IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J. A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 524 OF 2021

TABIBU NYUNDO.....1ST APPELLANT

THOBIAS NTAKICHIYA.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mlacha, J.)

dated the 21st day of September, 2021

in

Criminal Sessions Case No. 18 of 2021

.....

JUDGMENT OF THE COURT

29th May, & 5th June, 2023

MWAMPASHI, J.A.:

The appellants, TABIBU s/o NYUNDO and THOMAS s/o NTAKIYICHA (henceforth the 1st and 2nd appellants respectively), were arraigned before the High Court of Tanzania at Kigoma (the trial court) for the offence of murder contrary to sections 196 and 197, both of the Penal Code [CAP 16 R.E. 2019; now R.E. 2022] (the Penal Code). According to the particulars of the offence, it was alleged that on 27.01.2019 at Gwanumpu Village within the District of Kakonko in Kigoma Region, the appellants jointly and together murdered one JIMSON s/o BUCHUMI (the deceased). They were

both found guilty of the offence, duly convicted and sentenced to suffer death by hanging, hence the instant appeal.

The material facts from a total of nine (9) witnesses and seven (7) exhibits paraded and tendered by the prosecution upon which the prosecution case against the appellants was based and on which the conviction was founded, are as follows: In the morning hours of 28.01.2019, Shukuru January Michael (PW1) received three text messages sent from a mobile phone with a Subscriber Identity Module (SIM Card) No. 0754301385. The messages were to the effect that one Jimson Buchumi (the deceased), the son of Buchumi Kafitiye (PW2), had been kidnapped and further that PW2 should be so informed and required to pay Tshs. 5,000,000/= as a ransom for the release of his son. PW1 showed the messages to PW2 and the case was reported to the Village Chairman, one Festo Sulila (PW6) and the Village Executive Officer, Robert John Gendaruhezi (PW7). Thereafter, PW1, PW2, PW6 and PW7 reported the case to Gwanumpu Police Post where they were received by H.3907 D/Sgt. Fredy (PW8) who conveyed the report to E.9284 D/SGT Stanley (PW9) and the OC – CID of Kankoko Police Station. It is also on record that PW8 directed PW6 and his team to mount a search for the deceased.

After the search for the deceased had proved futile, PW6 convened a Village meeting on 30.01.2019 whereby it was resolved that the ransom be raised by contributions from the Villagers. By 31.01.2019, Tshs. 1,500,000/= had been raised including Tshs. 800,000/= from PW2. The amount raised, that is, Tshs. 1,500,000/=, was then sent to the kidnappers in three equal instalments through a mobile phone with SIM Card No. 0754301385. It was PW6's mobile phone with SIM Card No. 0752332835 which was used to send the ransom. Despite the ransom being sent to the kidnappers, the deceased was not released. This prompted PW2 to go to Kibondo on 01.02.2019 where, in the company of Deus Sulila Tiugarugwa (PW4), he visited a Voda Shop where he was informed that SIM Card No. 0754301385 to which the ransom was sent, was registered in the name of one Elizabeth Toi and that it had recently been used via Msonga tower, then at Mtendeli, Kasanda and Gwanumpu Village. On the next day, that is, 02.02.2019, PW4 went at the said Voda Shop and was informed that the ransom received vide SIM Card No. 0754301385 had been transferred to SIM Card No. 0745139289 registered in the name of the 2nd appellant.

Having learnt that the 2nd appellant, who was well known to him, was involved in the kidnapping of PW2's son, PW4 passed the information to PW2 and PW6 who, while in the company of some other villagers, went

to the 2nd appellant's house but he was not there. They were however, told by the 2nd appellant's young brother, one January Lazaro Ntakiyicha, that the 2nd appellant had gone to his farmland. Upon getting at the farmland, they found the 1st appellant who told them that the 2nd appellant had just returned home. They decided to arrest the 1st appellant who was searched and found in possession of a mobile phone make Tecno, black in colour but with no SIM Card. PW6 communicated with PW7 who managed to arrest the 2nd appellant. When the appellants were taken at Gwanumpu Police Station they allegedly admitted to have kidnapped the missing PW2's son and the 2nd appellant told them that SIM Card No. 0745139289 belonged to him and was in his jacket at home. The jacket was brought by his wife and the said SIM Card was found hidden in it. When checked after the 2nd appellant had disclosed his password, the SIM Card was found to have Tshs. 1,480,000/= which was withdrawn by PW6 forthwith and handed to PW8 together with the mobile phone seized from the 1st appellant.

Sometimes later, the appellants together with January Lazaro Ntakiyicha who had also been arrested, were collected by PW9 from Gwanumpu Police Post to Kakonko Police Station. Thereafter, on 05.02.2019, PW9 received from PW6, the mobile phone, Tshs. 1,376,000 and two SIM Cards, that is, No. 0745139289 and No. 0752332835. The

said exhibits were handed over by him to the exhibit keeper (PW5) WP 104997 Sgt. Elina of Kakonko Police Station. During the trial, the money was tendered in evidence as Exhibit P2, the mobile phone as Exhibit P3 and the two SIM Cards collectively as Exhibit P4. According to PW5, the exhibits were in respect of murder case KAK/IR/55/2019.

PW9's testimony was to the effect that the appellants who had been in remand at Kakonko Police Station since their arrest on 02.02.2019, did on 06.02.2019, ask to see him. They then confessed to have kidnapped and killed PW2's son. Having so confessed, the appellants led him and other police officers including PW8 to the place where the deceased body was recovered. Thereafter, the appellants were whisked off back to the police station before PW8 went to fetch PW2, PW6, Dr. Samson Benjamin (PW3) and other villagers who collected the deceased body. PW3 conducted the autopsy of the deceased body at the scene. He opined that the cause of the death was lack of oxygen. The Post-mortem examination report to that effect was tendered and admitted in evidence as Exhibit P1. PW9 did also testify that on the same date, that is, 06.02.2019, at 14:00 hours and 18:00 hours, he recorded the appellants' cautioned statements which were tendered and admitted in evidence as Exhibits P6 and P7. It is also on record from the testimony of PW9 that, the appellants were

taken before the Justice of Peace for their confessions to be recorded but they refused.

In their respective defence, the appellants denied to have committed the offence in question. They also denied to have known each other before. The 1st appellant claimed that he was arrested on 30.01.2019 and not 02.02.2019. He also contended that, just as other villagers, he himself learnt that PW2's son had been kidnapped on 28.01.2019. That, he participated in the search mounted by the villagers and in contributing for the ransom. While the 1st appellant did not deny having been found in possession of the mobile phone (Exhibit P3) he denied to have led the police to the place where the deceased body was found. He questioned why the village leaders were not involved in the alleged exercise of him leading the police to the recovery of the deceased body. As for the 2nd appellant, he also claimed to have participated in the search mounted and in contributing for the ransom. He, as it was for the 1st appellant, denied to have led the police to the place where the deceased body was recovered. They also both denied to have confessed or recorded any cautioned statement voluntarily.

Having heard the evidence from both sides, the trial court found that basically, the case against the appellants was based on circumstantial

evidence and the confessions voluntarily made by the appellants leading to the discovery of the deceased body. The trial court believed the prosecution evidence to be true while that of defence was doubted because the appellants appeared or looked worried as people with a guilty conscious. The trial court also found that there was no way the police could have discovered the deceased body if not led by the appellants. It was further found that the 2nd appellant was found in possession of the SIM Card to which the ransom was transferred from the SIM Card that had been sending the text messages demanding the ransom and to which the said ransom was sent by PW6 through his mobile phone with SIM Card No. 0752332835. The evidence relating to the three text messages allegedly sent to PW1 and the transactions of the ransom was found by the trial court to be wanting for lack of electronic evidence from the relevant mobile network provider VODACOM but it was found remotely connecting the appellants to the offence. In conclusion, the trial court found that there was strong and enough evidence to prove the offence against the appellants beyond reasonable doubt. The appellants were thus, accordingly convicted and sentenced to suffer death by hanging.

At the hearing of the appeal, the appellants were represented by Mr. Silvester Damas Sogomba, learned advocate whereas the respondent

Republic had the services of Ms. Sabina Silayo, learned Senior State Attorney.

Each appellant had, initially, lodged his own separate memorandum of appeal. Whereas, the 1st appellant's memorandum of appeal consisted of six (6) grounds of appeal, the 2nd appellant's memorandum of appeal had five (5) grounds of appeal. However, the grounds of appeal raised by the appellants were similar and raised common complaints. Except for the ground of appeal on procedural ailment in regard to the summing up to assessors, which was argued separately, Mr. Sogomba combined all the remaining grounds of appeal into one general ground to wit; whether the case against the appellants was proved beyond reasonable doubt. It should also be pointed out, at this stage, that, for reasons that will become apparent in the course of determining the above singled general ground of appeal, we will not consider the ground of appeal on summing up.

Submitting on the ground of complaint that the case against the appellants was not proved to the hilt, Mr Sogomba argued that while the prosecution case against the appellants was built on the scenario that the appellants sent three text messages demanding the ransom and further that the ransom sent was received by them, there was no cogent electronic evidence to prove that there were really such text messages

sent by the appellants as no print out of the alleged three text messages was tendered in evidence. He also contended that the SIM Cards involved were not proved to belong to any of the appellants. He insisted that there was no evidence, from VODACOM, the relevant network provider, nor from Tanzania Communications Regulatory Authority (TCRA), proving not only that SIM Card No. 0745139289 was registered in the name of the 2nd appellant but also that the ransom was sent to that SIM Card. He insisted that, under the circumstances of this case, witnesses from VODACOM and TCRA were material witnesses. Mr. Sogomba contended further, that there was no cogent evidence to link the alleged three text messages and the ransom to the appellants and to the murder in question.

Mr. Sogomba did also argue that despite the seriousness of the case, the police did not conduct the investigations required, instead left it in the hands of local villagers. He pointed out that even the exhibits were left to be handled by the local villagers resulting into them being tampered with. For instance, while it is in evidence that Tshs. 1.500,000/= was allegedly raised by the villagers and sent to the kidnappers as a ransom, it was only Tshs. 1,480,000/= which was kept as an exhibit by PW8. More surprisingly, it is only Tshs. 1,376,000/= which reached PW5 and finally tendered to the trial court as exhibit P2.

It was further submitted by Mr. Sogomba that the trial court erred in basing the conviction on cautioned statements. He argued that while the appellants were arrested on 02.02.2019, their cautioned statements were recorded on 06.02.2019, well beyond the prescribed period of 4 hours. He thus urged us to expunge the said two cautioned statements from the record.

As regard to the piece of evidence that the appellants led to the discovery of the deceased body, it was argued by Mr. Sogomba that the appellants did not lead the police officers to the discovery of the deceased body. He contended that there was no good reason given as to why no independent witness was involved in that alleged exercise. He wondered how, even PW6 who had been actively involved in the matter with his village mates, was not called to witness the exercise. Mr. Sagomba did also argue that the trial court misdirected itself when it held that the cautioned statements by the appellants led to the discovery of the deceased body while the said statements were recorded after the alleged recovery. It was further submitted by him that since the appellants denied to have led the police to where the deceased body was recovered, non-involvement of at least one independent witness in the alleged exercise, watered down the evidence from the two police officers, that is, PW8 and

PW9, whose evidence was to the effect that the appellants led to the discovery of the deceased body.

In his insistence that the appellants never confessed to have committed the murder in question or led PW8 and PW9 to the recovery of the deceased body on 06.02.2019 as claimed by the prosecution, Mr. Sogomba referred us to page 84 of the record of appeal where PW5 is on record telling the trial court that the exhibits handed over to her on 05.02.2019 by PW9 were in respect of Murder Case No. KAK/IR/55/2019. He wondered how, if it was on 06.02.2019 when the appellant confessed and revealed that that PW2's son had been murdered by them, were the exhibits being linked to the murder case against the appellants well before the said 06.02.2019. He insisted that the police might had been led to the discovery of the deceased body by someone else and not the appellants.

Upon taking the floor, Ms. Silayo expressed her stance that she was not opposing the appeal. In her brief submissions, she pointed out that there was no electronic evidence to prove not only the money transactions but also the alleged three text messages demanding the ransom. She also joined hand with Mr. Sogomba that witnesses from VODACOM and TCRA were very material in the case at hand.

As for the cautioned statements, it was argued by Ms. Silayo that the statements were recorded out of time. She contended that even if 02.02.2019 is not considered as the date when the appellants were arrested for murder but 06.02.2019 when they allegedly confessed to have committed the murder, the prescribed period of four hours within which the cautioned statements ought to have been recorded cannot be certainly computed because PW9 did not tell at what time did the appellant allegedly confess before him and hence re-arrested for the offence of murder. Ms. Silayo did also submit that the cautioned statement of the 1st appellant was not among the documents that were read to the appellants during the committal proceedings. She therefore joined Mr. Sogomba and urged us to expunge the said cautioned statements from the record.

Regarding the piece of evidence that the appellants led to the discovery of the deceased body, Ms. Silayo argued that taking into account that the appellants denied to have led the police to the discovery of the deceased body, the said piece of evidence from PW8 and PW9 was watered down by non-involvement of an independent witness in the exercise of recovering the deceased body. She contended that due to the seriousness of the offence and the circumstances of the case, independent witnesses were crucial.

Understandably, the appeal having not been opposed, there was nothing from Mr. Sogomba to rejoin.

Having heard the submissions from the counsel for the parties, we find that the issue that calls for the determination of this Court is whether or not the case against the appellants was proved beyond reasonable doubt as required by the law.

Before dwelling into determining the above posed issue, we find it apposite to firstly restate the salutary principle of law that, a first appeal is in the form of re-hearing. That being the case, a first appellate court is duty bound to re-evaluate the entire evidence on record and subjecting it to a critical scrutiny and if warranted to arrive at its own conclusion of fact. See- **D.R. Pandya v. R** [1957] E.A. 336, **Iddi Shaban @ Amasi v. Republic**, Criminal Appeal No. 111 of 2006 and **The Director of Public Prosecutions v. Stephen Gerald Sipuka,** Criminal Appeal No. 373 of 2019 (both unreported). In determining this appeal, we will be guided by the above stated principle.

It is on record that, in convicting the appellants, the trial court relied on three pieces of evidence, **firstly**, circumstantial evidence in regard to the alleged three text messages and money transactions through mobile phones, **secondly**, the appellants' cautioned statements and **thirdly**, the

evidence that the appellants led the police officers to the discovery of the deceased body. From the above, the issue before us is whether the evidence on record in the above three areas was cogent and strong enough to justify the finding by the trial court that the case against the appellants was proved to the hilt.

Beginning with the issues on the three text messages and the mobile money transactions from which the prosecution sought to draw inference of guilt against the appellants, we agree with the counsel for the parties, that there was no evidence to prove beyond reasonable doubt, **firstly**, that there were really any text message on the kidnapping of the deceased or on the ransom allegedly demanded by the appellants. As rightly argued by the learned counsel, the police ought to have printed the alleged text message and the certified print out ought to have been tendered in evidence by the prosecution as an exhibit. **Secondly**, there was no evidence, preferably from VODACOM or TCRA, to prove ownership of the SIM Cards involved, with the exception of SIM Card No. 0752332835 of which there was no dispute that it belonged to PW6. In particular, there was no evidence proving that SIM Card No. 0745139289 to which it was alleged the ransom from SIM Card No. 0754301385 was transferred, belonged to the 2nd appellant.

Apart from the above, there was again, no good evidence to prove the money transaction allegedly made to meet the demands by the kidnappers. Firstly, there was no evidence to prove that really, Tshs. 1.500,000/= was sent from SIM Card No. 0752332835 belonging to PW6 to SIM Card No. 0754301385 allegedly registered in the name of one Elizabeth Toi. Again, the allegation that Tshs. 1,500,000/= was later transferred from SIM Card No. 0754301385 to CIM Card No. 0745139289 allegedly registered in the 2nd appellant's name, was not proved beyond reasonable doubt.

For the above given reasons, we therefore agree with the learned counsel for the parties that, evidence from VODACOM or TCRA was required to prove that the alleged text messages were really sent by the appellants and also that the appellants were involved in the transactions of the ransom. Further, we find that the adduced evidence on the alleged text messages and money transactions, did not link the appellants neither to the kidnapping of the deceased nor to his murder.

As for the appellants' cautioned statements (Exhibits P6 and P7) we again agree with the learned counsel for the parties that, the High Court erred in basing the conviction on the said statements. It is clear on the record that while the appellants were arrested on 02.02.2019, it was not

until 06.02.2019 when the cautioned statements in question were recorded. This was in contravention of section 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) which provides for the period within which an accused person should be interviewed and his cautioned statement recorded, 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 offender;*

Besides the above ailment regarding the two cautioned statements, it is also true as it was pointed out by Ms. Silayo, that the 1st appellant's cautioned statement (Exhibit P7) was not among the documents which was listed and which its substance was read out and explained to the 1st appellant by the committal court during committal proceedings as it is mandatorily required under section 246 (2) of the CPA. The record of appeal at pages 54 and 55 clearly shows that it was only the substance of the cautioned statement of the 2nd appellant (Exhibit P6) which was read out and explained to the appellants.

For the above reasons, the cautioned statements of the appellants (Exhibits P6 and P7) were therefore illegally procured and tendered in evidence. The statements were inadmissible in evidence and deserve to be expunged from the record, which we hereby do. See- **Joseph Mkumbwa and Another v. Republic**, Criminal Appeal No. 97 of 2007 and **Shabani Hamisi v Republic,** Criminal Appeal No.146 "A" of 2017 (both unreported).

Finally, it is on the finding by the trial court that the appellants were responsible for the death in question because they led the police to the discovery of the deceased body. On this, we agree with Mr. Sogomba that, under the circumstances of this case where the appellants denied not only to have confessed but also to have led the police to the discovery of the deceased body, the evidence on record from PW8 and PW9 could no stand alone to support the allegation that the appellants led to the discovery of the deceased body. We agree with both learned counsel that due to the seriousness of the offence and also the fact that from the very beginning the case was being handled by the deceased's father PW2, PW6 and the villagers, non-involvement of any of them or any other independent witness in the alleged exercise, leaves a lot to be desired.

It should also be borne in mind that although the kidnapping incident was instantly reported to the police and the text messages demanding the ransom shown to them, the police did not take any required remedial action. It was PW2 and the Village Chairman PW6 who were left with the task of investigating and finally arresting the appellants as prime suspects. The only thing the police did, was to remand the appellants in custody following their arrest by PW2 and PW6. It is under these circumstances that we find that the evidence by PW8 and PW9 that the appellants led them to the discovery of the deceased body was watered down by the failure to involve PW2 or PW6 or any other independent witness in the alleged exercise, that is, the discovery of the deceased body. We also find that the trial court did therefore err in holding that it was the appellants' confessions that led to the discovery of the deceased body.

The evidence from PW9 that the appellants confessed to have murdered the deceased on 06.02.2019 and that they led to the discovery of the deceased body is also dented, **firstly,** by the fact that it is on record that the appellants refused to confess before the Justice of Peace. If the appellants freely called PW9 and confessed to have committed the murder, what made them refuse to do so before the Justice of Peace. **Secondly**, is the fact that while according to PW9, it was on 06.02.2019

when it was revealed by the appellants that the deceased had been murdered and when the appellants led to the discovery of the deceased body, there is evidence from PW5 which tend to suggest that there was a murder case against the appellants well before 06.02.2019 because according to her, the exhibits handed over to her by PW9 on 05.02.2019, were in respect of the Murder Case No. KAK/IR/55/2019.

Before we sign off, we find it appropriate to express our great concern and disappointment on how the deceased's kidnapping report was neglected by the police. We cannot think of any good reason as to why the police could not have acted promptly on the lead from the alleged text messages but they instead left such a serious case to be handled by ordinary citizens. It is our belief that had the police acted promptly and diligently, the death of the deceased might have been prevented and good evidence to net the culprits could have been obtained.

Be as it may, for the reasons we have amply demonstrated above, we find that the case against the appellants was not proved beyond reasonable doubt.

In the event, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellants. We order that the appellants be released from prison forthwith unless they are so held for

any other lawful cause. We further direct that Tshs. 1,376,000/= (Exhibit P2) be remitted to the Chairperson of Gwanumpu Village for distribution to those who contributed to it including PW2 who contributed Tshs. 800,000/=. The mobile phone, make Tecno (Exhibit P3) be handed back to the 1st appellant.

Appeal allowed.

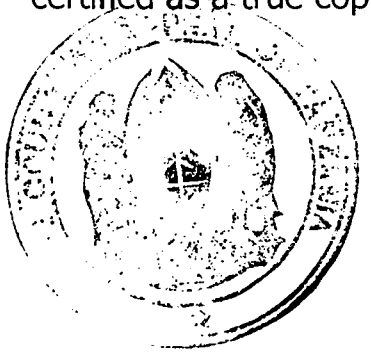
DATED at **KIGOMA** this 3rd day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 5th day of June, 2023 in the presence of Mr. Silvester Damas Sogomba, learned advocate for the appellants and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Amina Mawoko, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL