IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J. A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 140 OF 2020

NZWELELE LUGAILA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Mwanza District Registry at Mwanza)

(Ismail, J.)

dated 3rd day of February, 2020

in

Criminal Sessions Case No. 140 of 2014

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JUDGMENT OF THE COURT

6th & 14th July, 2022

KWARIKO, J.A.:

The appellant herein and three others namely; Dema s/o Daudi @ Malimi, Elizabeth d/o Mazulya and Kabula d/o Nkalikulya, then first, second and third accused persons were formerly arraigned before the High Court of Tanzania at Mwanza with the offence of murder contrary to sections 196 and 197 of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022]. The prosecution alleged that on 7th November, 2012 at Igumangobo Village within Kwimba District in Mwanza Region, the four accused persons murdered one Mihayo d/o Buyoyo (the deceased). All denied the charge.

However, on 29th August, 2014, a *nolle prosequi* was entered in respect of the second and third accused persons in terms of section 91 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002; now R.E. 2022] (the CPA). Further, when the case was fixed for trial on 23rd October, 2019, the trial court was informed that the first accused had died and the case against him abated in terms of section 284A of the CPA. At the end of the trial, the appellant was convicted and sentenced to suffer death by hanging. Dissatisfied, the appellant has preferred this appeal.

However, before we determine the merit or demerit of the appeal, we find it deserving to recapitulate the material facts of the case which led to this appeal. In the morning of 7th November, 2021, a report of the death of the deceased was received at Nhungumarwa Police Station where No. D. 6814 Detective Sergeant Someke (PW2) and No. F. 56 Detective Sergeant Jones (PW3) went to the scene of crime. They found the house of the deceased broken and the deceased body lying therein with multiple injuries. A sketch map of the scene was drawn by PW2 which was admitted in evidence as exhibit P2 during the trial.

On the same date, Dr. Josephat Makoko (PW1) performed an autopsy on the deceased body. According to him, the cause of death was

excessive bleeding due to multiple cut wounds. His findings were posted in the post-mortem examination report which was admitted in evidence as exhibit P1.

Meanwhile, PW2 who was assigned to investigate the case managed to arrest some suspected murderers including the appellant who was arrested at Nhungumarwa Village on 6th January, 2013. Upon interrogation, the appellant was said to have admitted the allegations. However, during the trial, the appellant objected to his cautioned statement alleging first, that it was recorded out of prescribed time and second, that he did not make it at all. However, upon a trial within trial, it was admitted in evidence as exhibit P3. In his cautioned statement, the appellant revealed that the first accused hired him together with other people to kill his mother for payment of TZS. 1,200,000.00 on allegation that she was bewitching his cows.

The appellant who was the only witness for the defence, denied the charge. He testified that he was arrested on 2nd January, 2013 at Nhungumarwa Village and taken to Nhungumarwa Police Station before he was transferred to Ngudu Police Station. He was kept in custody until 5th January, 2013 when he was taken out and sent to a room where he was

given a paper to sign. Since he is illiterate, he appended his signature without knowing the contents therein. He did not question anything because he was deceived that he was going home. Thereafter, he was arraigned before the court on 6th January, 2013 where he met the first accused whom he did not know before. He denied to have ever known the deceased.

In its deliberation, the trial court believed the appellant's confession contained in his cautioned statement, exhibit P3 to be the truth of what had happened on the material day. That, it was the appellant in collaboration with other persons who were at large who with malice aforethought killed the deceased. The appellant was accordingly convicted and sentenced as shown earlier. He was aggrieved by the decision of the trial court, hence this instant appeal.

On 28th July, 2020, the appellant raised five grounds of appeal in the memorandum of appeal, whilst on 1st July, 2022, the appellant's counsel filed a supplementary memorandum of appeal containing one ground. For convenience purposes we have paraphrased and condensed the two sets memoranda into the following two grounds of complaints: **One,** that the trial court erred in law and fact in admitting and convicting the appellant

relying on the cautioned statement of the appellant, exhibit P3. **Two,** the trial court erred in law and fact for failure to hold that the unexplained delay to arrest and charge the appellant meant that the case was fabricated against him.

At the hearing of the appeal, Mr. Chama Matata, learned advocate represented the appellant, whilst the respondent Republic had the services of Ms. Gisela Banturaki, learned Senior State Attorney.

When he took the floor to argue the first complaint, Mr. Matata submitted that, the trial court erred to rely on the appellant's cautioned statement which was tainted with irregularities due to the following reasons: **First,** it was recorded out of prescribed period of four hours required under section 50 (1) (a) of the CPA after the appellant was taken under restraint. Expounding, he submitted that the appellant was interviewed after lapse of four days since his arrest on 2nd January, 2013 at 8:00 am and taken to Ngudu Police Station at 1:00 pm but the interview was conducted on 5th January, 2013 at 3:30 pm.

The learned counsel contended further that the allegations by the prosecution that the appellant was arrested on 6th January, 2013 lacks proof because D/Sgt Jones who testified as the first witness in the trial

within trial (TPW1), said that upon arrest the appellant was not registered in the police register. Thus, in the absence of such register, there is no reason why the appellant's account should not be believed. He argued in the alternative that even if the appellant was truly arrested on 6th January, 2013 at 12:00 noon and interviewed at 4:30 pm it was about five hours later which was out of the prescribed period of four hours. And that the contention by the prosecution that the delay was occasioned by the fact that the appellant was being transported to the police station lacked legal backing. To fortify his contention, the learned counsel referred us to the case of **Sia Mgusi @ Wambura & Two Others v. R,** Criminal Appeal No. 125 of 2015 (unreported).

It was the learned counsel's further submission that the basic period for interviewing a suspect should start to run after being taken under restraint and not after commencement of interview as it was held by the trial Judge. Relying on the cited case of **Sia Mgusi @ Wambura** (supra), he argued that exhibit P3 is illegal for being taken out of time and thus deserved to be expunged from the record.

Secondly, Mr. Matata argued that exhibit P3 lacks evidential value because the recording officer did not certify that he read it over to the

appellant as required by the law. **Thirdly,** he faulted the trial Judge for holding that it is only the appellant who could have given the impugned statement. According to him, some other persons could have provided the police with the information contained in exhibit P3. He mentioned those persons to be the appellant's co-accused and one Nyanjige who was present when the deceased was being killed. He argued further that since the appellant said he is illiterate, the Judge erred to hold that he signed the statement. In the alternative, the learned counsel argued that the appellant repudiated the cautioned statement and therefore it needed corroboration which is lacking in this case.

It was Mr. Matata's contention in respect of the second ground of appeal that the delay to arrest and arraign the appellant connotes that the case against him was fabricated. Based on his submissions, the learned counsel urged us to find the appeal meritorious and allow it.

In her reply submissions, Ms. Banturaki started by declaring her stance that she was opposing the appeal. She argued in respect of the first ground that exhibit P3 was obtained within the time prescribed by the law. She expounded that the appellant was arrested at Nhungumarwa Village on 6th January, 2013 at 12:00 noon and transported for about 1:30 hours

to Ngudu Police Station covering a distance of 35km. She went on to state that, at the police station they found the interview room occupied and thus the interview commenced at 4:30 pm. She contended that there was no need to apply for extension of time to interview the appellant because the delay had been explained as required by the law. The learned counsel thus argued that the allegations that the appellant was arrested on 2nd January, 2013 is unfounded that is why the trial Judge believed the account given by the prosecution.

It was Ms. Banturaki's further submission that the trial Judge considered the details in the cautioned statement which proved the ingredients of the offence of murder. That, there was intention to commit the offence where the appellant was hired by the first accused to murder his mother for allegations that she was bewitching his cows. As for *actus reus,* the use of machete in the killing tallies with the findings in the post-mortem report that the deceased body was found with injuries caused by sharp object directed in the neck, head and hands. To fortify her contention, the learned counsel relied on the Court's earlier decision in **Hamisi Juma Chaupepo v. R,** Criminal Appeal No, 95 0f 2018 (unreported).

In addition, she argued that the trial court was correct to believe that only the appellant was capable of giving such a detailed account on how the deceased was killed and thus no any other person could have given such kind of information concerning the first accused.

Ms. Banturaki submitted further that the statement was read over to the appellant and he signed at the end whereas the certificate is also contained therein. Otherwise, she argued that, the appellant is self-defeating by turning around to claim that he did not make his confession and at the same time arguing that it was obtained outside the prescribed period.

Going forward, she argued that the trial Judge correctly invoked the provisions of section 169 of the CPA to hold that the admissibility of the cautioned statement did not prejudice the appellant considering that the murder of the mother orchestrated by her son is a public interest offence. And that, the appellant was given opportunity to object the statement. To fortify her contention, she cited the case of **Chacha Jeremiah Murimi & Three Others**, Criminal Appeal No. 551 of 2015 (unreported).

Regarding the second ground, Ms. Banturaki submitted that there was no delay in arresting the appellant since there was no eye witness to

the murder hence it was only through a tip off that led the police to become aware of the appellant's involvement in the murder, hence his arrest. She finally urged us to dismiss the appeal for lacking in merits.

In rejoinder, Mr. Matata argued that the cautioned statement was not given by the appellant as he was only tricked to sign it believing that they were papers for bail. And finally, that, illegal admission of document cannot be said to be for public interest and there is no evidence to show that the appellant absconded from his home village.

This being a first appeal, it is in the form of a re-hearing where the first appellate court has a duty to re-evaluate the entire evidence on the record to find out whether the trial court correctly appreciated the facts of the case presented before it. -See: **Mkaima Mabagala v. R,** Criminal Appeal No. 267 of 2006; **Juma Kilimo v. R,** Criminal Appeal No. 70 of 2012; and **Oscar Lwela v. R,** Criminal Appeal No. 49 of 2013 (all unreported). For example, in the first case, the Court observed thus:

> *"It is trite law that first appeal it is in the form of a re-hearing. The appellant is entitled in law, to have our own consideration and views of the entire evidence and our decision thereon."*

Therefore, in determination of this appeal, we shall be guided by this settled principle of law.

Having considered the submissions by the parties, the first issue which calls for our deliberation is whether the appellant's cautioned statement (exhibit P3) was obtained out of the prescribed period of four hours. Section 50 (1) (a) of the CPA is relevant in this respect as it provides thus:

> *"50.- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–*
>
> > *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence."*

In order to decide this issue, we would like first to be clear as to the date the appellant was arrested. On his part, the appellant claimed that he was arrested on 2nd January, 2013 at Nhungumarwa Village and taken to Ngudu Police Station and thereafter he was interrogated on 5th January, 2013. Therefore, according to him, he was interrogated after lapse of four

days thus outside the prescribed period of four hours after being taken under restraint. However, when he was cross-examined during the trial within trial the appellant's account contradicted as he stated as follows:

> *"I cannot read but a can write properly. I don't remember when is today. I cannot recall the dates but I can remember the days. I can remember the dates very well. I cannot read. I remember dates but when they arrested me, they told me that is the date I was arrested. I heard people talking about these dates. I was repairing my bicycle. There were people when I was arrested. I did not know that I would be charged with this offence. I did not see the importance of getting somebody to testify on the date."*

It goes without saying that the appellant was not certain on the date when he was arrested. According to him, it was other people who told him of the date of arrest. However, although the burden of proof lies on the prosecution, in the circumstances of this case, the appellant ought to have brought those people to testify and he said that he did not find it necessary to call them.

On the other hand, the prosecution was emphatic that the appellant was arrested on 6th January, 2013 at 12:00 noon at Nhungumarwa Village and transported for one and half hours to Ngudu Police Station covering about 35km. But on arrival, the interview room was occupied hence waited for some time and the interrogation commenced at 4:30 pm. However, the appellant's counsel was up in arms that the prosecution did not prove the day of the appellant's arrest for its failure to tender the police register book. It is our considered view that this argument is not valid because the prosecution was consistent that the date of arrest of the appellant was 6th January, 2013 and after all it is not always that the register book is tendered to prove the date of arrest of suspects where there is other sufficient evidence in that regard. The appellant's counsel did not state any other reason for us to disbelieve the prosecution on this aspect.

Now, because the appellant's account on the date of arrest is questionable, we have found the prosecution's account to be straight and thus we hold that the appellant was arrested on 6th January, 2013 at 12:00 noon and the interview commenced at 4:30 pm. The question that follows is whether the appellant was interviewed within four hours following his being taken under restraint. If the basic period is counted from exactly

12:00 noon when the appellant was arrested to 4:30 pm when the interview commenced it brings four and half hours. This meant there was delay of half an hour to interview the appellant. However, the prosecution evidenced that soon after arrest, the appellant was transported to the police station for about one and half hours which time they argued, should be discounted in calculating the basic period available for the interview.

Again, the appellant's counsel argued that the time used to transport a suspect to the police station is not excluded in calculation of the basic period for interviewing a suspect relying on the case of **Sia Mgusi @ Wambura & Two Others** (supra).

Having considered this argument, we are of the view that; the appellant was interviewed within four hours having excluded the time used to transport him to the police station. This is per section 50 (2) of the CPA which provides thus:

> *"50.- (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 have found the case of **Sia Mgusi @ Wambura & Two Others** (supra) distinguishable from the instant case because the delay to record the second appellant's statement was more than ten days from 23rd June, 2008 when he was arrested in Dar es Salaam and transported to Musoma and kept for some days before he was interviewed on 4th July, 2008 without the prosecution assigning any reason for the delay even after he reached Musoma. The Court held in that case that the prosecution ought to have applied for extension of time to interview the appellant under section 51 (1) and (2) of the CPA.

However, even if the statement was obtained beyond the time fixed by the law, the delay was only of thirty minutes which we have found to be very negligible, comparing to the matter under consideration being of high public interest, thus the omission does not go to the root of the matter to

invalidate the appellant's cautioned statement. – see **Chacha Jeremiah Murimi & Three Others** (supra).

The appellant's counsel also had another string to his bow. He argued that there was no certificate by the recording officer to show that he had read over the statement to the appellant. We think this complaint is misconceived because at page 121 of the record of appeal the recording officer certified that he had written the appellant's statement correctly and honestly. This certificate followed the appellant's declaration that he had ensured that his statement was correctly and honestly written. He signed his declaration. What is missing in the certificate is the words that *'the statement has been read over to the appellant.* We find this to be a matter of semantic which is immaterial since it does not go to the root of the case. In addition, since we have found that the cautioned statement was read over to the appellant, the allegation that he was tricked into signing the same thinking they were bail papers, lacks base within which to stand.

It is our further observation that the appellant was not certain on why he wanted to object his cautioned statement. This is because, at first, he claimed that the statement was recorded outside the prescribed period but later he complained that he did not at all give such statement. This

state of affairs clearly shows that the objection was nothing but an afterthought.

From what we have endeavoured to discuss above, we have no doubt that the appellant's cautioned statement was obtained in accordance with the law and the trial court did not err to admit and act on it. As we have found the cautioned statement to be free from errors, there was even no need to resort to section 169 of the CPA.

Further, the trial Judge did not err to find that the cautioned statement proved the ingredients of the offence of murder. In his statement the appellant explained the whole episode as thus:

> *"...Nakumbuka mwanzoni mwa mwezi November 2012 tarehe kamili siikumbuki nilionana na huyo HONA s/o MPONDAMALI na MWANI NYANYA na nikawaeleza kuwa kuna kazi ya kufanya yaani ya kukata mapanga pale nyumbani kwa DEMA s/o @ MALIMI na wao walikubali kufanya kazi hiyo. Tulikutana pale mnadani hungumalwa na baadaye siku hiyo tukamtafuta DEMA pale mnadani ambapo tuiipanga naye kufanya kazi hiyo kwa gharama ya Tsh 1,200,000/= kesho yake siku ya ijumaa alitutangulizia Tsh 800,000/= na kukubaliana naye kumalizia kiasi kilichobaki baada ya kukamilisha kazi.*

Kwa kuwa mimi pamoja na wenzangu tajwa hapo juu tulikuwa tunafahamu nyumbani kwa DEMA pamoja na huyo mama yake kwa sura hatukuwa na haja ya kuelezwa. Tarehe 07/11/2012 majira ya usiku tukiwa watatu yahani mimi, HONA s/o MPONDAMALI na MWANI NYANYA tulifanya hayo mauaji. Mimi nilibaki sebuleni, aliyeingia ndanI na kukata marehemu mapanga alikuwa nI HONA s/o MPONDAMALI na MWANI NYANYA yeye allbaki nje kuangalia usalama. Hivyo mimi nakiri kuwa sisi ndiyo tuliofanya mauaji ya huyo mama yake na DEMA s/o DAUD @ MALIMI. Wakati tunafanya mauaji hayo marahemu alikuwa amelala na mwanamke mwingine ambaye simfahamu. Kuhusu DEMA siku hiyo hakuwepo pale nyumbani. Baada ya kumaliza kazi ya mauaji DEMA s/o DAUD alitulipa pesa zetu Tsh 400,000/= zilizokuwa zimebaki..."

According to this confession, the first accused DEMA DAUD @ MALIMI wanted her mother dead because he was accusing her of bewitching his cows. To accomplish his mission, he approached the appellant and two others who were known to be masters of killing by using machetes. They demanded to be paid TZS. 1,200,000.00 for the job and they received a down payment of TZS. 800,000.00. They executed the

plan of killing the deceased by cutting her with machetes on different parts of her body including neck, head and both hands. Thereafter, the deal was completed by being paid the remaining TZS. 400,000.00. Therefore, the plan to kill the deceased proved malice aforethought, the killing proved *actus reus,* the deceased is really dead and the perpetrator is proved to be the appellant.

The trial Judge also did not err to hold that the appellant's confession was supported by the contents of the post-mortem examination report exhibit P1, which indicates that the cause of death was excessive bleeding due to multiple cut wounds. The report also showed that the deceased suffered cut wounds in the neck, head and both hands. In the case of **Hamis Juma Chaupepo @ Chau** (supra), where the post-mortem report was found to have corroborated the contents of the appellant's cautioned statement, the Court observed thus:

> *"...In assessing the probity and weight to be accorded to the appellant's confessional statement, the learned trial Judge considered three things for him to come to a conclusion that the appellant's admission qualified to be a confession of the offence.....whether there is any corroboration of which he found that the contents of the post-*

mortem examination report, Exhibit P2 corroborated the contents of the cautioned statement, Exhibit P4."

Additionally, as rightly held by the trial Judge, it is only the appellant who could have given such a detailed account of the whole plan to kill the deceased. The allegations by Mr. Matata that the police could have sourced the information from other suspects of the murder is unfounded because it is not backed by any cogent evidence. It is a statement from the bar. We have no flicker of doubt that the trial court reached to the correct findings that the confession statement of the appellant was the whole truth of the matter. This is because, according to section 27 (1) of the Evidence Act [CAP 6 R.E. 2022], a confession made to a police officer is admissible and may be proved against the accused person if it is proved that it is voluntary and lawfully made. The first complaint thus fails.

The second complaint is that the delay to arrest the appellant meant that the case was fabricated against him. As correctly argued by Ms. Banturaki, the killers were not identified at the scene of crime, hence it was through police investigation where the appellant's involvement became known. He was accordingly arrested and voluntarily confessed to the killing. Therefore, since the appellant was not mentioned to be the suspect

immediately after the murder, it cannot be said that there was delay to arrest him. This complaint too fails.

Consequently, we are settled in our mind that the prosecution case was proved beyond reasonable doubt against the appellant and he was correctly convicted and sentenced. As such, this appeal is devoid of merit and it is hereby dismissed in its entirety.

DATED at **MWANZA** this 13th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 14th day of July, 2022 in the presence of the appellant in person, also Mr. Chama Matata, learned counsel for the appellant and Mr. Deogratius Richard Rumanyika, 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