IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 447 OF 2019

MARECHA MASHALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania,
(District Registry) at Tabora
(Matuma, J.)

dated the 25th day of July, 2019

in

Criminal Session Case No. 16 of 2018.

.....

JUDGMENT OF THE COURT

14th & 17th March, 2023

MUGASHA, J.A.:

This appeal arises from the decision of the High Court in which the appellant was charged and convicted of the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2022. It was alleged by the prosecution that, on 7/11/2017 at Kisato hamlet in Uvinza District within Kigoma Region, the appellant did murder one Kamuli d/o Jolijo. When called upon to answer the charge, he denied the prosecution's accusations. In order to prove its case, the prosecution paraded six witnesses and four documentary exhibits namely, the autopsy report of the deceased (exhibit P1); the sketch map of the scene of crime (exhibit P2); the cautioned and

extra judicial statements of the appellant (exhibits P3 and P4). The appellant was the only witness for the defence and as earlier hinted, he denied to have murdered the deceased.

The facts underlying the present appeal are such that, the deceased was a step mother of the appellant. She resided in a homestead at Kalangala hamlet whereas the senior wife and the appellant's mother resided in another locality. On the fateful day, the deceased together with her co-wife and the appellant happened to be working together on their farms and along them were their sons including the appellant's brother Tungu Mashala who testified as PW2. At about 10.00 am they were through with the farming, and the deceased prepared breakfast for the entire family. While the two wives continued to have breakfast, their husband Mashala Mane (PW1) directed his sons including the appellant to construct a house. However, the appellant opted not to join his brothers and instead, without asking permission from his father or even alerting his siblings, he left the premises with a hoe and an axe.

Later in the evening at around 06.00 pm, Mariam Ruziga Jilala (PW3) while on the way back from school, found a lifeless body of the deceased lying down on the pathway with a cut wound on the head. Mariam Ruziga (PW3) reported the incident to her mother who later notified the hamlet chair. The deceased's husband (PW1) recalled to have received the sad news

from one Mungo the deceased's son who is not among the prosecution witnesses. PW1 suspected the appellant to be the culprit as he was nowhere to be seen and did not disclose as to where he was embarking to and that apart, he left with an axe. The fateful incident was reported to the police and subsequently, the doctor who examined the deceased body established that her death was due to severe wounds on the head and severe bleeding. The Postmortem examination report was admitted at the trial as exhibit P1. Thereafter, relatives were allowed to bury the deceased body and yet, the appellant was nowhere to be seen. Ultimately, on 24/11/2017 the appellant was arrested at Mishamo in Katavi, sent to Ifumbula police station and later to Uvinza police station where he was made to record a cautioned statement and later an extra judicial statement which were admitted at the trial as exhibits P3 and P4 respectively.

On his part, the appellant denied the charge. He told the trial court that, besides having a good relationship with the deceased, he left the deceased alive as she was having breakfast and thus, PW1's suspicion should not be a basis of conviction. That apart, he recounted to have been arrested on 14/11/2017 and five days later taken to Uvinza, tortured and forced to make the confessional statements.

After the summing up to the assessors two of them returned a unanimous verdict of not guilty whereas one assessor returned a verdict of

guilty for the offence of murder. However, the learned trial Judge convicted the appellant as charged on the basis of the confessional statements believing such evidence to have been corroborated by the credible oral account of PW1 and PW2 and the conduct of the appellant who left home without informing other members of the family to constitute inferential circumstantial facts pointing to the guilt of the appellant.

Aggrieved with the decision of the High Court, the appellant has preferred the current appeal to the Court. Initially, on 31/10/2019 the appellant lodged a Memorandum of Appeal with 7 points of grievance. Later, through his advocate, on 8/3/2023, the appellant lodged a supplementary Memorandum of Appeal comprising four grounds of complaint as hereunder:

1. That the learned trial Judge erred in law and in facts to rely on a cautioned statement of the appellant which was illegally recorded.

2. That, the learned trial Judge erred in law and in fact to rely on extra judicial statement which did not follow the Chief Justice's instructions.

3. That, the learned trial Judge erred in law and in fact in failing to conduct properly the summing up to assessors and direct them on vital points of law which rendered the trial not conducted with the aid of assessors.

4. That the prosecution failed to prove the offence against the appellant beyond reasonable doubt.

At the hearing of the appeal, in appearance was advocate Ms. Stella Thomas Nyakyi for the appellant and Ms. Mwamini Fyeregete, learned Senior State Attorney assisted by Ms. Lucy Enock Kyusa and Mr. Merito Boniphace, both learned State Attorneys for the respondent Republic.

At the hearing the appellant's counsel abandoned the initial Memorandum of Appeal and the 3rd ground of appeal in the supplementary memorandum and it was so marked.

Basically, the main grievances of the appellant are to the effect, **one**, the trial was flawed with procedural irregularities on account of improper admission and reliance of the confessional statements to convict the appellant; and **two**, that the charge was not proved beyond reasonable doubt.

Pertaining to the procedural irregularity, it was submitted that the appellant's cautioned statement at page 92 of the record of appeal was recorded beyond the period prescribed under section 50(1) (a) of the CPA and such delay was not explained by G 209 D/C Alkado (PW4) who was informed about the appellant's arrest on 24/11/2017 and on 25/11/2017 he took the appellant to Uvinza Police where the cautioned statement was

recorded at 14.00hrs as per G. 5018 D/C Morshid, PW6's account at page 49 of the record. On account of the said delay to record the appellant's cautioned statement, and in the absence of explained delay, Ms. Nyakyi implored on us to expunge the cautioned statement from the record.

Another shortfall pointed out by Ms. Nyakyi was the uncertainty surrounding the certification to show if the cautioned statement was read out to the appellant. She argued this to be in violation of section 57 (4) of the CPA adding that, it prejudiced the illiterate appellant who was denied an opportunity to know the contents of the cautioned statement so as to exercise his right to have the statement rectified. To bolster her arguments, she cited to us the cases of **JUMANNE MOHAMED AND TWO OTHERS VS. REPUBLIC**, Criminal Appeal No. 534 of 2015 and **CHAMURIHO KIRENGI @ CHAMURIHO JULIUS VS. REPUBLIC**, Criminal Appeal No. 597 of 2017, (both unreported). She thus urged us to expunge the appellant's cautioned statement from the record.

In reply, it was the learned Senior State Attorney's stance that the appellant's cautioned statement was recorded within the period prescribed by the law and that the statement was certified as per the dictates of section 58 (4) of the CPA. In this regard, she implored on us not to expunge the cautioned statement of the appellant which contains his confession on the murder of the deceased.

The period in which a statement of suspect must be recorded is governed by section 50 (1) (a) and (b) of the CPA which stipulates as follows:

> *"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;*
>
> *(b) If the basic period available for interviewing the person is extended under section 51, the basic period as so extended".*

In the case at hand, it is glaring that the recording of the appellant's cautioned statement was delayed considering that he was under restraint at Mrangu Police from 24/11/2017 whereas the statement was recorded on 25/11/2017. Therefore, in the absence of any plausible explanation for the delay and the extension to record the statement being obtained, the cautioned statement was vitiated and in violation of the dictates of the law. See: **JUMANNE MOHAMED AND 2 OTHERS VS. REPUBLIC** (supra).

Thus, on account of the said omission, it was not proper to act on the appellant's cautioned statement to ground the conviction and we accordingly expunge it from the record and find the ground of complaint merited.

In ground two the learned trial judge is faulted to have acted on the illegally procured extra judicial statement to convict the appellant. On this, it was submitted that, the extra judicial statement was made contrary to the chief Justice's directions. It was pointed out that the extra judicial statement at page 95 of the record misses the essential details on what should be contained therein, to wit, the place and date of arrest; where the appellant slept before being presented to the Justice of Peace and it does not show if the appellant was cautioned that the contents of the statement would be used against him at the trial. In the premises, it was Ms. Nyakyi's argument that in the wake of missing details in the statement, it cannot be safely vouched that the statement was voluntarily offered by the appellant. She cited to us the case of **PETRO TEOPHA VS. REPUBLIC**, Criminal Appeal No. 58 of 2012 (unreported) to bolster her arguments.

On the other hand, following a brief dialogue with the Court, Ms. Fyeregete conceded that on account of prevalent omissions in the extra-judicial statement of the appellant, it was wrongly procured and acted upon to convict the appellant.

The recording of the extra-judicial statement is regulated by Chief Justices' instructions containing detailed aspects which must be complied with before the extra judicial statement is recorded. The details include: **One**, the time and place of arrest; **two** the place the suspect slept before the date he was taken to the Justice of the peace and **three**, if he is made aware that the contents of the statement may be utilized as evidence at the trial; and **four,** whether he really wishes to make the statement on his own free will. The essence of complying with the CJ's instructions was underscored in the case of **JAPHET THADEI MSIGWA VS. REPUBLIC**, Criminal Appeal No. 367 of 2008 (unreported) the Court observed.

> *"We think the need to observe the Chief Justice's instructions are twofold. One, if the suspect decided to give such a 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".*

In the case at hand, the manner in which Benedect Severine Kalomba (PW7) wrote the extra judicial statement shows that he was not aware of CJ's instructions. Thus, on account of failure to comply with the instructions, it cannot be safely vouched that the appellant confessed to have committed the offence of murder. On account of the said omission, the evidence of PW7

along with exhibit P4 cannot be spared and the same is expunged from the record. Thus, the second ground of appeal is merited.

Having expunged the confessional statements this takes us to determining the 4th ground of appeal whereby the learned trial judge is faulted to have relied on weak evidence to convict the appellant. While Ms. Nyakyi submitted that the remaining oral evidence is shaky as it is based on suspicion that the appellant is the one who killed the deceased having disembarked with an axe and without informing any of the relatives as to where he was heading to. He argued that suspicion however great cannot be a basis of conviction. She thus implored on the Court to allow the appeal, quash and set aside the conviction and sentence meted on the appellant and set him at liberty.

On the other hand, the learned Senior State Attorney clinging on the cautioned statement of the appellant, argued the same to be corroborated by the conduct of the appellant who disembarked without notifying any relative and fled to Katavi after the fateful incident. She urged us to dismiss the appeal and sustain the conviction and the sentence.

In the present case, there is no eye witness who saw the deceased being hacked to death. The question to be answered is whether what was recounted by the prosecution on circumstances surrounding the killing

incident, suffice as circumstantial evidence to irresistibly point to guilt of the appellant.

The law relating to circumstantial evidence has long been settled in our jurisdiction. An accused person may be convicted on the strength of circumstantial without any other type of evidence to corroborate it. Circumstantial evidence has been described as the best evidence, as was aptly articulated by Sir Udo Udoma, the then Chief Justice of Uganda, in Uganda High Court Criminal Appeal No. 220 of 1963 (unreported):

> *"... it is no derogation to say that it was so; it has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics".*

The above Ugandan case was cited with approval in the case of **Julius s/o Justine & Four Others v. Republic**, Criminal Appeal No. 155 of 2005 (unreported)]. Likewise, in **Georgina Masala v. Republic,** Criminal Appeal No. 128 of 2014 (unreported), we relied on **Samson Daniel v. Republic** (1934) 1 EACA 46 to state that circumstantial evidence may be conclusive than the evidence of an eye witness. We observed:

> *"Circumstantial evidence may be not only as conclusive but even more conclusive than eye witness".*

Similarly, in **Simon Musoke v. Republic** [1958] 1 EA 715, the Court of Appeal for East Africa, held:

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt".*

The defunct Court of Appeal also imported to East Africa the holding of the decision of the Privy Council in **Lezjor Teper v. Reginam** [1952] A.C 480 in which it was stated at p. 489:

> *"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".*

The erstwhile Court of Appeal also quoted the following excerpt from **Taylor on Evidence** (11th Edn.) at p. 74:

"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt".

In the light of the cited decisions, can it be safely vouched that circumstantial evidence in the present case was such that it irresistibly pointed to the guilt of the appellant? Our answer is in the negative and we shall proceed to give our explanation. In the present matter, PW1, the appellant's father suspected him to be the culprit because the appellant had defied to join other siblings to construct a wooden house and besides he left the homestead without informing any member of the family. At page 37 of the record of appeal PW1 testified that:

"I suspected Marecha to the murder because he was nowhere to be seen and he left with an axe".

PW2 also recounted that, the appellant promised to join them in the construction works and when he asked for an axe, they told him to pick the other one. At page 40 of the record of appeal during cross-examination PW2 is on record to have said:

"Kilichofanya tufikirie kuwa Marecha ndiye ameua ni kwasababu haijawahi kutokea achukue shoka na kutoweka na baada ya tukio sikumuona".

The appellant had his own version as to what made him to disembark without informing his father. This is reflected at page 69 of the record of appeal as he stated:

> *"I did not inform my relatives because of the nature of my father "ilikuwa ni msimu wa kiiimo na baba yangu ni mkali, niliona nikumuaga ataendelea kunibana nifanye kazi za nyumbani".*

Yet, he told the trial court that he disembarked he left behind the deceased alive having breakfast with his mother, which was confirmed by PW2. In the premises, what transpired between the period when the deceased disembarked from the homestead of the appellant's mother up to when she was found dead is a quagmire. In this regard, the oral account of the prosecution witnesses does not irresistibly point to the appellant and we agree with Ms. Nyakyi that it is purely based on suspicion whereby, suspicion however great cannot form a basis of conviction. See: **Hekima Madawa Mbunda and Another vs. Republic**, Criminal Appeal No. 556 of 2019, **MT. 60330 PTE Nassoro Mohamed Ali v. Republic**, Criminal Appeal No. 73 of 2002, **Mashaka Pastory Paulo Mahengi and 5 others v. Republic,** Criminal Appeal No. 49 of 2015 (all unreported).

On account of what we have endeavoured to discuss we are satisfied that, although the deceased was murdered, it was not proved beyond a

reasonable doubt that it is the appellant who murdered her. We thus find the appeal merited and it is allowed. The conviction and sentence meted on him are hereby quashed and set aside and we order for his immediate release unless he is held for another lawful cause.

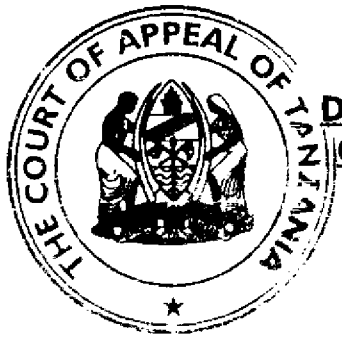
DATED at **TABORA** this 16th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 17th day of March, 2023 in the presence of Ms. Stella Thomas Nyakyi, learned counsel for the appellant, and Ms. Hannarose Kasambala, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL