IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 373 OF 2017

1. ANDIUS GEORGE SONGOLOKA.....1ST APPELLANT
2. MIHAMBO KANYENGA KAMATA @ BICHI .....2ND APPELLANT
3. UNELA S/O SHINJI JILOYA KUWILU @ SEME .....3RD APPELLANT
VERSUS

THE DPP.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mgetta, J.)

Dated the 31st day of August, 2017
in
Criminal Sessions Case No. 39 of 2019

JUDGMENT OF THE COURT

2nd June & 29th July, 2020

MKUYE J.A:.

The appellants, Andius George Songoloka, Mihambo Kanyenga Kamata @ Bichi and Unela Shinji Jiloya Kuwilu @ Seme (hereinafter the 1st, 2nd and 3rd appellants respectively) were together and or severally charged with two other persons, namely, Cosmas Songoloka and Sajenti Kalinga who were the 2nd and 4th accused respectively and not subject to

this appeal. They were charged with four counts, that is, conspiracy to murder contrary to section 215 of the Penal Code, Cap 16 R.E. 2002 (the Code); attempt to murder contrary to section 211 (a) of the Code; maiming contrary to section 222 (a) of the Code; and possession of human being parts contrary to section 222A of the Code. It was alleged in the first count that the appellants together with two others between July, 2014 and March, 2015 at Kipeta village within Sumbawanga District in Rukwa Region did unlawfully conspire to kill one Baraka Cosmas. In the second count, it was alleged that the trio together with the former 2nd accused on the 8th day of March, 2015 during night time at Kikonde Hamlet, Kipeta village within Sumbawanga District in Rukwa Region did unlawfully attempt to murder one Baraka Cosmas by cutting off his right hand. In the third count, the trio together with the former 2nd accused were alleged that on 8th day of March, 2015 at Kikonde Hamlet Kipeta village within Sumbawanga District in Rukwa Region unlawfully wounded or caused grievous harm to Baraka Cosmas by chopping off his right hand with a sharp object; and on the fourth count, only the 4th accused was alleged that on 26th day of April, 2015 at Malonji Village within Mbozi

District in Mbeya Region was found in unlawful possession of human being part, to wit, a right hand of one Baraka Cosmas.

When the charges were read over to the appellants and the other accused persons they pleaded not guilty to all the counts except for the 4th accused who pleaded guilty to the fourth count and was accordingly convicted and sentenced to eight years (8) imprisonment.

In order to prove the case against the remaining accused persons the prosecution fielded fourteen witnesses and produced fourteen (14) documentary exhibits.

The brief facts of the case are that on 8th March, 2015 the victim, Baraka Cosmas was asleep at his parents' home together with his mother Prisca Shabani (PW1). The victim's father, one, Cosmas Yoram Songoloka who was the 2nd accused and acquitted had gone to sleep at his second wife's house.

In the dead of night of the fateful date at about 01:00 to 02:00 hours, PW1 woke up in order to relieve herself. As she was going out

she was attacked by a person who hit her on the head as a result of which she fell unconscious. When she regained consciousness she found that one of her children with albinism (Baraka) crying in agony while bleeding from his hand. When she inspected him she realised that his hand was chopped off at his wrist. PW1 went to seek assistance from his brother in law, Paschal, who together with other neighbours gathered at her house. They rushed the victim to the police station and then to Kamsamba Health Centre for treatment. Thereafter, the victim was transferred to Mbeya Referral Hospital for further treatment.

Investigation was mounted by the police from Sumbawanga CID's Office who were reinforced by the Special Task Force constituted by the Director of Criminal Investigations (the DCI) to deal with investigations on matters concerning persons with albinism. It all started by the arrest of the appellants who had vanished from the village immediately after the incident and their arrests led to a further arrest of two conspirators, the father of the victim inclusive.

It was the prosecution's case that the 1st appellant was arrested on 30th March, 2015 midnight at Mpembano village and he confessed to know the incident. He was taken to Laela Police Station and thereafter to Sumbawanga CID's office where they reached on 31/3/2015 whereupon his cautioned statement was recorded on 31/3/2015 and later his extra judicial statement (EJS) (Exh. P 14) was recorded on the same date.

The 2nd appellant, according to C9895 D/Sgt Laurent (PW12) and PW5 was arrested on 14/4/2015 at Kamsamba village and he mentioned other conspirators and disclosed his communication with Sajenti Kalinga (the former 4th accused person). He was then taken to Mbeya on 15/4/2015 where they reached at 07.00 hrs upon which his cautioned statement (Exh. P 13) was taken on the same date and his EJS (Exh. P 15) recorded on 20/4/2015. The 3rd appellant was arrested on 17/4/2015 and his cautioned statement was recorded on 18/4/2015 and his EJS (Exh. P 17) was recorded on 20/4/2015.

In their defence, the appellants denied involvement with the offences.

Upon a full trial, the trial court relying on the circumstantial evidence from the cautioned and extra judicial statements of the appellants, found them guilty and convicted the 1st and 2nd appellants on all the three counts and the 3rd appellant for the 2nd and 3rd counts. The 1st and 2nd appellants were each handed a custodial sentence of ten (10) years for the 1st count; and all the three were each sentenced to fifteen (15) years imprisonment for the 2nd count; and eighteen (18) years for the 3rd count which sentences were ordered to run concurrently. The 2nd accused was acquitted as we have hinted earlier on.

Aggrieved, the appellants lodged an appeal to this Court. Earlier on the appellants had filed their own joint substantive memorandum of appeal consisting 8 grounds of appeal. Later, the counsel for the appellants filed a supplementary memorandum of appeal consisting 4 grounds of appeal. However, for a reason to be apparent later, we will reproduce the grounds in the supplementary memorandum of appeal which read as follows:

1. *The Honourable Judge erred both in points of law and facts when he convicted and sentenced the Appellants on the offences of*

Conspiracy to murder, attempt to murder and maiming relying on their caution statements namely exhibits P7. P12 and P13 which were recorded contrary to Section 50(1) (a) of the Criminal Procedure Act, Cap. 2002.

2. *The Honourable Judge erred both in points of law and facts when he convicted and sentenced the Appellants on the offences of Conspiracy to murder, attempt to murder and maiming relying on the caution Statement of MIHAMBO KANYENGA KAMATA @ BICHI namely Exhibit P12 which referred to uncharged offence namely "Kujeruhi) without specifying under which law the offence was committed.*

3. *The Honourable Judge erred both in points of law and facts when he admitted extra judicial statements of the appellants namely exhibits 14,15 and 17 which were taken out on unreasonable time.*

4. *The Honourable Judge erred both in points of law and facts when he admitted a caution statement of the 3rd Appellant, UNELA SHINJI JILOYA KUWILU @ SEME namely as exhibit P13 without conducting trial within trial.*

When the appeal was placed before us for hearing, all the appellants were jointly represented by Mr. Justinian Mushokorwa and Mr. Simon T.M. Mwakolo, both learned advocates who were physically present in Court while the 1st appellant, was at Ruanda Central Prison and the 2nd and 3rd appellants were at Sumbawanga Prison but were

linked to the Court through video conference facility. The respondent/Director of Public Prosecutions had the services of Mr. Saraji Iboru, learned Senior State Attorney, assisted by Mr. Simon Peres and Ms Marietha Maguta, both learned State Attorneys.

In support of the appeal it was Mr. Mushokorwa who began to submit. He opted to begin with ground No.4 of the supplementary memorandum of appeal where the complaint was on the admission of the 3rd appellant's objected cautioned statement without conducting a trial within trial. He argued that the trial court wrongly admitted the 3rd appellant's cautioned statement without conducting a trial within trial despite the fact that it was objected to by the defence counsel on account of being tortured. He pointed out that it is settled law that whenever there is such an objection, the court must conduct a trial within trial in order to ascertain the voluntariness of the statement. He referred us to the case of **Robinson Mwanjisi and Others v. Republic**, (2003) TLR 218 where the Court expunged the appellants' cautioned statements because the issue of voluntariness of such

statements was not properly resolved for failure to conduct a trial within trial. In the end, he urged the Court to expunge the 3rd appellant's cautioned statement from the record of appeal as the trial court failed to do so.

In relation to ground No. 2 of the supplementary memorandum of appeal, Mr. Mushokorwa took us to page 208 of the record of appeal and argued that in the introduction of the 2nd appellant's cautioned statement (Exh. PE2), the recording officer informed the appellant that he committed the offence of "Kujeruhi" without mentioning the provision and the law contravened. This, he said, was contrary to section 57 of the Criminal Procedure Act, Cap 20 RE. 2019 (the CPA) and rendered the appellant not to understand the offence he stood charged. For this reason, he urged the Court to expunge it from the record of appeal.

As regards ground No. 3 of the supplementary memorandum of appeal, Mr. Mushokorwa contended that all the extra judicial statements (Exh. PE 14, PE 15 and PE 17) of the appellants were recorded out of time or unreasonably late. He acknowledged that, though the Guide of

Justices of the Peace (the Guide) permits the police to take the suspect if he so wishes to the justice of the peace and sets out ten conditions to be observed, it does not state a specific time within which the EJS can be taken. He added also that, despite the fact that in **Mashimba Doto @ Lukubanija v. Republic,** (2016) TLS R 388 the Court interpreted the time to be as soon as practicable; in **Vicent Ilomo and Others v. Republic,** Criminal Appeal No. 337 of 2017 (unreported), the Court relaxed the time within which the EJS can be taken to mean that the suspect can be taken to the justice of the peace anytime. He was of the view that the latter decision was not certain as it left the issue of time open ended. In this regard, Mr. Mushokorwa urged the Court to find that a reasonable time was required for the suspects to be taken to the justice of peace and argued further that as the EJSs were taken out of time, they be expunged from the record of appeal.

Elaborating the issue that the EJSs were taken out of time, Mr. Mwakolo contended that while PW4 said the 1st appellant was arrested on 30/3/2015, according to PW14, his EJS was recorded on 31/3/2015

which was after fourteen and a half hours had lapsed. As to the 2nd appellant, he said, he was arrested by PW12 on 14/4/2015 but his EJS (Exh. PE14) was recorded on 20/4/2015. In relation to the 3rd appellant, he argued, he was arrested by PW9 on 17/4/2015 but his EJS was recorded by PW14 on 20/4/2015. He said, there was no reason advanced for such delay.

In arguing ground No. 1 of the supplementary memorandum of appeal, Mr. Mwakolo submitted that the appellants' cautioned statements Exh. PE 7, PE 12 and PE 13 were recorded after four (4) hours had lapsed contrary to section 50 (1) of the CPA. He said, though the 1st appellant was arrested at Mpembano on 30/3/2015 at 23:00 hrs, his cautioned statement (Exh. P7) was recorded on 31/3/2015 8:00hrs while the required time had elapsed. He added that the 2nd appellant's cautioned statement (Exh. PE12) was recorded on 15/4/2015 at about 8:00 while he was arrested by PW12 on 14/4/2015; and the cautioned statement of the 3rd appellant was recorded on 18/4/2015 though he was arrested on 17/4/2015.

While relying on the case of **Pambano Mfilinge v. Republic,** Criminal Appeal No. 283 of 2009 (unreported), he urged the Court to expunge the said statements as they were recorded out of time. In the end, Mr. Mwakolo tried to argue ground No. 5 of the substantive memorandum of appeal filed by the appellants but upon realizing that it was a futile exercise he abandoned the whole memorandum of appeal.

In reply, Mr. Peres prefaced by declaring their stance of supporting both the conviction and sentence and argued grounds Nos. 1, 2 and 4 leaving the 3rd ground to be argued by Ms. Maguta. With regard to the 1st ground of appeal, he contended that the appellants' cautioned statements were not recorded out of time due to complication in the investigation of the case which entailed involvement of a Task Force constituted by the DCI to deal with cases involving people with albinism. He said, the first appellant was arrested by PW5 on 30/3/2015 at about 23:00hrs at Mpembano Village. Then he was transported to Sumbawanga where they arrived on 31/3/2015 at 7:00 hrs and interrogation took place at 8:00hrs.

As to the 2nd appellant the learned State Attorney submitted that PW12 had testified that he was informed by PW8 from Kamsamba Police Station of his arrest at Masanyita Village on 14/4/2015. That, they went there to pick him and arrived at Mbeya on 15/4/2015 at about 7:00hrs where upon his statement was recorded from 8:00 hrs to 10:30 hrs. As regards the 3rd appellant's cautioned statement (Exh. P.E. 13), he said, he was arrested on 17/4/2015 at Mkusi village. He was then taken to Ilemba Police Station where the Task Force took him to Mbeya and his statement was recorded on 18/4/2015. The learned State Attorney was of the view that due the nature and the circumstances of the case, the statements were recorded within time. He referred us to the case of **Chacha Jeremiah Murimi and 3 Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported) in which the Court cited with approval the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported) and stated as follows:

> *"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."

Mr. Peres added that even if the Court finds that there was a delay, such delay was cured by the complications of the case and section 50(2) of the CPA. He made further clarification that though the appellants may have been arrested at places where there were police stations, such stations were not seized with the case file in order to deal with such a matter except the OC – CID of Sumbawanga who had the case file or the Task Force which was mandated to deal with such cases. He also argued that the case of **Pambano Mfilinge** (supra) cited by the counsel for the appellants was distinguishable as in that case there were no special circumstances.

With regard to ground No. 2 that in recording the 2nd appellant's cautioned statement the 2nd appellant was not properly informed on the offence he was facing by only showing "Kujeruhi", Mr. Peres argued that section 57 of the CPA governing recording of the statements does not provide for a mandatory requirement to cite the relevant provision of the law except to explain to him the nature of the offence he is charged

with. He was of the view that the information he was given was sufficient as it is reflected in the statement he made that he understood the nature of the offence.

In relation to the 4th ground of appeal that the 3rd appellant's cautioned statement (Exh. P13) was admitted without conducting a trial within trial though the same was objected to its being tendered, Mr. Peres conceded that the trial court flawed in admitting it without conducting a trial within trial. However, he went further to argue that so long as it led to the discovery whereby the 4th accused was found with the hand of the victim he was possessing, it can be considered and be relied upon. To support what Mr. Peres submitted, Mr. Iboru chipped in and added that since the 3rd appellant complained to have been tortured, it means the same was taken involuntarily. However, since it led to the discovery it should not be expunged but should be considered. The case of **Mabala Masasi Mongwe v. Republic**, Criminal Appeal No. 161 of 2010 (unreported) was cited to us in support.

Last, is ground No. 3 that the appellants' EJSs were recorded out of time. As we have alluded to earlier on, this was argued by Ms. Maguta. She contended that the 1st appellant's EJS (Exh. P14) was recorded on 31/3/2015 though he was arrested on 30/3/2015, the 2nd appellant's EJS (Exh. P15) was recorded 20/4/2015 after being arrested on 14/4/2015, and the 3rd appellant's EJS was taken on 20/4/2015 after being arrested on 17/4/2015. The learned State Attorney pointed out that the Guide to the Justices of the Peace does not provided for specific time for recording the EJSs; but again, she added, according to the same Guide, the suspect would be taken to the justice of the peace voluntarily meaning that at the time he expresses his willingness to give his statement. She held the view that though in the case **Mashimba Dotto @ Lukubanija** (supra) the Court said such statement was required to be recorded within a reasonable time, also the position given in **Vicent Ilomo's case** (supra) that the EJS may be recorded at any time was quite proper. For those reasons the respondent's counsel urged the Court to dismiss the appeal.

In rejoinder, Mr. Mushokorwa contended that if the cautioned statement is invalid it cannot be salvaged by the fact that it leads to the discovery.

As to ground No. 2, he stressed that the appellant did not understand the nature of the offence.

In relation to ground No. 1, Mr. Mwakolo insisted that the cautioned statements were taken out of time without any explanation as to what hindered them to record the same within time and wondered why the same were not recorded at the police stations they were held.

At this juncture, we wish to state that we will deal with the grounds of appeal in the order that was followed by the respondent, that is, ground 1, 2, 4 and lastly ground No 3. As regards ground No. 1, we agree with Mr. Mushokorwa that the appellant's cautioned statements were indeed taken out of the prescribed time. However, according to section 50 (1) (a) of the CPA, the appellants were required to be interrogated within a period of 4 hours counting from the time each was

under restraint unless time was extended under section 51 of the same Act. No extension of time was sought and granted.

Mr. Peres submitted that the delay to interview the suspects was due to the complication in the investigation of the case which involved the Task Force established by the DCI and as such, the anomaly was curable under section 50 (2) (a) of the CPA which provides as follows:

> *"(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."*

We agree with Mr. Perez. The evidence of this case shows that the 1st appellant was arrested on 30/3/2015 by Ass. Inspector David (PW4) at about 24:00 hrs at Mpembano Village. He was then taken to Laela Police Station then transferred to Sumbawanga where they arrived on 31/3/2015 at 7:00 hrs and his statement was taken at 8:00 hrs which was after about 9 hours from his restraint. The 2nd appellant was arrested on Masanyita Village and taken at Kamsamba Police Station on 14/4/2015 before being taken to Mbeya where the task force had its base and arrived on 15/5/2015 at 7:00 hrs where upon the cautioned statement was recorded at 8:00 hrs to 10:30hrs which was after 26 hrs. The 3rd appellant was arrested on 17/4/2015 by Insp. Nicodemus Joseph Mbukwini (PW9) at Mkusi village and was taken at Ilemba Police station where the Task Force took him to Mbeya and recorded his statement on 18/4/2015 which was also after 24 hours from his restraint.

Looking at the nature and the circumstances of the case, we entertain no doubt that it was a complicated case that involved investigation from several places. It involved a person with albinism

whose hand was chopped off at the incident which took place at Kikande hamlet in Kipeta Village within Sumbawanga District and the Region of Rukwa. Definitely, the matter fell within the mandate of Office Commanding of the District of Sumbawanga and hence under supervision of the OC – CID for that District. Inspite of that, there was also a Task Force constituted by the DCI from Police Headquarters whose officers were in Mwanza before they were sent to Sumbawanga to reinforce the investigation over the matter including recording of the appellants' statements.

In this regard, the contention by Mr. Mwakolo that the statements could have been recorded in the police stations where the appellants were arrested or kept cannot stand because some of them were mere police posts and even the police stations were not siezed with the case file. As it is, it was the OC – CID of Sumbawanga and also the Task Force who were seized with that duty. The Task Force operated as well from Mbeya. And, if we may add, we think that keeping another base at Mbeya was quite proper since the Task Force had a hint that the buyer

of the said hand (4th accused) was at Mbozi which is within Mbeya Region. Indeed, the said accused was arrested and when he appeared at the trial he confessed and was sentenced as alluded to above.

It is also noteworthy that the 3rd appellant was the one who mentioned the former 4th accused to be the buyer of the hand. He also took the members of the task force to Mbozi and when they were informed that he was in Dar Es Salaam, he led them there where they managed to arrest him (4th accused). Incidentally, even in their defence, all the appellants did not object being arrested at those places.

We have examined the case of **Pambano Mfilinge** (supra) where the Court expunged the cautioned statement extracted in contravention of section 50 of the CPA and we are of the view that it is distinguishable to this case. This is so because in that case unlike in this case, there was no circumstances showing why the cautioned statement of the accused was recorded out of the required time.

In this case, since the appellants were still in the course of the investigation after their arrest for having been conveyed from one place

to another; and the fact that the statements were recorded immediately after their arrival at the police station where their statements were recorded, then we are settled in our mind that section 50 (2) (a) of the CPA covered them and hence their statements cannot be expunged from evidence (See **Chacha Jeremiah Murimi and 3 others** (supra)).

The complaint in ground No. 2 is that in the preamble to the 2nd appellant's cautioned statement, the appellant was just informed that he was charged with offence of "kujeruhi" without citing the relevant law contravened. Mr. Mushokorwa did not, however, cite any law or authority to support his argument.

The law governing interviews of persons under restraint is under sections 52, 53, 56, 57 and 58 of the CPA. As was rightly argued by Mr. Peres section 57 of the CPA governing recording of interviews does not require mentioning of the provision of law contravened. However, section 53 (b) of the same Act, in particular, provides for the rights to be explained to persons under restraint as follows:

" *Where a person is under restraint, a police officer shall not ask him any questions, or ask him to do anything for the purpose connected with the investigation of an offence, uniess:-*

(a) .....

(b) *a person has been informed by a police officer, in a language in which he is fluent in writing and, if practicable, orally, of the fact that he is under restraint and of the* ***offence in respect of which he is under restraint;*** *and...*" [Emphasis added]

As it is, under the above cited provision and not section 57 of the CPA, what is required is to explain the nature of the offence which, we think, was sufficiently done to enable him understand the offence he stood charged with. We have looked into the nature of the appellant's explanation in his cautioned statement and we are satisfied that such statement was given by a person who understood the nature of the offence he was charged with.

Perhaps at this juncture we need to define the term "kujeruhi" in its literal translation "to cause grievous harm." In this case the assailants maimed the victim by cutting off his hand. This, no doubt, falls under the offence of causing grievous bodily harm. Much as in the said cautioned statement's preamble, there is a space to fill in the provision of the law contravened, we think, in view of the fact that the victim's hand was chopped off and that the 2nd appellant gave a statement along those lines, it cannot be said that he was prejudiced in any way. That said, we dismiss the 2nd ground of appeal for lack of merit.

In relation to the 4th ground of appeal that the 3rd appellant's cautioned statement was admitted without conducting a trial within trial though it was objected by the defence side, Mr. Peres readily conceded to it. As was rightly pointed out by Mr. Mushokorwa, it is settled law that where an objection is raised as to the production in court of the statement by the accused, the trial court has to stop the proceedings and conduct an inquiry or a trial within trial in order to ascertain it's

involuntariness. This is a requirement under section 27 (2) and (3) of the Evidence Act [CAP 6 R.E. 2002]. Also, this Court has, in times without number stated that upon an objection being taken against a confession, the trial court should stop everything and conduct a trial within a trial or an inquiry. For instance, in the case of **Twaha Ally and 5 Others v. Republic,** Criminal Appeal No. 78 of 2004, (unreported) the Court stated:

> *"...If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the court must stop everything and proceed to conduct an inquiry or trial within trial into the voluntariness or otherwise of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."* (Emphasis supplied).

See also **Nyerere Nyague's** case (supra); **Makelele Kulindwa v. Republic,** Criminal Appeal No. 175 "B" of 2013; **Paulo Maduka and 4 Others v. Republic,** Criminal Appeal No. 110 of 2010; and

Zakaria Kazembe v. Republic, Criminal Appeal No. 236 of 2013 (all unreported).

In this case, the record of appeal at page 210 shows that when the 3rd appellant's cautioned statement was sought to be tendered in court, it was objected by advocate Budodi on among others that the appellant was tortured, beaten and forced to sign the papers. At pages 212-213 the trial judge ruled in favour of the prosecution and admitted it as Exh. P13 without the trial within trial being conducted. This was definitely wrong as we have stated herein above. The omission rendered it to lack evidential value.

However, the issue is whether it should be expunged as prayed by Mr. Mushokorwa or be considered in evidence because it led to the discovery of the subject matter in issue as was argued by Mr. Peres and Mr. Iboru. It was the argument by the learned State Attorneys that so long as the said statement led to discovery of the subject matter, it could be considered. In the case of **Mabala Masasi Mongwe** (supra), when the Court was confronted with an akin scenario, it stated as follows:

"Hence, we too are satisfied that the circumstances in this case lead us to find that the appellant's confession leading to discovery of the deceased graves is true."

In this case it is not in dispute that the 3rd appellant's cautioned statement was wrongly admitted. However, in the said statement he explained among others about a certain rich man, one, Sajenti Kalinga who was in need of purchasing human being parts of a person with albinism; and how the former 2nd accused on 8/3/2015 informed him that he was going to sleep at his second wife's house; how he effected the plan of chopping off the victims hand; how he left with the 2nd appellant and went to Kamsamba. He also explained how on the following day they went to Hansekento village in Mbozi and handed over the hand to the purchaser (4th accused). He also explained that he was arrested on 17/4/2015 at Mkusi village and on being searched he was found with a paper containing the phone numbers of 2nd appellant and Sajenti Kalinga (4th accused); and how he was taken at Laela Police Station then to Mbeya Central Police Station. According to PW5, the 3rd

appellant disclosed the purchaser of the hand and led the Task Force to Dar Es Salaam where they were able to arrest Sajenti Kalinga on 25/4/2015. Thereafter the said Sajenti Kalinga admitted to possess the alleged hand after having been brought to him by the 2nd and 3rd appellants and he willingly showed the said hand at Hansekento village in Mbozi District whereupon on 26/4/2015 he lead the Task Force to his home where the hand was recovered from a tree within his compound.

Given the above, since the 3rd appellant together with 2nd appellant mentioned the 4th accused, which information led to his arrest in Dar es Salaam and after being taken at his home the hand was recovered, which was also confirmed by the 4th accused in material particular, and also since the 3rd appellant's EJS is in the line with what was stated in the cautioned statement, we find that his statement contained nothing but the truth as was stated in **Mabala Masasi Mongwe's** case (supra). In this regard, we are of the considered view that the cautioned statement was indeed a confession worth to be considered by the trial

court. In this regard, we find the 4th ground of appeal devoid of merit. We dismiss it.

In ground No. 3 which is the last ground, the appellants' complaint is that their EJS were taken out of time. It is a common ground that the Guide does not provide for a specific time within which the EJS is to be recorded. Also, in the case of **Joseph Stephen Kimaro and Another v. Republic** Criminal Appeal No. 340 of 2015 (unreported), in emphasis, the Court stated as follows:

> *"In other words,* ***unlike caution statements whose time to be recorded is prescribed under section 50 and 51 of the CPA, no such limitation is imposed in extra judicial statements, recorded before Justices of the Peace*** *whose concern is to make sure that an accused person before him is a free agent and is not under fear, threat or promise when recording his statement."* [Emphasis added]

It is also noteworthy that it is not in dispute that in recording the EJS, the justice of the peace is required among others to observe the

mandatory requirements under the Guide (See **Japhet Thadei Msigwa v. Republic,** Criminal Appeal No. 367 of 2008 (unreported)). However, what is certain in the instant case is that the appellants' EJSs were recorded within reasonable delay.

In the case of **Mashimba Dotto @ Lukubanija** (supra) where the appellant was taken to the justice of the peace six days after restraint, the Court linked it with section 32(2) of the CPA requiring persons under restraint to be taken to the court "as soon as practicable" and stated as follows:-

> *"No reason was given as to why the appellant remained in custody for six (6) days before he was taken to the justice of the peace. In our view, the period of six days was not a period we could safely say was "as soon as practicable" within the dictates of section 32 (2) of the Criminal Procedure Act."*

Yet in the case of **Vicent Ilomo and Another** (supra), the Court said that the suspect can be taken to the justice of the peace at any time when he is ready and willing to give his EJS.

Mr. Mushokorwa was of the view that the decisions of this Court were contradictory. On our part, we see no contradiction between the positions propounded in **Vicent Ilomo and Another's** case (supra) and **Mashimba Dotto @ Lukubanija's** case (supra). It is our firm view that what is required to be observed is the reasonableness of time within which the suspect elects to make his EJS to the justice of the peace the bottom line being when the suspect is willing to give his statement. In this case, the 1st appellant was arrested on 30/3/2015 and his EJS was recorded on 31/3/2015; the 2nd appellants' EJS was recorded on 20/4/2015 though he was arrested on 14/4/2015; and the 3rd appellant, his statement was recorded on 20/4/2015 despite the fact that he was arrested 17/4/2015. Indeed, one can see that they were not recorded immediately after their arrests but as we have indicated above, all depends on the willingness of the maker to make such statement. Given the circumstances, we find that the appellants' EJSs were not recorded out of time. Hence, this ground is answered in the negative.

At this juncture it is worth declaring that in this case there was no direct evidence. In convicting the appellants, the trial court

based its decision on circumstantial evidence specifically from the cautioned statements and EJSs of the appellants.

On our perusal of the record of appeal, we are satisfied that the appellants' cautioned statements except that of the 2nd appellant were tendered and admitted properly. All the statements had similarities in the sequence of events from when they set to conspire to the time they effected their ruthless act of chopping off the victim's hand and handing it over to the intended purchaser 4th accused and how they were arrested. Each appellant also gave an account on his participation to the crime and mentioned other appellants with their involvement of the crime. The 4th accused, the purchaser, also admitted his involvement and indeed showed and retrieved the victim's hand at his home. On top of that, the appellants' EJSs corroborated what they said in their cautioned statements. In this regard, we entertain no doubt that what the appellants confessed was the truth and hence their statements amounted to confessions.

Looking at the entire evidence, we are satisfied that the prosecution proved its case beyond reasonable doubt and, hence, we confirm the trial court's findings.

In the event, the appeals are devoid of merit. They are hereby dismissed to that extent.

DATED at **DAR ES SALAAM** this 23rd day of July, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Judgment delivered this 29th day of July, 2020 in the presence of the appellants and Mr. Simon Mwakolo learned advocate for the appellants all linked through video conference from Sumbawanga and Ruanda – Mbeya Prisons and Ms. Estezia Wilson learned State Attorney represented the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL