IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 586 OF 2017

1. MASHIKU S/O KIDESHENI
2. GODI S/O MIKOBA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Decision of the High Court of Tanzania at Mwanza)
(Ebrahim, J.)

dated the 13th day of October, 2017
in
Criminal Sessions Case No. 6 of 2014

.....

JUDGMENT OF THE COURT

9th & 15th July, 2021

NDIKA, J.A.:

The appellants, Mashiku Kidesheni and Godi Mikoba, along with two other persons, Diana Semeni and Shinje Kalusi, who are not parties to this appeal, were tried by the High Court of Tanzania at Mwanza (Ebrahim, J.) for murdering Misalaba Masanza ("the deceased") on 26th April, 2013 at Salama village within Magu District in Mwanza Region. While the said Shinje Kalusi and Diana Semeni were acquitted of the offence, the appellants were found guilty as charged. They were consequently convicted and sentenced to suffer death. They now appeal against conviction.

To establish its case, the prosecution produced five witnesses and four pieces of documentary evidence. Briefly, the prosecution case tended to show that on 23rd April, 2013, the deceased left his home at Kasoli village in Bariadi on a bicycle for Bugati village where he was due to attend a burial. He did not return home that day. His disappearance prompted a search conducted by his relatives including his son, PW1 Tano Misalaba. PW2 Masuka Makelemo and PW3 Dioniz Joseph Maendeleo joined the search, which ended in the recovery of the deceased's bicycle on 26th April, 2013 and later the discovery of the deceased's decomposing body at Salama village within Magu District. According to the post-mortem examination report (Exhibit P.1) that was unveiled at the trial, the deceased's death was due to strangulation of the neck and multiple injuries on the body. In essence, there was no dispute as to the cause and incident of the deceased's death. That the death was certainly homicidal appeared too plain for argument.

As to who were the perpetrators of the killing, PW1 pointed an accusing finger at the said Diana Semeni, who happened to be the deceased's niece. Evidence was led that Diana had an acrimonious land disagreement with his uncle and that she hired hitmen to finish him off. PW3, who happened to be the Ward Executive Officer, alluded to the dispute, recounting that he handed over the land in dispute to the deceased obviously in the chagrin of Diana.

That hypothesis was reinforced by two extra-judicial statements that PW5 Rose Mashala, a Justice of the Peace, tendered in evidence, saying that she made them from the first appellant (Exhibit P.3) and his co-appellant (Exhibit P.4). The statements were retracted but the trial court admitted them after conducting mini-trials according to the procedure. In essence, the statements depicted the appellants confessing to have killed the deceased upon being engaged to do so by Diana.

A police investigator, PW4 E.1247 Detective Corporal Bisse, tendered at the trial a cautioned statement attributed to the second appellant. This was, however, rejected by the court on account of a procedural infraction.

When put to their defence, the said Diana and the appellants denied the accusation against them flat out. In addition, the appellants raised *alibis*.

In her judgment, the learned trial Judge mainly acted on the extra-judicial statements (Exhibits P.3 and P.4) to convict the appellants of murder. However, she found, rightly so, that the said Diana could not be convicted solely on the statements without corroboration. She was alive to the settled position of the law that to found conviction on co-accused's evidence, there ought to be corroboration from independent evidence.

Mr. Deocles M.S. Rutahindurwa, learned counsel for the appellants, lodged a supplementary memorandum of appeal on 5th July, 2021 in substitution of the one lodged by the appellants on 8th January, 2019. The supplementary memorandum cites two grounds, which we paraphrase as follows:

1. *That the learned trial Judge erred in law and in fact by convicting the appellants upon uncorroborated extra-judicial statements which were irregularly procured and wrongly admitted.*
2. *That the learned trial erred in law and in fact by convicting the appellants on weak prosecution evidence.*

At the hearing of the appeal, Mr. Rutahindurwa represented the appellants who also appeared via a video link from Butimba Central Prison whereas Ms. Maryasinta Lazaro, learned Senior State Attorney, stood for the respondent.

Submitting in support of the appeal, Mr. Rutahindurwa attacked the extra-judicial statements, contending that they did not comply with the Chief Justice's Guide for Justices of the Peace ("the CJ's Guide"). To bolster his submission, he relied on the case of **Martin s/o Fabiano and Another v. Republic**, Criminal Appeal No. 84 of 2020 (unreported) which followed the earlier decision of the Court in **Japhet Thadei Msigwa v. Republic**, Criminal

Appeal No. 367 of 2008 (unreported). In the latter case, the Court observed that:

> *"We think the need to observe the Chief Justice's Instructions [is] twofold.* ***One****, if the suspect decided to give such statement he should be aware of the implications involved.* ***Two****, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntary. Non-compliance will normally render the statement not to have been taken voluntarily."*

In **Japhet Thadei Msigwa** (*supra*) the Court revisited the CJ's Guide, now published in **A Handbook for Magistrates in the Primary Courts – Revised and Updated Version**, January 2019. It summarized the steps a Justice of the Peace must take before recording an extra-judicial statement thus:

> *"Before the Justice of the Peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed. The Justice of the Peace ought to observe, inter alia, the following*
>
> *(i) The time and date of his arrest;*
> *(ii) The place he was arrested;*

(iii) *The place he slept before the date he was brought to him;*

(iv) ***Whether any person by threat or promise or violence has persuaded him to give the statement;***

(v) ***Whether he really wishes to make the statement on his own free will;***

(vi) ***That if he make a statement, the same may be used as evidence against him."***

[Emphasis added]

Mr. Rutahindurwa forcefully contended that PW5, the Justice of the Peace, did not follow any of the above envisaged steps before she started recording the two statements. In the circumstances, he submitted that it was unclear if the statements were voluntarily made. He thus urged us to expunge the statements.

On the second ground of appeal, the learned counsel argued that once the two statements are discounted, there would be no evidence upon which to sustain the impugned convictions. Accordingly, he urged us to allow the appeal and proceed to acquit the appellants.

On the adversary side, Ms. Lazaro, too, supported the appeal. She conceded that the two retracted statements were markedly non-compliant with

the CJ's Guide and that they were liable to be expunged from the evidence as they were rendered involuntary. She said that the statements do not mention the offence for which the appellants were being investigated nor do they state whether they were read over and confirmed by the appellants to be correct. She was clear-cut that the statements could not, therefore, be the sole basis for convicting a person of a capital offence without corroboration.

As regards the second ground of appeal, the learned Senior State Attorney, again, expressed her agreement with her learned friend that once the statements are discounted, the rest of the evidence on record is too weak to sustain the impugned convictions.

We have examined the record of appeal and considered the concurrent submissions of the learned counsel. At the outset, we wish to express our agreement with the learned counsel that the impugned convictions in this case hinged on the tenability of the extra-judicial statements and nothing else. For none of the prosecution witnesses gave a cogent account that directly linked the appellants to the murder. So, the main issue before us is whether the two statements were proper and reliable.

To begin with, we wish to express our agreement with Mr. Rutahindurwa that, on the authorities he cited, it is imperative on the part of a Justice of the

Peace to ensure substantial compliance with the CJ's Guide in recording the suspect's extra-judicial statement so as to guarantee that the statement was freely and voluntarily given – see also **Petro Teophan v. Republic**, Criminal Appeal No. 58 of 2012; **Jackson Daudi v. Republic**, Criminal Appeal No. 111 of 2002; **Geofrey Sichizya v. Republic**, Criminal Appeal No. 176 of 2017 (unreported).

Having examined the two statements complained of, we think that the Justice of the Peace (PW5) who recorded the statements appears to have been completely unaware of the CJ's Guide. For she did not comply with most parts of it. For example, the statement attributed to the first appellant (Exhibit P.3) starts in its operative part after his personal particulars were recorded thus:

> *"Mtuhumiwa baada ya kumhoji hana lolote, naye ameanza kutoa maungamo yake kwa kusema ...."*

The above text loosely translates as follows:

> *"After interviewing the suspect, he said he has nothing else to say and then started to give a confession as follow ...."*

It is evident from both statements that the appellants were not informed of the offence for which they were under investigations nor were they asked whether any person by threat or promise or violence has persuaded them to

give their respective statements. The Justice of the Peace did not even inquire from each appellant as to whether he truly wished to make a statement on his own free will and that if he made one, it might be used as evidence against him. As submitted by Ms. Lazaro, none of the statements states whether it was read over and confirmed by the maker to be correct before it was signed. We firmly view these omissions as grave infractions that cannot be glossed over as they render the statements involuntary. It cannot be said, in the circumstances, that the appellants voluntarily confessed to the offence of murder they stood charged with. In consequence, we find merit in the first ground of appeal and proceed to discount the two extra-judicial statements.

By dint of the outcome on the first ground of appeal, we are compelled to allow the second ground of appeal as well. As held earlier, apart from the two statements now discounted, the rest of the evidence provides no incriminating material. To be sure, the tales by PW1 and PW3 on the acrimonious land dispute between Diana and the deceased to suggest that Diana might have had a hand in the homicide are obviously too conjectural to be relied upon.

In sum, we are of the view that the appellants' convictions are unsafe. We, therefore, feel constrained to allow the appeal and proceed to quash the

convictions and set aside death sentence imposed against the appellants. The appellants, Mashiku Kidesheni and Godi Mikoba, are to be set free forthwith unless they held for some other lawful cause.

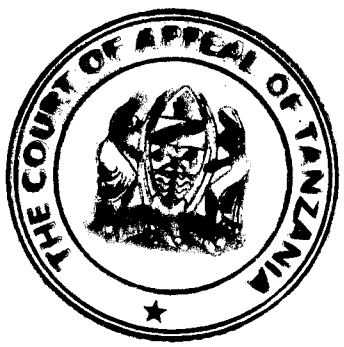
DATED at **MWANZA** this 15th day of July, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of July, 2021 in the presence of the Appellant in person linked via video conference at Butimba Prison and represented by Mr. Kassim Gilla, learned advocate holding brief for Mr. Deocles Rutahindurwa, learned advocate and Ms. Georgina Kinabo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL