then as the appellant opted to remain with the deceased he ordered PW2 to go back to her parents. PW2 reported the matter to the village authorities and upon being adviced, she sent the two children back to her parents and returned to the appellant's homestead where she found the deceased and the appellant not there.

PW2 had to spend the night at the residence of the ten cell leader one Ms. Msemwa.

On the following day, accompanied by the ten cell leader PW2 went at the appellant's homestead and they found him cleaning the surroundings. When probed on the whereabouts of the deceased he replied to have taken her to his sister at Ilembula. When asked to bring back the deceased, the appellant responded that procedures must be followed through the village chairman and the police. The ten cell leader gave the appellant an ultimatum of one day to bring back the deceased which was not heeded to and PW2 had to inform her parents on the missing child while the Village Executive Officer ordered the arrest of the appellant. Upon interrogation the appellant repeated his earlier story that the deceased was in Ilembula with her sister. Thereafter, PW2 accompanied by one militiaman Avachi and Rose Sagala went to Illembula but could not trace the deceased or the appellant's sister and they returned back to Uwemba.

On 18/4/2011, PW2, a militia, the appellant and Jackson Sagala went to Ilembula, at the residence of the appellant's younger brother. This time the appellant had a new story that the deceased was with his sister

who had gone to Dar es salaam. Then, the appellant refused to return back to Njombe and the matter was to be reported to Njombe police station whereby PW2 and the appellant were arrested and held for one week at the police station for investigation. While at the police, the appellant was interrogated by D/SGT Mwanaidi (PW8) and he confessed to have killed the deceased and thrown the body into Hagafilo river. According to PW5 and PW7, a similar account on what had befallen the deceased was narrated to them by the appellant subsequent to which a mounted search enabled the recovery of the deceased's body in Hagafilo river.

According to the testimony of PW3, PW5 and PW7 the attire worn by the deceased facilitated the identification of her body by PW3 and the autopsy revealed the cause of death to be strangulation. Since the body was decomposed, relatives were directed to bury it along the river bank. PW8 recalled to have drawn a sketch map of the scene of crime which was tendered at the trial and admitted as exhibit P4. The appellant as well, made an extra judicial statement before PW4 one Daruweshi Mpwerea the Justice of peace and confessed to have killed the deceased.

In his defence, the appellant denied to have killed the deceased asserting that, it is PW2 who left from their residence together with all the

children including the deceased. He claimed to have been arrested on 16/4/2011 and refuted to have made any confession on the killing incident.

After a full trial, the judge summed up the case to the assessors who all returned a unanimous verdict of guilty. The verdict of the learned trial judge at page 196 of the record is as follows:-

> *"The available direct and circumstantial prosecution evidence in this case is overwhelming and credible. The accused person, being the last person to be seen or left with the deceased child and later the body of the child being discovered and fetched from the Hagafilo river within his area means that it is the accused person who killed the child."*

Ultimately the appellant was convicted and sentenced to suffer death by hanging.

Aggrieved, the appellant has appealed to the Court challenging the decision of the trial court. Eight grounds raised by the appellant himself were abandoned and instead, through the learned counsel the appellant

raised only two grounds in the substituted memorandum of appeal as follows:-

1. That, the trial court erred in law and fact in admitting and or acting upon exhibits P1- Report on Post-Mortem Examination, P2 – Extra Judicial Statement, P3- Cautioned statement and P4- Sketch Map in convicting the appellant with the offence of murder.
2. That, from the evidence on record, the trial court erred in law and fact in convicting the appellant while the case was not proved beyond reasonable doubt.

The hearing was conducted, vide a virtual link with Ruanda Central Prison where the appellant is a prison inmate and was represented by Mr. Jally Willy Mongo, learned counsel whereas the respondent Republic had the services of Ms. Pienzia Nichombe, learned State Attorney.

In addressing the first ground of appeal, it was submitted that, although during the preliminary hearing the autopsy report and the sketch map were admitted as exhibits P1 and P4 respectively, they were not read out to the appellant and as such, were wrongly acted upon to convict the appellant. In view of the said infraction, he urged us to expunge exhibits P1 and P4 from the record. The learned counsel also faulted the extra

judicial statement to have contravened the Chief Justice's Guide to Justices of the Peace in recording the extra judicial statements. The attack was basically on two fronts that the statement was not voluntarily made by the appellant who was also not informed if that statement would be used as evidence against him at the trial. On this account the appellant's counsel urged us to expunge the extra judicial statement having relied on the case of **GEOFREY SICHIZYA VS DPP,** Criminal Appeal No. 176 of 2017 (unreported).

The appellant's counsel also attacked the cautioned statement of the appellant pointing out that while the appellant was arrested on 16/4/2011, the statement was recorded on 20/4/2011 which is beyond the prescribed four hours and that the statement was not read out to the appellant before he appended a signature. He argued this to contravene the provisions of sections 50 (1) (a) and 57 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA) which renders the cautioned statement involuntary and urged us to expunge it from the record. To support the propositions, he referred us to the case of **ALPHONCE MWALYAMA AND 2 OTHERS VS REPUBLIC,** Criminal Appeal No. 37 of 2004 (unreported).

In the second ground of appeal, the learned counsel faulted the prosecution account contending that it fell short of proving that it is the appellant who terminated the deceased's life. On this, he argued that, failure by the prosecution to parade material witnesses such as, Peter Mgaya and Ms. Msemwa to whom PW2 registered the complaint on the appellant having taken away the deceased, poked holes in the prosecution case and renders PW2's account not corroborated. On this account, Mr. Mongo urged us to draw an inference adverse to the prosecution. He added that a similar fate befalls the prosecution case having not paraded members of the village authorities who were material witnesses as they were involved in the recovery of deceased's body from the river.

The manner of identification of the deceased's body after being recovered was also faulted on two fronts: **One,** PW3 who claimed to have identified the deceased made a description of the deceased's attire during cross-examination which was an aforethought instead of doing so during the examination in chief. He urged us to disregard such evidence. **Two,** the deceased's clothes were not exhibited in the evidence as exhibits which cast a doubt on the prosecution case if at all the deceased's body was recovered. The appellant's counsel also invited the Court to reconsider the

trial evidence and arrive at its own conclusion because the appellant's conviction was mainly based on the prosecution witnesses who were from the same family. Thus, Mr. Mongo urged us to allow the appeal and set the appellant free.

On the other hand, Ms. Nichombe vigorously resisted the appeal apart from conceding on the omission surrounding the autopsy report and the sketch map of the scene of crime, she added that section 293 of the CPA was contravened because the appellant was not addressed on the right to have summoned the Doctor who prepared the autopsy so that he could be cross-examined. He thus supported the course taken by the appellant's counsel that the two exhibits were wrongly acted upon to convict the appellant and deserve to be expunged. However, she argued that, the other remaining evidence is sufficient to establish death of the deceased and that her body was recovered from the river and it was properly identified. To back up the propositions, she cited the case of **HAMIS JUMA CHAUPEPO @ CHAU VS REPUBLIC,** Criminal Appeal No. 95 of 2018 (unreported).

As for the extra judicial statement she argued that it was voluntarily made by the appellant having been recorded in accordance with the Chief

Justice's Guide to the Justices of the Peace. Pertaining to the cautioned statement, though she conceded that it was recorded beyond the four basic hours, she was quick to point out that the delay was occasioned by the long investigative process which was occasioned by the appellant's initial refusal to record and his stance on different stories on the whereabouts of the deceased forcing a follow up twice from Njombe to Ilembula. Moreover, she asserted that section 57 (3) of the CPA was not contravened because the appellant is on record to have acknowledged the making of the cautioned statement. In this regard, she urged us not to expunge the cautioned and extra judicial statements on account of being made in accordance with the law.

She further contended that, the credible prosecution evidence on the record justified the conviction of the appellant considering that, the confession contained in the cautioned statement led to the discovery of the deceased's body in Hagafilo river coupled with the circumstantial evidence on the killing of the deceased which points to the guilt of the appellant being the last person seen with the deceased before her death. She thus urged us to dismiss the appeal in its entirety.

Having carefully considered the grounds of complaint, the submissions of learned counsel and the record before us, we have to determine if the charge was proved against the appellant at the required standard. Before doing so, it is crucial to state that this being a first appeal is in the form of a re-hearing and this being the first appellate court, it is incumbent on us to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at own conclusions of fact. (See **D. R. PANDYA v R** [1957] EA 336 and **IDDI SHABAN @ AMASI vs. R**, Criminal Appeal No. 2006 (unreported)).

At the outset, we agree with the course taken by the learned counsel that, the autopsy report and the sketch map of the scene of crime (exhibits P1 and P4) were not read out to the appellant after being admitted in the evidence and as such the appellant was convicted on the basis of the documentary evidence which he was not made aware of. Moreover, the autopsy report was wrongly acted upon to convict the appellant who was not prior informed on his right to call the doctor who prepared the report which was a violation of the provisions of section 291 (3) of the CPA. See - **DAWIDO QUMUNGA VS REPUBLIC** [1993] TLR 120 and **ANDREA NGURA VS REPUBLIC**, Criminal Appeal No. 15 of 2013 (unreported) and **HAMIS JUMA**

CHAUPEPO @ CHAU VS REPUBLIC (*supra*). The said infractions occasioned a failure of justice on the part of the appellant and we are constrained to expunge exhibits P1 and P4 from the record.

Pertaining to the extra judicial statement of the appellant, we agree with the learned Senior State Attorney that it was made in compliance with the Chief Justice's Guide to the Justices of the Peace in recording such statements. We say so after being satisfied that apart from the appellant being cautioned, he was made aware to be suspected to have committed the offence of murder and that the extra judicial statement would be used as evidence against him. In this regard, he voluntarily expressed willingness to make the statement and thus the Guide to the Justices of the Peace in recording the Extra Judicial Statements was not contravened as viewed by the appellant's counsel.

Regarding the recording of the cautioned statement of the appellant parties locked horns on its propriety because it was recorded beyond the basic four hours and it was not read out to the appellant before he appended his signature. Section 50 (1) (a) of the CPA which regulates the periods for interviewing a suspect and recording a statement stipulates as follows:

"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended."

However, the exception under subsection (2) is to the following effect:-

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

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

In the case at hand, though it is not in dispute that the appellant who was arrested on 16/4/2011 made the cautioned statement on 20/4/2011 which is beyond the prescribed four hours, it is on record that the appellant in the first place was not willing to make the statement having insisted to make the same in the presence of his uncle one Osias Mkayula which was heeded to by the police. Also, according to the evidence of PW1, PW2 the appellant gave different versions on the whereabouts of the deceased which necessitated travelling twice to Ilembula in search of the missing deceased but it was futile. This is cemented by the appellant's cautioned statement whereby at page 173 among other things, he revealed the following:-

"Mnamo tarehe 14/4/2011 nikiwa nyumbani majira ya saa 08.00 hrs walikuja M/Kkiti wa kijiji cha Magoda Peter s/o Mgaya akiulizia mtoto yuko wapi niwapatie nikawadanganya kama nimempeleka nyumbani kwetu kijiji cha Ikwega. Lakini nilikuwa nawadanganya tu kwani

mtoto nilishamtupa kwenye maji. Walipofuatilia wakaona ni uongo ndipo wakanileta kituo cha Polisi..."

Moreover, according to the evidence of PW5 and PW7, the appellant confessed to have killed the deceased and thrown her body in Hagafilo river and such information facilitated mounting a further search and recovery of the body in the river. In the premises, we are satisfied that the delay to record the cautioned statement was sufficiently explained by the prosecution to have been occasioned by prolonged investigation in the search on the whereabouts of the deceased. Also having scrutinized the cautioned statement of the appellant at the end he made a following declaration:-

"Haya ndio maelezo yangu ambayo nimeyatoa kwa hiari yangu mbele ya mjomba wangu OSIAS s/o MKAYULA" sahihi yangu God Katende"

We are convinced that this was the appellant's response after the statement was read to him and that is why he appended his signature and as such, section 57 (3) of the CPA was not contravened. Thus, from the surrounding circumstances we do not find any matters of facts suggesting the involuntariness of the cautioned statement.

As to whether the charge was proved against the appellant, since none of the prosecution witnesses testified to have seen the appellant killing the deceased, it is not in dispute that what surrounded the occurrence of the offence is basically circumstantial evidence. In this regard, if an accused is alleged to have been the last person to be seen with the deceased, in the absence of plausible reasons to explain away the circumstances leading to the death, he or she will be presumed to be the assailant. Thus, the circumstantial evidence must be such as to produce moral certainty and precision, to the exclusion of every reasonable doubt as it was emphasized in the case of **SIMON MUSOKE VS REPUBLIC,** [1958] 1 E.A. 715, In this case the Court of Appeal for East Africa among other things, held:-

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

This Court has on several occasions emphasized that great caution should always be taken before grounding a conviction on the basis of

circumstantial evidence. In the case of **SAIDI BAKARI VS REPUBLIC,** Criminal Appeal No. 422 of 2013 (unreported) the Court stated:

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

[See also **MICHAEL MGOWOLE AND ANOTHER VS THE REPUBLIC,** Criminal Appeal No. 205 of 2017 (unreported)].

A similar caution on the basis of circumstantial evidence was addressed by the Supreme Court of India in **TANVIBEN PANKAJKUMAR DIVETIA VS STATE OF GUJARAT,** (1997) 7 SCC 156 having persuasively among other things, stated:-

> *"...each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about*

the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible."

Commencing with the evidence of PW2, she recalled to have left the deceased with the appellant following a misunderstanding between them and later the appellant said that the deceased was in Ilembula which was not true. This is corroborated by the appellant's cautioned and extrajudicial statements whereby upon being probed by Peter Mgaya the village chairperson of Magoda village, the appellant disclosed to have lied to them having said to have taken the deceased to his home village while he had killed and thrown her body in the river. On this account, even if Peter Mgaya and Ms. Msemwa were not lined up as prosecution witnesses, the appellant's confession in the cautioned statement corroborated PW1's and PW2's account on what had befallen the deceased after being left alive with the appellant up to when she was murdered and her lifeless body thrown in Hagafilo river.

The other detail is on the identification of the deceased's body whereby the appellant faulted the same arguing that, her attire was not initially described by PW2 and neither were the clothes worn by the deceased exhibited in the evidence. While it is true that the description of

the attire of the deceased was said by PW2 during cross examination, that was not the only evidence considering that those present during the search and recovery of the deceased's body included PW5 and PW7 who gave their testimonial account. At page 88 of the record during the examination in chief PW5 told the trial court as follows:-

> *"The body was in red gown, hairs were worn out the body started giving bad smell and the neck was tied up by kitenge. However, it was easy to identify those for those familiar with the deceased. The body had swollen. The body was smelling but the clothes were intact. Then entire body was intact too only that the head was bald..."*

At page 101 of the record PW7 recalled as follows:-

> *"...We approached ...and saw a dead body of a child stripped in water. The child had a red cloth and Kitenge material in the head and the neck.... the body was identified by Rose Sagala who told us that she had been with the child for a long time... she told us that even the clothes found in the body of the deceased were bought*

by herself.... After the identification the police and doctor told us to bury the body. The body was buried at Hagafilo river side because it was decomposed..."

In the light of the said prosecution account it is glaring that both PW5 and PW7 were consistent and coherent on the description of the attire of the deceased which made PW3 to identify the deceased after recovery of the body which was decomposed and had to be buried along the river bank following the advice of the doctor who conducted the autopsy. In this regard, besides the challenged evidence of PW3, still PW5 and PW7 confirmed that PW3 did identify the deceased's body. In the circumstances, in the absence of evidence that before burial the body was undressed, it was not possible to have the deceased's clothes available to be exhibited in the evidence at the trial as suggested by Mr. Mongo and this did not adversely impact on the prosecution case considering the credible prosecution account that the body was identified by PW3 after it was recovered from the river.

Finally, it was the appellant's complaint that his conviction was based on the account of prosecution witnesses from the same family. We found

this argument wanting because section 127(1) of the Evidence Act [CAP 6 RE. 2019] categorically stipulates as follows:-

> *"(1) Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

In terms of the cited provision, family members are as well competent witness who are not barred to testify in a criminal trial. See- **JONAS RAPHAEL VS REPUBLIC**, Criminal Appeal No. 42 of 2003 (unreported). The aforesaid notwithstanding, apart from PW1, PW2, PW3 and PW6 being from the same family of the Sagala the remaining witnesses in particular PW5 and PW7 were independent and testified on what was revealed to the them by the appellant on how he murdered and her body thrown in Hagafilo river. This crucial information led to the discovery of the killing incident as corroborated by the appellant's own confession in the cautioned and extra judicial statements.

All said and done we are satisfied that, the prosecution account irresistibly points to the guilt of the appellant since he was the last person to be seen with the deceased before she was mercilessly murdered and her lifeless body thrown in Hagafilo river as the appellant was all out to conceal and destroy the evidence on the killing incident. In view of what we have endeavoured to discuss, we do not find any cogent reason to fault the decision of the High Court and as such, the appeal is without merit. We accordingly dismiss it.

DATED at **IRINGA** this 13th day of August, 2020.

S. E. A MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of August, 2020 in the presence of Appellant in person linked through Video Conference and represented by Mr. Jally Willy Mongo, learned counsel and Ms. Pienzia Nichombe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL