

**IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA**

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 573 OF 2016

JOHN SHINIAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Shinyanga)

(Makani, J.)

dated the 29th day of July, 2016

in

Criminal Sessions Case No. 45 of 2015

JUDGMENT OF THE COURT

19th & 25th August, 2020

KEREFU, J.A.:

The appellant, John Shini was charged with the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2019] (the Penal Code) in the High Court of Tanzania at Shinyanga (Makani, J.) in Criminal Session No. 45 of 2015. It was alleged that, on 4th October, 2013 at Zawa Village, Maswa District in Simiyu Region, the appellant did murder one Antonia Jitinde, the deceased. After a full trial he was found guilty, convicted and sentenced to suffer death by hanging.

In essence, the substance of the prosecution case as obtained from the record of appeal indicate that, the appellant was a servant of Antonia

Jitinde (the deceased) who was living alone as she did not have children, thus the appellant, among other things, was taking care of her cows. It was further alleged that early October, 2013 the deceased went missing though the appellant was seen in his normal routine of taking the cows out for grazing and then returning them in. Sagani Peter (PW2) the Militia Commander in the Village testified that suspicion arose among the villagers when they saw the appellant selling the deceased's cows. PW2 said that he raised that concern to Mohamed Kitonya Ziraimu (PW3) the Village Executive Officer who instructed him to arrest the appellant. PW2 stated further that the appellant was arrested on 28th October, 2013 and brought to PW3's office. PW2 said that when they asked the appellant on the whereabouts of the deceased, he told them that she went to Isoro Village to look for traditional medicine (*'Kiziba'*) to protect her cows from thieves. PW2 testified further that, when they asked the appellant on his act of selling the deceased's cows, he told them that it was the deceased who asked him to do so as to get money for the said medicine.

PW2 said that, since they were not convinced with the appellant's response, they decided to take him to Shishiwi Police Station. At the police

the appellant was released because there was no complainant on the matter, he said.

PW2 stated further that on 29th October, 2013 he was instructed by PW3 to arrest the appellant as the relatives of the deceased reported on the disappearance of the deceased. PW2 said, at that second time, the appellant confessed before them that he killed the deceased as he wanted to inherit her cows and farms. PW2 narrated further that, after the confession, PW3 called the Police and when they arrived, the appellant again confessed to have killed the deceased. PW2 said that on 30th October, 2013 the appellant took them to the deceased house and showed them a pit where he buried the deceased's body. He said, the deceased's body was exhumed and it was in bad condition.

PW3's testimony with respect to his encounter with the appellant dovetailed with that of PW1. PW3 added that the appellant told them that he killed the deceased in the company of Tungu Malambi and Charles Makomango who was commonly known as '*Kanga*'. PW3 also said that on 30th October, 2013 the police officers came to his office in company of Dr. Nyangala and there were other people including the Councilor, the Chairman of the Village, PW2 and elders of the village. He said, on that day,

the police also interviewed the appellant who again, confessed to have killed the deceased. PW3 added further that the pit where the body was buried was used by the deceased to prepare bricks. PW3 testified that the police with the assistance of the villagers who assembled in response to the alarm (*'the mwano'*) started to dig the pit and found the deceased body badly decomposed. PW3 said that he recognized the body of the deceased as it was on black blouse and a purple skirt, which he recalled to have seen the deceased in that attire. PW3 said, after the exercise, the police allowed the deceased relatives to take the body for burial and the appellants together with the two suspects and Majenga Magoso (PW1) were arrested. He said that the two suspects denied to have killed the deceased and they were released.

Majenga Magoso (PW1), who was in the business of buying and selling cows, testified that on 24th October, 2013 the appellant went to his house and informed him that he is selling cows. PW1 said, he bought the two cows for TZS 450,000.00. PW1 testified further that on 30th October, 2013, PW3 informed him that the two cows belonged to the deceased and he ordered him to return the same, which he said, he did. PW1 testified further that, he also heard the *'mwano'* and went to the deceased's house

where he also discovered that the two cows he once bought from the appellant belonged to the deceased.

E. 3076 D/CPL Jonas (PW4) the investigation officer testified that, he was involved in the investigation of the incident and obtained the exhumation order from the District Court on 30th October, 2013. Dr. Nyangala did a post-mortem-examination of the deceased's body and prepared his report. PW4 prepared a sketch map of the scene of crime. PW4 also testified to have interviewed the appellant who confessed to have killed the deceased and recorded his cautioned statement. The postmortem report, sketch map of the scene of crime and the appellant's cautioned statement were admitted in evidence as prosecution exhibits P2, P3 and P4, respectively.

In his defence, the appellant testified on his own behalf and called no witness. In his examination in chief found at page 29 of the record of appeal, the appellant did not deny the charge levelled against him. However, during cross examination, he testified on how he knew the deceased as his close neighbour, who lived alone and that she had about 20 cows. He then narrated on how he was arrested.

When the respective cases on both sides were closed, the presiding learned Judge summed up the case to the assessors who sat with her at the trial. They unanimously returned a verdict of guilty against the appellant. Having concurred with the unanimous verdict of the assessors, the learned Judge found the appellant guilty and convicted him as charged based on the circumstantial evidence and his oral confession before PW2, PW3, PW4 which led to the discovery of the deceased body. The learned trial Judge also relied on the appellant's cautioned statement which she said, was detailed and gave full account on how he participated in the killing of the deceased. Therefore, upon conviction, the appellant was handed down the mandatory death sentence.

Aggrieved by both, the conviction and sentence, the appellant has come to this Court. Initially, the appellant lodged a memorandum of appeal comprising seven grounds of appeal. However, on 5th August, 2020, Mr. Paul Revocatus Kaunda, learned counsel for the appellant lodged a substituted memorandum of appeal under Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The substituted Memorandum of Appeal contained the following four (4) grounds of appeal: -

- 1. That, the trial court grossly erred in law and fact by acting on the uncorroborated testimony of PW1, PW2, PW3 and PW4;*
- 2. That, the trial court erred in law and fact by acting on un-cautioned oral confession of the convict;*
- 3. That, the trial court erred in law and fact when it failed to appreciate the exculpatory testimony of the cautioned statement of the convict (Exhibit P4); and*
- 4. That, the prosecution failed to prove the offence beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared through a video conference facility linked to Shinyanga District Prison and was represented in Court by Mr. Paul Revocatus Kaunda, learned counsel. The respondent Republic was represented by Mr. Nassoro Katuga, learned Senior State Attorney assisted by Mses. Salome Mbughuni, learned Senior State Attorney, Caroline Mushi and Immaculata Mapunda, both learned State Attorneys.

On taking the stage, Mr. Kaunda intimated that he will argue the first and the second grounds jointly and then the third and fourth grounds separately.

Starting with the first and second grounds of appeal, Mr. Kaunda faulted the trial court to convict the appellant by relying on the uncorroborated evidence of PW1 who testified that he did not know the deceased. Mr. Kaunda contended further that the evidence of PW2, PW3 and PW4 did not corroborate the testimony of PW1 as among them, no one testified to have seen the appellant killing the deceased. He emphasized that the evidence which itself requires corroboration cannot corroborate another weak evidence. To bolster his argument, he referred us to the case of **Ndalahwa Shilanga & Another v. Republic**, Criminal Appeal No. 247 of 2008 (unreported).

As regards the appellant's oral confession, Mr. Kaunda faulted the trial court to have relied on the appellant's oral confession allegedly made before PW2, PW3 and PW4 while it was not proved that the said confession was made voluntarily. He contended that PW2, PW3 and PW4 being persons with authority they were required to caution the appellant before making his confession. It was his argument that the alleged oral confession was made un-procedurally and under threat as the appellant was not a free agent.

As regards the third ground on the appellant's cautioned statement, Mr. Kaunda argued that, since the said statement was recorded immediately

after the oral confession when the appellant was still under the same fear, it was not voluntarily made.

When probed by the Court as whether that issue was raised during the trial and specifically when exhibit P4 was being admitted in evidence, Mr. Kaunda, though, conceded that the said issue was not raised during the trial, he argued that, the same can as well be raised at the appeal stage. He as such argued that, though, in his cautioned statement, the appellant had narrated in detail on how the deceased was killed and buried but there is no single paragraph which implicates him to have killed the deceased. He said, the appellant's role was only to illuminate the scene of crime by using torchlight and there were other two people who did the actual killing but were not charged. He cited section 203 of the Penal Code and argued that the appellant's cautioned statement is self-exculpatory.

On the last ground, Mr. Kaunda contended that, though PW3 testified that the appellant was arrested for the second time after the deceased's relatives reported to his office on the disappearance of the deceased, the said relatives were not called to testify before the trial court to prove that fact. Finally, Mr. Kaunda prayed for the appeal to be allowed, as he said the

prosecution failed to prove the case against the appellant beyond reasonable doubt.

In response, Mr. Katuga opposed the appeal and supported the appellant's conviction. Starting with the first and second grounds of appeal, Mr. Katuga challenged the argument by Mr. Kaunda that the evidence of PW1 was not corroborated by PW2, PW3 and PW4. He argued that the testimony of PW2 was corroborated by PW1 and PW3. He said, PW1 testified on how he bought the two cows of the deceased from the appellant and also PW3 testified on how the appellant was arrested, confessed and showed them the place where he buried the deceased.

On the appellant's oral confession, Mr. Katuga challenged the submission made by Mr. Kaunda that PW2, PW3 and PW4 were required to caution the appellant. He said, Mr. Kaunda failed to distinguish procedures used in oral confessions and those of recording a cautioned statement. To elaborate on this point, Mr. Katuga referred us to section 3 (1) of the Evidence Act, [Cap. 6 R.E. 2019] (the Evidence Act) where a confession is defined to mean '*words*' or '*conduct*' or combination of both. He also referred to section 27 (1) of the Evidence Act, where he said there is no

requirement of warning or cautioning a witness before making his oral confession.

As for the third ground on the appellant's cautioned statement (exhibit P4), Mr. Katuga cited section 53 (c) of the Criminal Procedure Act, [Cap 20 R.E. 2019] (the CPA) and argued that, the procedure of recording cautioned statement by police officers is provided for under that section. He clarified that a cautioned statement is not always a confession. He added that warnings and cautions are applicable under section 53 of the CPA and not otherwise. On the same line of argument, Mr. Katuga said, the evidence of PW2, PW3 and PW4 in respect of the appellant's oral confession do not need corroboration as they testified on what they heard and how the appellant directly confessed before them. Mr. Katuga submitted further that what the appellant confessed led to the discovery of the deceased's body. He cited section 31 of the Evidence Act and argued that a confession which leads to discovery is acceptable under the law. To bolster his argument, he cited the case of **Tabu Nyanda @ Katwiga v. Republic**, Criminal Appeal No. 220 of 2004 (unreported).

Mr. Katuga also challenged the submission of Mr. Kaunda that the appellant did not do the actual killing and that his cautioned statement

exonerated him from that offence. The learned Senior State Attorney cited section 22 (1) of the Penal Code which deals with '*parties to the offence*' and argued that since in his cautioned statement the appellant clearly indicated the role he played in the exercise of killing the deceased, he committed the offence. On the claim by Mr. Kaunda that the cautioned statement was not voluntarily made, Mr. Katuga spiritedly argued that the same, having not been raised during the trial when the said statement was admitted in evidence, is purely an afterthought.

As for the last ground on the complaint that the deceased's relatives were not called to testify, Mr. Katuga cited section 143 of the Evidence Act and argued that the same does not require a specific number of witnesses to prove a fact. He said what was required was the quality of evidence and credibility of witnesses. The learned Senior State Attorney rested his case by urging the Court to find the appeal unmerited and dismiss it in its entirety.

To cement on what has been submitted by Mr. Katuga, Ms. Mbughuni referred us to the cases of **The Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82 and **Mboje Mawe & 3 Others v. Republic**, Criminal Appeal No. 161 of 2010 (unreported). She then

insisted that, since the appellant's oral confession led to a discovery of where the deceased's body was buried the same was properly acted upon as it falls squarely under the ambit of the provisions of section 31 of the Evidence Act. She also prayed for the entire appeal to be dismissed.

In rejoinder submission, Mr. Kaunda reiterated what he submitted in chief and he distinguished the case of **Mboje Mawe & 3 Others** (supra) cited by Ms. Mbughuni that it was based on an old principle.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we think, the burning issue for our consideration is whether the prosecution proved its case beyond reasonable doubt.

There is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed when the offence was committed. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of the circumstantial evidence as discussed in the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017 when this Court remarked that: -

"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See Simon Musoke v. Republic, [1958] EA 715). Sarkar on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:

- 1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*
- 2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
- 3) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."*

In determining this appeal therefore, we shall be guided by the said principles to establish whether or not the available circumstantial evidence in the case at hand irresistibly points to the guilt of the appellant.

As regards the first and second grounds of appeal, it is clear that the appellant's complaint is on the testimonies of PW1, PW2, PW3 and PW4 that they were not credible witnesses and their evidence was not corroborated. In his submission, Mr. Kaunda submitted that the oral confession made by

the appellant before PW2, PW3 and PW4 was involuntary because the said witnesses, being persons with authority did not caution the appellant prior to his confession. On the other side, the learned State Attorneys insisted that the appellant's oral confession was properly made, and if anything, is reliable and acceptable under section 31 of the Evidence Act.

Confession, as argued by Mr. Katuga, is defined under section 3 of the Evidence Act to mean '*words*' or '*conduct*' or '*combination of both*.' In the case of **Posolo Wilson @ Mwalyengo v. Republic**, Criminal Appeal No. 613 of 2015 (unreported) the Court gave guidance as to when oral confession can be relied upon. 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 suspects.** See for example Director of Public Prosecutions v. Nuru Mohamed [1988] TLR 82."* [Emphasis added].

In the instant case, the evidence on record which tend to implicate the appellant heavily and which apparently was used by the trial court to convict him is, **first**, his oral confession he gave before PW2, PW3 and PW4 which finally led to the discovery of the deceased body. **Second**, the

evidence of PW1 who testified to have bought the two cows from the appellant which later on were discovered to belong to the deceased. **Third,** the appellant's cautioned statement which narrated in detail on how the deceased was killed and buried together with the role he played in the process of killing the deceased.

It is our considered view, and as rightly found by the trial court, all these facts provide overwhelming evidence of the appellant's participation in the commission of the offence. The incriminating circumstances which led to the discovery of the deceased body are irresistible inference that the appellant was a party to the murder of the deceased. It is therefore our considered view that even section 203 of the Penal Code cited to us by Mr. Kaunda cannot exonerate him from committing that offence. We are therefore in agreement with Mr. Katuga that since in his cautioned statement the appellant has clearly indicated his role of illuminating the scene of crime by using torchlight, he has taken part in committing the offence in terms of section 22 of the Penal Code which provides that: -

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely—

- a) *every person who actually does the act or makes the omission which constitutes the offence;*
 - b) *every person who does or omits to do any act for the purpose of enabling or **aiding another person to commit the offence;***
 - c) ***every person who aids** or abets another person in committing the offence;*
 - d) *any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counselling or procuring its commission.*
- (2) *A conviction of counselling or procuring the commission of an offence **entails the same consequences in all respects as a conviction of committing the offence;** and*
- (3) *A person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission the act or omission **would have constituted an offence on his part, is guilty of an offence of the same kind and is liable to the same punishment as if he had himself done the act or the omission.** [Emphasis added].*

It is our further view that, the oral confession made by the appellant before PW2, PW3 and PW4 is significant because it eventually led to the discovery of the deceased body. In the case of **Mboje Mawe & 3 Others** (supra) the Court when faced with an akin situation; the appellant's oral

confession which led to the discovery of the parts of the deceased's body, stated that: -

*"Finally, the significance of this confession lies in the fact that **he stated where the body parts were buried and eventually on arrival at his house, he dug them out himself. In essence therefore, this was 'a confession leading to discovery.'**" [Emphasis added].*

In the instant case, since the oral confession made by the appellant before PW2, PW3 and PW4 led to the discovery of the deceased body, we agree with the submission of Mr. Katuga that such confession is relevant. We thus find the case of **Ndalahwa Shilanga & Another** (supra) cited to us by Mr. Kaunda distinguishable with the facts of this case, because in that case the appellant's confession did not lead to discovery. That said, we find the first and second grounds of appeal devoid of merit.

The third ground is straightforward and should not detain us because it is apparent, at page 22 to 25 of the record of appeal that during the trial, the appellant did not object the admissibility of exhibit P4. It is also clear that even after the contents of the said exhibit were read over before the court, the appellant did not cross examine PW4 on that aspect. It is trite law that, a party who fails to cross examine a witness on a certain matter is

deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic**, Criminal Appeal No. 134 of 2012 (both unreported). We are therefore in agreement with Mr. Katuga that, since the appellant did not utilize that opportunity during the trial, challenging the said exhibit at this stage of an appeal, is nothing but an afterthought.

As for the last ground, on the failure to call the relatives of the deceased, we agree with Mr. Katuga 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] T.L.R. 148 and **Hassan Juma Kanenyera v. Republic** [1992] T.L.R. 100. At any rate the said relatives would not have added any weight to this case, as they were not mentioned to be at the scene of crime.

Consequently, looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the trial court properly held that the case against the appellant was proved beyond reasonable doubt.

For the foregoing reasons, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

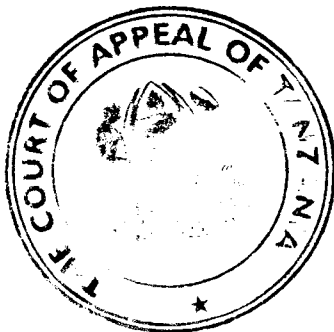
DATED at **SHINYANGA** this 24th day of August, 2020.


A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 25th day of August, 2020 in presence of the Appellant via Video link and Ms. Wampumbulya Shani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL