

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

CRIMINAL APPEAL NO. 87 OF 2014

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.)

**1. JOSEPH KAFUKA
2. ANTHONY MWITULA** } **APPELLANTS**

VERSUS

THE REPUBLIC **RESPONDENT**

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

(Mkuye, J.)

dated the 9th day of July, 2012

in

Criminal Sessions Case No. 9 of 2010

JUDGMENT OF THE COURT

16th & 23rd June, 2014

KAIJAGE, J.A.:

The two appellants namely; Joseph Kafuka (1st appellant) and Anthony Mwitula (2nd appellant), were convicted as charged of the murder of Castory Stanslaus @ Kacha (the deceased) by the High Court sitting at Iringa. They were consequently sentenced to death. Aggrieved, they instituted a joint appeal to this Court.

We propose to preface our judgment by stating the brief account of the evidence which led to the appellants' conviction.

From a total of twelve (12) witnesses, the prosecution led evidence to the effect that during the morning hours of 16/9/2009, the deceased went to the house of the 1st appellant with whom they had established business relations. Devota Maduhu (PW1), a co-tenant of the 1st appellant informed the deceased that the latter was not in attendance. At this stage, we shall let the evidence of PW1 speak for itself on what exactly subsequently transpired. In her sworn testimony, she is on record to have stated the following, among other things:-

"On 16/9/2009 in the morning, Kacha (the deceased) came and knocked at the back door. He asked for Joseph (1st appellant) and I told him he was not there. Then Kacha left. I went to fetch water. I started washing clothes. I went inside and heard someone groaning. He was groaning in Joseph Kafuka's room. I asked Joseph as to what was happening. Joseph said Kacha was epileptic (anaumwa kifafa). I continued with my business. Kacha used to purchase paddy from Joseph Kafuka. I did not see the person who was groaning.

Thereafter at about 10.00 Joseph came and told me that Kacha was sleeping. He said he felt shy for his sickness."

Upon being cross-examined and re-examined, PW1 is also on record to have related to the trial High Court that she did not enter the 1st appellant's room because the latter had locked the door, claiming that the deceased was feeling shy and did not want any other person to know that he was epileptic.

It was further the case for the prosecution that during the night of 16/9/2009, it became common knowledge, in Kimande village, that the deceased was not at his matrimonial home and his whereabouts were unknown. A search for him was mounted, and was superintended by Mussa Abdallah Mlula (PW3) and Augustino Lyelu (PW6) who were, respectively, the then Chairman and Executive Officer (VEO) of Kimande village. The appellants became the first suspects for the disappearance of the deceased. When he was asked about the whereabouts of the deceased, the 1st appellant admitted having been responsible for the disappearance of the deceased, stating that he killed the latter by using a panga and knife in conjunction with the 2nd appellant. The said oral

confession was made before PW3 and PW6. Upon that admission, the appellants were arrested. In the meantime, the incident was reported to the police authorities and the search for the deceased continued.

The testimonial account of the prosecution witnesses further revealed that later on the same day, the search party found the deceased's body buried in a shallow pit somewhere in the bush. Also found in the vicinity, was a bicycle (EXHP5) which belonged to the deceased, a knife (EXHP2) and a hoe (EXHP3). The search party in concert with Insp. Teddy Timbuka (PW8), D/Cpl. Lawrence (PW9) and other police officers exhumed the deceased's body for burial purposes and for further police investigations. The said prosecution witnesses found head injuries and a stab wound on the deceased's abdomen. According to Dr. Charles Mwabulambo (PW7) who conducted an autopsy on the deceased's body, the death of Castory Stanslaus Kacha was due to severe haemorrhage and head injury. His report on post-mortem examination was earlier tendered during the preliminary hearing and was admitted in evidence as EXHP1.

In the course of police investigations, an emergency search was conducted by PW8 and PW9 in a room then occupied by the 1st appellant.

Cash money to the tune of Tshs.272,000/= (EXHP7) and a notebook (EXHP8) were recovered and seized therefrom. The evidence of PW8 has it that when the 1st appellant was quizzed about EXHP7 and EXHP8 the latter stated that same were taken from the deceased. It was No. 5054 D/Cpl. Ally (PW10) and No. D.7456 D/Cpl. Jaffary (PW12) who, respectively, obtained and recorded the 1st appellant's cautioned statement (EXHP9) and that of the 2nd appellant (EXHP11). Apparently, the confessional statements contained in the said both exhibits are not exculpatory, and each appellant incriminates himself and the other. However, both EXHP9 and EXHP11 were retracted in the course of trial. Indeed, in the Extra Judicial Statement (EXHP10) made by the 1st appellant before Flora Samwel Mhelea (PW11), the 1st appellant confessed to have killed the deceased in collaboration with the 2nd appellant.

In their respective defences, both appellants categorically denied to have killed the deceased. They claimed that the real murderers of the deceased were Fikiri and Kasweswe, both relatives of PW6. They further advanced a claim that because PW6 was all out to save his relatives, they were threatened to be killed if they were to disclose who were the actual

killers. They asserted that they were labouring under that threat of PW6 when they made the said cautioned statements.

The trial of the appellants was conducted with the aid of three (3) assessors who returned verdicts of guilty as charged against both appellants. Having taken stock of the appellants' confessional statements made to the police and to the justice of peace, the Post Mortem Examination Report, the 1st appellant's oral confession made to PW3 and to PW6 and other corroborative circumstances including the appellants' conduct, the learned trial judge was satisfied that the appellants killed the deceased with malice aforethought.

The memorandum of appeal lodged on behalf of the appellants by Mr. Alfred Kingwe, learned advocate, lists three (3) grounds, but two (2) were abandoned. He pursued the outstanding ground comprised of the following complaint:-

"That the learned Judge erred in law and fact in convicting the appellants with murder when the case was not proved beyond reasonable doubt."

At the hearing of the appeal, Mr. Kingwe appeared for both appellants while the respondent Republic which resisted the appeal was represented by Ms. Lilian Ngilangwa, learned State Attorney.

Submitting in support of the sole ground of appeal, Mr. Kingwe faulted the learned trial judge for relying on the retracted appellants' cautioned statements (EXHP9 and EXHP11) without warning herself and in the absence of other corroborative evidence. In this regard, he cited to us the case of **PASCHAL KITIGWA V. R.** [1994] TLR 65. In her focused submission in rebuttal, Ms. Lilian made reference to passages in the impugned trial High Court decision in which the Court meticulously addressed the law on retracted confessions and how, after it had warned itself on the dangers attending reliance on such confessions, it proceeded to convict the appellants as charged.

On our part we are, with respect, in agreement with Ms. Lilian. Going by the record, it is clear that after restating the holding in **TUWAMOI V. UGANDA** (1967) EA 84, the learned trial judge proceeded to deliberate thus in her judgment:-

"I am aware that before making use or reliance on the retracted confession, the court has to warn itself of the danger of convicting on retracted confession (Hamis Meure Gandthi and Others V.R. (1966) TLR 12).

After warning myself of such danger, I find that the confessions were nothing but truthful to be acted upon even without corroboration."

Having in mind the foregoing extract from the trial High Court decision, we are satisfied that Mr. Kingwe's argument that the trial High Court did not warn itself before relying on the appellants' retracted confessional statements has no basis at all.

We are similarly in agreement with Ms. Lilian that the existence of other independent evidence and circumstances corroborative of the appellants' cautioned statements proves the case against the appellants beyond any reasonable doubt. This being a first appeal, this Court is perfectly entitled to re-evaluate the evidence on record and come to its own conclusions.

Upon our own re-evaluation of the entire evidence on record, we have found established, the fact that the 1st appellant was the last person

to be seen with the deceased when the latter was alive. In his defence, the 1st appellant while shifting the blame to Fikiri and Kasweswe, he nevertheless admits that the deceased was killed in his presence and in his room which he had rented. Also found established is the fact that the 1st appellant initially volunteered information to PW1 that the deceased was in his room suffering from epilepsy, and that other persons were restricted from seeing him and knowing about his condition. This explains why PW1 was barred from entering the 1st appellant's room allegedly because the deceased did not want people to see him in that state of illness.

Another piece of circumstances we have found corroborating the appellants' cautioned retracted statements is an admission by the 1st appellant before PW3 and PW6, that he killed the deceased in collaboration with the 2nd appellant. It is significant to take note here that in their respective incriminating cautioned statements, the appellants are giving details on what role each played in killing the deceased. We have earlier alluded to the fact that the 1st appellant confessed to have inflicted cut wounds on the deceased's head by using a panga, and the 2nd appellant's confession being that he stabbed the deceased's abdomen using a knife.

Going by the report on post-mortem examination (EXHP1), the cause of the deceased's death appears to be related to the nature of the assaults inflicted on the latter's body. Furthermore, the occipital cut with an overflow of brain tissue and the massive penetrating cut wound found on the deceased's body appears also to correspond with the weapons which the appellants admit to have used in killing the deceased.

In our judgement, we are in agreement with the learned High Court trial judge that on the authority of **TUWAMOIS** case (*supra*), she could have properly secured the appellants' conviction on the basis of their retracted confessions contained in the cautioned statements (EXHP9 and EXHP11) after satisfying herself, as she did, that same were true and after warning herself, as she also did, of the dangers of convicting on the basis of such retracted confessions. However, she went ahead to find other corroborative evidence most of which correspond with the supportive direct evidence and incriminating circumstances linking the appellants with the murder in question which we have endeavoured to unearth herein above.

Considering the nature of the murder weapons, the vulnerable parts of the deceased's body against which fatal injuries were inflicted, coupled

with the appellants' conduct before and after they had killed the deceased, we also see nothing to fault the trial court's finding that the appellants killed the deceased with malice aforethought.

Submitting further in support of the appeal, Mr. Kingwe correctly, in our view, faulted the manner in which PW11, the Justice of the Peace, obtained and recorded the 1st appellant's confession in the extra judicial statement (EXHP10). She did not conform to the cumulative Chief Justice's Instructions to the Justices of the Peace made under section 56 (2) of the then Magistrates' Courts Act, 1963 Cap. 537 which by virtue of the saving provisions contained in section 72 (3) of the current Magistrates' Courts Act, Cap. 11 R.E. 2002, the said instructions are construed to have been made under the latter Act. (See, **HATIBU GANDHI & OTHERS V.R.** [1996] TLR 12 and **JAPHET THADEI MSIGWA V.R;** Criminal Appeal No. 367 of 2008 (unreported).

Elaborating on the shortcoming in EXHP10, Mr. Kingwe asserted that PW11 did not ascertain from the 1st appellant on whether or not any person by threat or promise or violence had persuaded the latter to give the statement. With respect, we are in agreement with Mr. Kingwe on this

point. EXHP10 was certainly taken in breach of the Chief Justice Instructions to the Justices of the Peace published in 1964 in a booklet titled "*A guide for Justice of the Peace.*" In this regard, the observations made thus in **JAPHET THADEI'S** case (*supra*) are instructive:-

"When Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter; the section is couched in mandatory terms".

The court went on:-

"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 he 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 makes a statement, the same may be used as evidence against him."*

[Emphasis is ours.]

In this case, an omission by PW11 to observe an instruction appearing in item (iv) of the above extract, vitiated EXHP10 of which we are prepared to discount the evidence contained therein, as we hereby do. We are, however, settled in our minds that even without EXHP10, the remaining solid incriminating evidence proves the case against the appellants beyond reasonable doubt.

In the event, and for the reasons stated above, we dismiss this appeal.

DATED at IRINGA this 21st day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL