IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 14 OF 2018

1. MIRAJI IDD WAZIRI @ SIMWANA
2. MSUMI RAMADHANI ASENGWA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Juma, J.)

Dated the 3rd day of February, 2012
in
Criminal Sessions Case No. 89 of 2007

JUDGMENT OF THE COURT

15th July & 7th August, 2020

KITUSI, J.A.:

The two appellants were prosecuted before the High Court, Dar es Salaam District Registry, for the murder of Hussein Mrisho Mangara, an offence under sections 196 and 197 of the Penal Code, Cap 16 R.E 2002. The prosecution witnesses testified that the deceased who was based in Dar es Salaam Region, was a trader dealing in charcoal and met his death in the hands of the appellants at Vigwaza where he had gone to buy charcoal for his business. The first

appellant allegedly lured the deceased to a forest where he and the second appellant administered the fatal blow and took from the deceased some money that he had intended to buy charcoal with. Subsequently, when it was evident that the deceased was missing, the people who had earlier seen the first appellant leave with him suspected and apprehended him. Later while in Police custody, the second appellant confessed to have committed the offence with the first appellant who then allegedly led the Police to the spot in the forest where the decomposing body of the deceased was found.

In defence the appellants denied any involvement in the death of the deceased whom they said they had never met before. They maintained that they could not have jointly executed the murder because they were also strangers to one another. The first appellant denied leading the police to the discovery of the body alleging that actually it is the police who took him with them to the forest where he saw the decomposing body of the stranger.

The High Court accepted the prosecution case and rejected that of the defence, being satisfied that the case against them had been

proved beyond reasonable doubt. The appellants were thus sentenced to the mandatory death penalty.

This is an appeal against both. We propose to refer to the details of the testimonies in the course of disposing the grounds of appeal.

At the hearing the appellants entered appearance through virtual connection while in prison, but they were also represented by counsel who were in court, Mr. Mbuga Jonathan for the first appellant and Mr. Melkior Sanga for the second appellant. Appearing for the respondent Republic were Ms. Cecilia Mkonongo, learned Senior State Attorney, and Justus Ndibalema, learned State Attorney.

We shall now address the grounds of appeal. The first ground of appeal complains that the trial court erred in relying on the cautioned statement of the second appellant while it was recorded out of time and then it was not read in court. The complaint in the second ground of appeal is that the court should not have found conviction on Exhibit P2, a retracted confession of a co-accused. The learned counsel for

the appellants argued the first and second grounds of appeal together which suits us because they are interrelated. In short, the grounds challenge the trial court for relying on the second appellant's cautioned statement (Exhibit P2) on the basis that its legality and reliability are challengeable. The learned counsel submitted that the cautioned statement suffered from two ailments; first it was recorded outside the prescribed time of four hours, and secondly it was not read over after admission.

Mr. Sanga argued that the basic time for recording cautioned statements under section 50 of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA) is 4 hours from the time a suspect is taken under restraint. That time, he submitted, may only be extended if an application for such extension is made and granted under section 51 (1) (2)(a) and (b) of the CPA. The learned counsel cited two cases to support his position, these are **Selina Yambi & 2 Others V. Republic,** Criminal Appeal No. 94 of 2013 and **Joseph Shabani Mohamed Bay & 3 Others V. Republic,** Criminal Appeal No. 399 of 2015 (both unreported).

Counsel pointed out that the cautioned statement allegedly made by the second appellant who was arrested on 16th March, 2007 was recorded on 17th March, 2007 from 1:30 P.M to 2:30 P.M. He also submitted that even after wrongly admitting the cautioned statement, its contents were not read over in court as required. He invited us to expunge that statement from the record.

It was Ms. Mkonongo who argued the case for the respondent. She was in support of the first and second grounds of appeal so she equally prayed that we expunge from the record, the cautioned statement of the second appellant.

We find clear merit in the complaints raised in grounds 1 and 2 for the reasons cited in the submissions by both counsel. The cautioned statement was recorded outside the statutory basic hours which we have consistently abhorred. See **Yusufu Masalu@ Jiduvi and 3 Others v. Republic**, Criminal Appeal No.163 of 2017(unreported). It was also not read in court after admission which again is inconsistent with the settled law. See our decision in **Joseph Maganga and Another v. Republic**, Criminal Appeal No. 536 of

2015 cited in **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017(both unreported). We therefore expunge the cautioned statement of the second appellant as prayed.

Before we move to the next ground, we are going to consider another issue, although not earlier raised as one of the grounds of appeal, but related to admissibility of documentary evidence, similar to the complaint raised in the first and second grounds. This is in respect of the Post Mortem Report which, it is argued, was wrongly relied upon by the trial court. The criticism is based on two grounds. **One**, that the Report was neither admitted as exhibit nor read over, and **two**, that it is of no evidential value because it does not disclose the cause of death.

Mr. Sanga briefly argued this point referring us to the Post Mortem Report which is marked as Exhibit P1. He then took us to the record which shows that Exhibit P1 is a Sketch Map and that nowhere was the Post Mortem Report formally tendered and admitted in evidence. Even then, Mr. Sanga submitted, the said report is clear that the cause of death is "unknown", therefore there would be no basis

for concluding that the deceased was killed, let alone that the appellants are the ones who killed him. Mr. Mbuga supported this line of argument and added that there is no proof of the weapon that may have been used against the deceased and thus the death cannot be linked to the appellants.

In response, Ms. Mkonongo conceded that the Post Mortem Report was irregularly admitted and relied upon by the trial court. She also joined the appellants' counsel in praying that the same be expunged from the record, although she maintained that there is still proof of murder. We shall come to that latter argument in due course.

As we have intimated above, this point was originally not one of the grounds of appeal, but being a point of law of significance we have a duty to consider it. We have scanned through the record of this appeal and have confirmed that the Post Mortem Report was not tendered and admitted in exhibit so it could not be part of the evidence. The position on this area is also settled that the court may not base its decision on a document which is not part of the evidence on record. One of the cases in which we have decided so is **Siwajibu**

Mwangule v. Republic, Criminal Appeal No 85 of 2009 (unreported) where we held inter alia: -

> *"It is true that in his judgment the learned Principal Resident Magistrate with Extended Jurisdiction made reference to a medical report on appellant's state of mind. Our perusal of the record of the trial court however does not show that the report was ever tendered in court. We agree with Mr. Nyabiri that in the circumstances it was improper to have made reference in the judgment of a report that had not been tendered in court".*

For the foregoing reasons and with respect, we accordingly accede to the prayer to expunge the Post Mortem Report, as we so do. There is no point, in our view, of discussing its evidential value having expunged it, although in passing, we agree that the Post Mortem Report would have been of questionable assistance in establishing the cause of death. We are now ready to consider other grounds of appeal.

The third ground of appeal was argued separately. It faults the trial court for acting on the evidence of PW4, an accomplice. We shall however, consider this ground along with ground 4 in which the appellants seek to fault the trial court for not drawing an adverse inference against PW9 and PW10 for their failure to tender the first appellant's written confession. It is chronologically convenient to consider these grounds together because in their totality they challenge these three prosecution witnesses, namely; PW4, PW9 and PW10. In order to appreciate the complaints, we shall now tell how it all started.

The deceased had traveled from Dar es Salaam to Vigwaza village within Coast Region in his usual mission to buy charcoal for sale. It seems that his contact person at Vigwaza village was Asha Shomvu (PW3) who not only used to supply him with charcoal but also ran a local tea room where other charcoal dealers used to hang out. On this particular trip when the deceased arrived at PW3's place he found her and the first appellant at the tea room. After learning that the deceased was in need of charcoal, the first appellant offered to

take him to a person who he said had better and cheaper charcoal than that of PW3. So, the two left, but according to PW3, she never saw the deceased alive again.

Two days later, the first appellant was at PW3's tea room with other charcoal dealers as usual, including Shani Ramadhani (PW5) and Rajabu Bakari (PW8). While there, PW5 received a phone call from a person known as Salum, a close associate or relative of the deceased. Salum was calling from Dar es Salaam inquiring why hadn't the deceased returned home, and the first appellant who was within earshot, overheard that conversation. When PW5 had finished the telephone conversation, the first appellant curiously asked him what had the conversation been about. PW5 told him that the deceased's family members were inquiring about his whereabouts. On hearing this, the first appellant who had been served tea and was about to take it, suddenly left the place without even taking the tea, to the surprise of those who were there. They got suspicious of his behaviour and reported the matter to the hamlet Chairman, and

eventually the first appellant was arrested by Ramadhani Shabani Mtenga (PW6), a member of people's militia.

While at the office of the Village Executive Officer (V.E.O) and being interrogated, the appellant was asked to tell where the deceased was. He allegedly stated that he had taken him to one Bakari Elias of Mipera Mitano village, and left him there to conclude the charcoal business with him. Acting on that information, PW6 and others went to pick Bakari Elias who happens to be the elder brother of Ramadhani Elias (PW4). The latter as a concerned relative decided to accompany his brother to the Village Executive's office in order to know what his brother was being suspected of.

The gist of the evidence of PW4 is that at the village office when the first appellant was asked to identify Bakari Elias he picked him (PW4) instead, which he said, tended to show that he did not even know who Bakari Elias was. On that basis PW4 was arrested and taken to police where he spent a week in custody before being released later. While in police restraint, PW4 heard the first appellant tell the police that it was the second appellant who had tutored him to

implicate anybody with the disappearance of the deceased, so as to spare him.

It is because of the foregoing that the appellant maintains that PW4 was an accomplice and that his evidence needed corroboration, which he submitted, was not forthcoming in this case. On the other hand, Ms. Mkonongo submitted that the evidence of PW4 was corroborated by PW6. After narrating how PW4 got wrongly picked by the first appellant, the learned Senior State Attorney submitted that his version of the matter was corroborated by PW6 who was there when PW4 was wrongly picked instead of Bakari Elias. PW6 testified that sometime later in the same month he witnessed the arrest of the second appellant after being named by the first appellant.

In arguing grounds 3 and 4 of appeal Mr. Sanga submitted that the law requires evidence of an accomplice to be corroborated and he argued that PW4 was an accomplice and his evidence was not corroborated. He further submitted that after the cautioned statement

allegedly made by PW4 is expunged, the remaining evidence to implicate the second appellant is the alleged oral confession of the first appellant. The learned counsel submitted further that under Section 27 (2) of the Tanzania Evidence Act Cap, 6 R.E 2002, it is the prosecution which bears the burden of proof. On that basis, it is argued, they have to prove that the first appellant made the confession and further that in the said confession he implicated the second appellant.

Mr. Mbuga submitted on the same grounds on behalf of the first appellant. He submitted that at best the evidence for the prosecution is merely circumstantial which should meet the required standard, citing the case of **Ali Bakari v. Republic**, [1992] T.L.R 11. He further submitted that the fact that the first appellant's written confession was not tendered by the prosecution, means that there is no evidence to substantiate its having been made by the said first appellant. The learned counsel concluded by submitting that the first appellant did not lead the police to the discovery of the body as alleged.

In response, the learned Senior State Attorney declared her support for the second appellant's appeal on the ground that the only evidence against him after expunging his cautioned statement is that of the first appellant who was a co-accused. She cited the case of **Emanuel Kondrad Yosipati v. Republic**, Criminal Appeal No. 296 of 2017 (unreported). She pointed out that since the cautioned statement has been expunged at the time of dealing with grounds 1 and 2, none of the prosecution witnesses implicated the second appellant with the offence.

Ms. Mkonongo submitted in relation to grounds 3 and 4 of appeal that the evidence of PW4 was corroborated by PW6, then went on to argue that the conviction of the first appellant was found on the following four threads of evidence; **One**, the first appellant was the last person to be seen with the deceased, **two**, the first appellant's conduct suggested guilt, **three**, the first appellant lied when he was interrogated on the whereabouts of the deceased, and **four**, he made a confession leading to discovery of the body of the deceased.

From the foregoing submissions, we shall now address two main issues which grounds 3 and 4 call upon us to address. These are; whether PW4's testimony should not have been acted upon him being an accomplice and; whether the evidence of PW9 and PW10 that the first appellant led them to the discovery of the body is unsubstantiated because they did not reduce into writing the said first appellant's oral confession.

To begin with, we agree in principle that evidence of an accomplice needs corroboration for it to be acted upon against an accused. However, a conviction is not necessarily illegal for being based on an uncorroborated evidence of an accomplice. We have said so in many occasions but one case shall surface to illustrate. This is the case of **Godfrey James Ihunya and Another v. Republic,** [1980] T.L.R 197.

We shall for a moment treat PW4 as an accomplice, and proceed to ask ourselves whether there was any corroborative evidence. The thrust of the evidence of PW4 was to reveal the fact that the first appellant's explanation as to where he had left the deceased was full

of lies. We have considered the submission of Ms. Mkonongo that corroboration came from PW6 and we wholly agree with her. PW6 testified how he arrested Ramadhani Elias at the suggestion of the first appellant who ended up picking PW4, a wrong person. Therefore, we are satisfied that the testimony of PW6 like that of PW4 tends to show that the first appellant gave an untruthful explanation as to where he had left the deceased. Therefore, PW6 supported PW4's version.

Besides that, does PW4 really fit in as an accomplice? Had PW4 decided to stay at home when his brother Ramadhani Elias was being arrested, would he have been picked by the first appellant? We are certain that PW4 does not fit in as an accomplice but his evidence was corroborated, anyway.

We now turn to the question of failure on the part of PW9 and PW10 to record the first appellant's confession. We are not going to consider the first appellant's contention in respect of PW9 and PW10 in isolation, instead we shall do so in the style suggested to us by Ms. Mkonongo. This is by considering the four factors earlier referred to.

The first factor is that the first appellant was the last person to be seen with the deceased. This principle has been developed by case law and it simply means that, where there is evidence that an accused was the last person to be seen with the deceased alive then there is a presumption that he is the killer unless he offers a plausible explanation to the contrary. See such cases as **Mathayo Mwalimu and Masai Rengwa v. Republic,** Criminal Appeal No. 147 of 2008 (unreported). There is evidence of PW3 that it was the first appellant whom she last saw with the deceased as he took him to a place where he would get better charcoal at a lower price.

The second factor is that in explaining the deceased's whereabouts the first appellant told lies. It is an elementary principle of law that an accused person has no duty to prove his innocence, but there are times when lies by such an accused may be resolved against him. See **Felix Lucas Kisinyila v Republic**, Criminal Appeal No 129 of 2002 (unreported). There is evidence of PW4 and PW6 that the appellant lied that he had taken the deceased to Ramadhani Elias whom he did not even know well.

The third factor is conduct of the first appellant. This is also a known and settled principle that conduct by an accused after or before the incident may spell his guilt. There are decisions to that effect such as **Mengi Paulo Samwel Luhanga and Another v. Republic**, Criminal Appeal No 222 of 2006 (unreported). In this case there is evidence of PW3, PW5 and PW7 that immediately upon learning that the deceased's relatives were looking for him, the first appellant was vividly frightened and left the place without taking the tea he had ordered.

We shall consider the first three factors together. In doing so we accept the version of PW3 that the appellant was the last person to be seen with the deceased alive. We are satisfied that PW3 is entitled to credence as there is no suggestion for us to hold otherwise. If need be, the case of **Goodluck Kyando v. Republic** [2006] T.L.R 363 is our basis for taking that view. Similarly, on the strength of testimonies of PW4 and PW6, it is our conclusion that the learned Senior State Attorney is correct in submitting that the appellant lied when trying to

explain the whereabouts of the deceased and further that his conduct at PW3's tea room was inconsistent with innocence.

As for the fourth factor which we intend to address separately, there are two issues within it for us to consider. The first is one of fact whether or not the appellant led the police to the forest where the body of the deceased was found. The second, depending on the answer to the first is, what is the effect. So, in the first limb we ask ourselves whether on the testimonies of PW9 and PW10 we can legitimately conclude that the first appellant led to the discovery of the body. In dealing with this question, the learned trial High Court Judge concluded as follows at pages 137 to 138 of the record:

> *"There is no doubt from the totality of circumstantial evidence that the body of the deceased was only discovered after the first accused had given the police information two weeks after the disappearance of the deceased. The body of the deceased and the role of the second accused were distinctly discovered from the information from the first accused. I believe the prosecution version of*

the evidence that PW9 and PW10 and other police officers were led to the scene of crime after the police had received that information from the first accused whilst in their custody at Kibaha on 16th March 2007"

The appellant would have us fault the above conclusion because PW9 and PW10 did not substantiate their testimonies with a written confession extracted from the first appellant. In resolving this stalemate, we have to remind the two contending sides that the trial court considered this thread of evidence as part of a chain of circumstantial evidence, and so did Ms Mkonongo in her submissions. Similarly, the appellants in the 3rd ground of appeal sought to fault the finding of the trial court asserting that PW4 broke that chain because of being an accomplice. Mr. Sanga even cited the case of **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 (unreported) in a bid to tilt the scales in favour of a finding that the factors for applying circumstantial evidence were not met, while Mr. Mbuga cited the case of **Ali Bakari v. Republic** (supra). Therefore, both sides should be aware that the allegation that the first appellant

led to the discovery of the body is part of the circumstantial evidence. On that ground we do not go along with the appellants' counsel that this needed to be proved by a written confession.

We have also considered whether PW9 and PW10 were seriously impeached on this issue during trial, because we take the view that if the first appellant did not lead them to the scene, the witnesses would have been subjected to serious cross examinations on that point. What we see however is rather routine, and at times less relevant. For instance, the defence counsel cross examined PW10 on the position in which they found the body and whether the injury was on the right or left side of the deceased's head. In our view, that is not the sort of questions one would expect from a person who was not instrumental in finding that body and challenges the allegation that he was. We have to add, that PW9 and PW10 like any other witness, are entitled to credence, unless the contrary is suggested, and here again we have in mind the famous case of **Gooluck Kyando v. Republic** (supra). Like the trial Judge, we accept their version without there being a written confession by the first appellant. We are aware that the law

recognizes oral confession and counsel for the appellants conceded to this. See the case of **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (unreported).

In the end and for the reasons we have shown, we are satisfied that the first appellant was the last person to be seen with the deceased and later his conduct and lies betrayed him, before he led the police to the place where the body was found. The cumulative effect of all these factors is that this chain of circumstantial evidence is incapable of no interpretation other than the guilt of the first appellant and accordingly we rejected any suggestion to the contrary. We find no merit in grounds 3 and 4 of appeal, which we dismiss.

In ground 5 of appeal, the appellants complain that there is no certificate of seizure of the body of the deceased. Counsel for the appellants did no pursue this ground because, we think, that requirement does not, as rightly submitted by Ms. Mkonongo, apply in our situation. We dismiss this ground without ado.

The last ground raises a complaint that the trial court did not consider the possibility of any person other than the appellants being the perpetrators of the murder. We shall address this ground by resolving a general issue, whether the prosecution proved the offence beyond reasonable doubts. On the basis of our conclusions in respect of the preceding grounds, this general issue poses no difficult. Earlier it was argued that death may be proved even without medical evidence. On the basis of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported) cited by the learned Senior State Attorney, we go along with her that in this case there was proof that the deceased met an unnatural death. We have said in respect of grounds 3 and 4 that the circumstantial evidence satisfies us that it is the first appellant and nobody else who killed the deceased. Our obvious conclusion is that the prosecution proved the case beyond reasonable doubt in respect of the first appellant. The evidence against the second appellant is thin, and we endorse Ms. Mkonongo's stance supporting his appeal.

Consequently, the appeal by the first appellant has no merit and we dismiss it in its entirety. The second appellant's appeal being meritorious, is allowed. We quash his conviction and set aside the sentence imposed on him. The second appellant's liberty shall be restored immediately if he is not being held for some other lawful cause.

We so order.

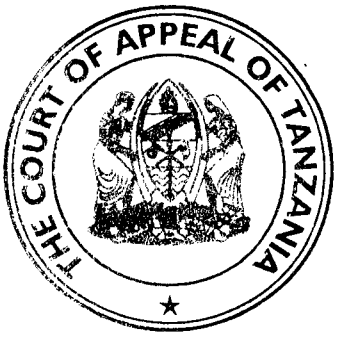
DATED at **DAR ES SALAAM** this 5th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 7th day of August, 2020 in the presence of appellants linked via video conference and Ms. Tully Helela, learned State Attorney for the Republic/respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL