IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J. A., SEHEL, J.A And MAIGE, J. A.)

CRIMINAL APPEAL NO. 115 OF 2021

YUSUPH s/o SYLVESTER.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba sitting at Biharamulo)

(Kairo, J.)

dated the 8th day of June, 2017

in

Criminal Sessions Case No. 20 of 2013

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JUDGMENT OF THE COURT

8th & 18th July, 2022

SEHEL, J.A.:

The appellant, Yusuph s/o Sylivester, was convicted of the offence of murder contrary to section 196 of the Penal Code, R.E. 2002 (now R.E. 2022) (the Penal Code) and sentenced to death by hanging by the High Court of Tanzania at Bukoba sitting at Biharamulo (the High Court). He was alleged to have murdered his neighbour, Bukobero w/o Ndagiwe (hereinafter referred to as "the deceased" or "Bibi Bukobero"). He was dissatisfied with the conviction. He thus appealed to this Court.

The facts giving rise to the appeal are such that: during the evening hours of the 27th day of March, 2010, the appellant reported to

Ntahondi Chimpaye (PW1), a ten-cell leader of Katahoka village, that he had not seen Bibi Bukobero for some time and did not know her whereabouts. On the following day, PW1 relayed the information to the Village Chairman, one Severin Mzuka (PW2) and they both agreed to report it to the Village Executive Officer, George Gunzali (PW3). PW3 directed them to inform the public and start searching for her. On that very day, PW1 and PW2 who were accompanied by the appellant started to search for Bibi Bukobero with no avail.

On the following day, that is, 29th March, 2010, they raised an alarm to alert other villagers and an intensive search was commenced. The appellant was also part of the search team. During search, it was suggested that since Bibi Bukobero was an old woman of about 80 years who used to walk with a supportive stick that was found inside her hut, she could not have gone far. They thus suspected the appellant and agreed to quiz him. It was the evidence of PW2 that the appellant had *"wasi wasi"* literally translating to mean that he was uneasy and worried when searching for the deceased.

It was the evidence of PW1 that they tied and quizzed the appellant while PW2 said that they beat him so as to get the truth. It is from that process, they managed to be told by the appellant that while

he was asleep, he heard movements behind the house. The appellant took them to the place where he said he heard the movements. Upon reaching there, PW1 and PW2 noticed that the soil was recently dug and covered with leaves. On a further quizzing, the appellant confessed that he killed Bibi Bukobero with the help of Paskali and another person whom he did not know his name and buried her there. When asked as to why he killed her, he said, he suspected Bibi Bukobero to have bewitched his son who was killed in a car accident. PW1 and PW2 phoned PW3 who arrived at the scene and found the appellant under arrest. PW3 reported the matter to the police.

When the police officer, Inspector Albert Makonda (PW4) arrived, the appellant narrated the same story to him. According to PW2, the police officers went to court to seek exhumation order. When they returned for the second time, they were accompanied by Dr. Mageda Kihulya (PW5), a District Medical Officer from Biharamulo District Hospital. The police officers directed the appellant to dig the place. Therein they found a female body buried while seated. Her hands and legs were tied up.

PW5 conducted the autopsy and found that the body had multiple cut wounds at the head, back, neck and other parts of the body which

might have been caused by a sharp object. He thus concluded in his Report on Post Mortem Examination Report (PMER) (Exhibit P2) that the death of the deceased was due to excessive haemorrhage.

The appellant was arrested and taken to Biharamulo Police Station and later on arraigned before the court for the offence of murder. After the appellant was addressed in terms of section 293 (2) of the CPA on the rights available to him in making his defence, he elected to remain silent by nodding.

When the three assessors who sat with the learned trial Judge were invited to give their opinions, the first gentleman and the third lady assessors returned a verdict of guilty. They were of the opinion that the appellant confessed to have killed Bibi Bukobero and led PW1 and PW2 to the place where he buried the deceased. The second gentleman assessor returned a verdict of not guilty as he was of the opinion that the confession was obtained through torture.

The High Court concurred with the two assessors that the appellant confessed orally to PW1, PW2, PW3 and PW4. It further held that the discovery of the deceased's body and the conduct of the appellant of being uneasy and worried circumstantially linked him with the charged offence. For those two pieces of evidence, it was satisfied

that the offence of murder was fully established against the appellant. He was therefore convicted and sentenced as indicated earlier.

Aggrieved, the appellant filed a memorandum of appeal comprised of seven (7) grounds, which are: -

"1. *That, the learned trial Judge erred in law by sentencing the appellant on unspecified provision of the law as required by section 312 (2) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] [now Cap. 20 R.E. 2022] (the CPA).*

2. *That, the learned trial Judge erred in law and fact by admitting exhibits P1 and P2 as evidence whilst it was not read out in court.*

3. *That, the conviction of the appellant was based on oral confession without any independent evidence linking the appellant with the crime.*

4. *That, the circumstantial evidence that sustained conviction of the appellant did not irresistibly point the appellant guilty as to the requirement of the law.*

5. *That the appellant was convicted on evidence which itself still required corroboration thus, would not corroborate another evidence as the law requires.*

6. *That there was no concrete evidence that the appellant committed the crime.*

7. *That, the case against the appellant was not proved beyond reasonable doubt."*

Later on, in terms of Rule 73 (2) of the Court of Appeal Rules, 2009 as amended, Mr. Josephat Rweyemamu, learned counsel for the appellant, filed a supplementary memorandum of appeal adding two (2) more grounds. They are:

> *"1. That, the trial court failed totally to address the assessors on the evidence adduced by the witness in respect of torture on the accused person before extracting the alleged confession from the accused person and instead misdirected the assessors that these were minor discrepancies, otherwise the purported evidence of confession would have been ruled as having obtained involuntarily.*
>
> *2. That, the trial court wrongly addressed the assessors in summing up on the fact that there was an exhumation order, despite the fact that such a fact was not testified upon or at all and no exhumation order was ever produced by the prosecution. This must have misled the assessors."*

At the hearing of the appeal, Mr. Josephat Rweyemamu, learned advocate, appeared for the appellant, whereas Messrs. Grey Uhagile and Amani Kiluwa, both learned State Attorneys, appeared for the respondent Republic.

Upon taking the floor, Mr. Rweyemamu outlined his oral submission that the third ground in the memorandum of appeal would be combined with the first ground in the supplementary memorandum of appeal whereas the first and second grounds in the memorandum of appeal together with the second ground in the supplementary memorandum of appeal would be argued separately. He would then conclude by combining the remaining grounds of appeal to front an argument that the offence was not proved beyond reasonable doubt.

Submitting on the first ground of appeal regarding failure by the trial court to specify the provision of the law under which the appellant was convicted, Mr. Rweyemamu referred us to pages 120 and 121 of the record of appeal where the learned trial Judge convicted the appellant without specifying the provision of the law. Such an omission, he argued, contravened the mandatory provision of section 312 (2) of the CPA thus vitiated the conviction and that, the sentence had no legal basis to stand. He therefore urged the Court to find merit on this ground of appeal.

In reply, Mr. Uhagile conceded that the learned trial Judge did not specify the provision of the law when convicting the appellant. However, he was quick to point out that in her judgment, the learned Judge

informed the appellant that he was found guilty of the offence of murder. It was the submission of Mr. Uhagile that since the appellant was notified on the type of offence, he was not prejudiced by such an omission. He added that, the omission is curable under section 388 of the CPA. He thus urged the Court to dismiss ground number one.

Having heard the submissions and revisited the record of appeal, it is true that the judgment of the High Court did not specify the provision of the law when convicting the appellant. The record bears out that she convicted the appellant for the offence of murder as charged. The charged offence and the section of the Penal Code was at the beginning of her judgment, that is, murder contrary to section 196 of the Penal Code. Failure to restate the provision of the law does not vitiate the conviction. We stated that position in the case of **Emmanuel Phabian v. The Republic**, Criminal Appeal No. 259 of 2017 (unreported) thus:

> *"In his judgment, the learned trial Resident Magistrate convicted the appellant as charged meaning that he was convicted of the offence of rape under ss. 130 (2) and 131 of the Penal Code which the trial magistrate specified at the beginning of the judgment. Thus, the fact that the offence and the sections of the law were not*

restated did not amount to non-compliance with s. 312 (2) of the CPA."

In that regard, we are inclined to the submission made by the learned State Attorney that the omission is curable under section 388 of the CPA as it did not prejudice the appellant.

We now turn to the second ground of appeal on which Mr. Rweyemamu submitted that the prosecution documentary evidence, that is, exhibits P1 (the sketch map) and P2 (PMER) were not read out after being admitted in evidence by PW3 and PW5, respectively. He argued that failure to read the exhibits, denied the appellant the right to understand the nature and substance of the facts contained therein for him to make a meaningful defence. He thus prayed for the said exhibits to be expunged from the record of appeal.

Mr. Uhagile admitted that according to the record of appeal, indeed exhibits P1 and P2 were not read out to the appellant after being admitted in evidence. He also conceded that the same ought to be expunged from the record. He fortified his submission by referring us to the decision of this Court in the case of **Anania Clavery Betela v. The Republic,** Criminal Appeal No. 355 of 2017 (unreported) where it was held that whenever it is intended to introduce any document in

evidence, it should first be cleared for admission, and be actually admitted, before it can be read out.

Mr. Rweyemamu briefly re-joined that if the exhibits will be expunged, the prosecution case will be seriously weakened.

On our part, having revisited the record of appeal, we fully agree with the submissions made by the counsel for the parties that the details of the sketch map was not explained to the appellant after it was admitted in evidence. Equally, the contents of the PMER was not read over to the appellant. It is a settled position of the law that before a document is admitted in evidence it should pass through three stages which have been lucidly stated in the case of **Lack s/o Kilingani v. The Republic**, Criminal Appeal No. 405 of 2015 (unreported) that:

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court ... alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents invariably pass through, before their exhibition as evidence."*

From the record of appeal, having passed the two stages of clearing and admission, exhibits P1 and P2 were not read over to the appellant. That was wrong and occasioned a miscarriage of justice to the appellant. Accordingly, we find merit in the second ground of appeal and proceed to expunge exhibits P1 and P2 from the record. That apart, we note that the contents of the sketch map was sufficiently explained by PW4 during his cross examination. Equally, the contents of exhibit P2 were also detailed by PW5 in his examination-in-chief. With respect, we do not subscribe to the submission made by Mr. Rweyemamu that the strength of the prosecution case depends on such exhibits but on the totality of evidence brought before the trial court.

Next are the combined grounds of appeal, the third ground in the memorandum of appeal and the first ground in the supplementary memorandum of appeal. The submission of Mr. Rweyemamu on those two grounds of appeal was three-fold. First, he argued that the alleged oral confession was obtained through torture from the appellant but the learned trial Judge simplified it to "quizzing". Although, he appreciated that PW1 had constantly used the word "quiz" in his evidence, Mr. Rweyemamu invited the Court to critically analyse the context in which the word was used. It was his submission that the word "*quiz*" used by

PW1 connotes different meaning from questioning. In trying to persuade us to find that it had different meaning, he referred us to page 22 of the record of appeal where PW1 said, *"in quizzing [the appellant] we tied him"* and page 24 where he said "*Yusuf [the appellant] wouldn't have told us without being quizzed.*" He contended that had the learned trial Judge properly directed her mind as to how the oral confession was obtained, she would not have arrived to a conclusion that the oral confession was made voluntarily.

Secondly, he argued that the learned trial Judge failed to properly address the assessors on the evidence adduced by the prosecution witness in respect of torture on the appellant before extracting the alleged oral confession. He argued that the learned trial Judge summed up to assessors that the appellant was "*quizzed and was bitten a bit*" while there was evidence of torture. He referred the Court to page 30 of the record of appeal where PW2 testified that they beat the appellant so as to get the truth.

Thirdly, relying on the principle stated in the case of **Azizi Abdallah v. Republic** [1991] T.L.R. 71, Mr. Rweyemanu invited the Court to draw adverse inferences on the failure by the prosecution to call key witnesses, namely Paskali and the Justice of Peace and failure to

tender the extra judicial statement that was mentioned by PW4 in his evidence-in-chief without there being any explanation as to why the witnesses who were within reach, could not have been called. For that reason, he urged the Court to find merit on the grounds of appeal.

On his part, Mr. Uhagile conceded that the confession was obtained through torture but he was of the view that it could still be acted upon because it was a confession leading to the discovery of the deceased's body, hence, admissible in terms of section 29 of the Evidence Act, Cap. 6 R.E. 2022 (the Evidence Act).

Moreover, Mr. Uhagile argued that there was subsequent confession made before PW3 and PW4 as it can be gathered from pages 34 and 37 of the record of appeal, respectively. It was his submission that the subsequent confession was made without inducement of any force, promise or threat and thus he was a free agent when making it. He made reference to the case of **Josephat Somisha Maziku v. The Republic** [1992] T.L.R. 227 that the appellant made a subsequent confession before PW3 and PW4 as a free agent.

Apart from confession, Mr. Uhagile added that there was circumstantial evidence which was used by the learned trial Judge to convict the appellant. He mentioned the circumstantial evidence used by

the learned trial Judge to convict the appellant, that: confession leading to the discovery of the deceased's body and the conduct of the appellant.

Regarding improper summing up, Mr. Uhagile submitted that the learned trial Judge properly addressed the assessors on the quizzing of the appellant on the evidence given by the prosecution witnesses and not otherwise. He referred us to page 27 of the record of appeal where in cross examination, PW2 told the trial court that the appellant was beaten a little bit. He also referred us to page 42 of the record of appeal where, when PW4 was answering the questions of the 1st assessor, he said that the appellant had no sign of being beaten.

Concerning adverse inferences, Mr. Uhagile supported the holding of the learned trial Judge that despite the absence of Paskali, in terms of section 23 of the Penal Code, the appellant cannot be exonerated from liability. Furthermore, Mr. Uhagile argued that PW3, the hamlet chairperson, explained the reason as to why Paskali could not be secured as a witness that in his area there was no person with that name. Such person was unknown in PW3's village. Mr. Uhagile added that the absence of evidence of the Justice of Peace and the extra judicial statement did not create any doubt on the prosecution case

because they were not material witnesses. With that submission, he urged the Court to dismiss the grounds of appeal for lack of merit.

In rejoinder, Mr. Rweyemamu argued that in the present appeal there was no circumstantial evidence because the so-called circumstantial evidence was in respect of the oral confession which was obtained through torture. He further argued that there was no subsequent confession rather a continuous confession made in the same environment of torture.

We wish to start from where Mr. Rweyemamu ended that there was no circumstantial evidence. We have shown herein that the conviction of the appellant was based on confession and circumstantial evidence. The learned trial Judge rightly restated the law on circumstantial evidence that in a case depending on circumstantial evidence, the court must, before drawing the inference of guilty, find that the inculpatory facts are incompatible with the innocence of the accused person, incapable of explanation upon any other reasonable hypothesis other than that of guilty and there are no other co-existing circumstances which would weaken or destroy the inference – see: **Elisha Ndatange v. The Republic,** Criminal Appeal No. 51 of 1999, **John Mugule Mdongo v. The Republic**, Criminal Appeal No. 18 of

2004 and **Saidi Bakari v. The Republic**, Criminal Appeal No. 422 of 2013 (all unreported). On our reappraisal of the entire evidence, we failed to find any circumstantial evidence. We shall explain. According to the evidence of PW2, the life of the appellant changed after the death of his son as he became uneasy and worried. We are therefore satisfied that the state of uneasiness and worriedness existed prior to the search. As such, it does not irresistibly infer that the appellant killed the deceased. Moreso, the evidence of all prosecution witnesses point that the discovery of the deceased's body was the result of the appellant's confession. Therefore, the discovery of the deceased's body is linked with the confession of the appellant.

We now turn to determine the oral confession. The learned State Attorney admitted that the confession of the appellant before PW1 and PW2 was obtained through torture. He however urged the Court to find that it was properly admitted and acted upon by the High Court in terms of section 29 of the Evidence Act. The said section provides:

> *"29. **No confession** which is tendered in evidence **shall be rejected on the ground that a promise or a threat** has been heid out to the person confessing unless the court is of the opinion that the inducement was made in such circumstances and was of such a nature as*

was likely to cause an untrue admission of guilt to be made."

It is no doubt that the above provision of the law allows the trial court to admit a confession obtained through a promise or threat if the trial court is of the opinion that no inducement was made and that the confession was not of such a nature as was likely to cause an untrue admission of guilt. In the case of **Richard Lubilo & Another v. The Republic** [2003] T.L.R. 149, the Court considered the scope of the above provision of the law that:

> *"... section 29 [of the Evidence Act] is two-fold: It is whether the accused person was induced by such promise or threat to make the confession. If the answer to both limbs of the question is in the affirmative, the confession is inadmissible. But if, on the other hand, the Court is of the opinion that the promises and threats were not of such a nature and were not offered in such circumstances as to operate on the mind of the accused, the confession is admissible. Such a confession, not being the product of the threats and promises, is a species of voluntary confessions. The question whether or not the threats and promises have operated on the mind of the accused is a subjective one and the Court*

will have to decide each case on its peculiar facts."

In a number of cases, this Court has taken a view that where actual torture is involved the purported confession should not be admitted in evidence because section 29 of the Evidence Act was not meant to apply in such a situation. This position was stated in the case of **Brasius Maona & Another v. The Republic,** Criminal Appeal No. 215 of 1992 (unreported) when it held:

"Once torture has been established, courts should be very cautious in admitting such statements in evidence even under the provisions of Section 29 of the Evidence Act, 1967 which in our considered view was not meant to be invoked in a situation where the inducement involved is torture."

In the appeal before us, it is not disputed that the oral confession by the appellant before PW1 and PW2 was obtained through torture. That being the position, we are settled that it was wrong for the learned trial Judge to admit and act upon it.

Mr. Uhagile tried to impress upon us that there was subsequent confession of the appellant before PW3 and PW4. Here we wish to refer to what we said in the case of **Josephat Somisha Maziku v. The Republic** (supra) that:

> *"It is a principle of evidence that where a confession is, by reason of threat, involuntarily made, and is therefore inadmissible,* ***a subsequent voluntary confession by the same maker is admissible, if the effect of the original torture, or threat, has*** *before such subsequent confession,* ***been dissipated and no longer the motive force behind such subsequent confession.***"[Emphasis added]

The evidence on record shows that at the time PW3 and PW4 arrived at the scene, they found the appellant was tied up by PW1 and PW2 and when asked him, he admitted to have killed Bibi Bukobero. With that evidence, it is obvious that the alleged subsequent voluntary confession by the appellant was made under the same surroundings of the original torture. We therefore, respectfully differ with the submission of the learned State Attorney that the appellant was a free agent. We find and hold that the alleged subsequent confession was obtained through torture hence inadmissible.

Lastly, is the issue as to whether the prosecution managed to prove the case against the appellant beyond reasonable. We have shown that the conviction of the appellant was based on confession and circumstantial evidence. Flowing what we have discussed and given that there is no any other evidence connecting the appellant with the murder

of Bibi Bukobero, we agree with the submission of Mr. Rweyemamu that the prosecution failed to prove its case against the appellant.

In the end, we find merit in this appeal. We accordingly allow it, quash the conviction and set aside the sentence with an order directing immediate release of the appellant, **Yusuph s/o Sylivester** from prison unless he is otherwise lawfully held.

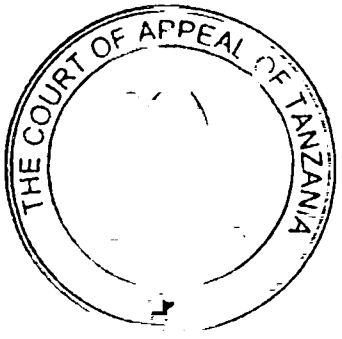
DATED at **BUKOBA** this 16th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2022 in the presence of Mr. Josephat S. Rweyemamu, learned counsel for the appellant and Mr. Amani Kiluwa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



O. A. Amworo
DEPUTY REGISTRAR
COURT OF APPEAL