

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

CRIMINAL APPEAL NO. 356 OF 2021

(CORAM: MKUYE, J.A., LEVIRA, J.A., And MASOUD, J.A.)

CHARLES NGELEJA @ JOJO NONI.....1st APPELLANT

MOSHI ALEXANDER @ CHIKOTI.....2nd APPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Khamis, J.)

**Dated the 7th day of June, 2021
in**

Criminal Sessions Case No. 40 of 2018

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JUDGMENT OF THE COURT

20th September & 3rd October, 2023

MASOUD, JA.:

This appeal by the two appellants arises from an incident which saw two spouses, namely, Makolobelo Chinika and Ngolo Jandika, a husband and wife, respectively being brutally killed. The killings occurred in the residence of the two deceased persons on 29th May, 2016 at Matagata Village, Sikonge District, within Tabora Region at around 04:00 hours. The assailants, who were suspected to be the appellants, were arrested by the villagers commonly known as "*wanazengo*" and were eventually charged

with and convicted of the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2002 now R.E 2022] in two counts. The first count was in respect of killing Makolobelo Chinika, while the second count was in respect of killing Ngolo Jandika.

The basis of the conviction was primarily the dying declaration which the second deceased was alleged to have made prior to her death. The claim that the second deceased made a dying declaration came from two prosecution witnesses. They were PW1 DSSGT Jumapili, and PW3 Ramadhan Kabibi, Chairman of Mwisonge Hamlet within which the incident occurred. They said that the second deceased in her dying declaration named the appellants as the ones that attacked them.

PW1 testified that he was told by one, Hassan Ally, Village Executive Officer (VEO), that the second deceased made the declaration before Bugwijihile Nzega, who was the first to arrive at the scene. The declaration had it that the second deceased identified by naming the appellants as assailants before she died. On the other hand, PW3 testified that the deceased made the declaration to him before she died. In such declaration, she said that she identified the appellants as the assailants. The evidence of PW1 and PW3 was heavily relied upon by the trial Judge in grounding the conviction.

There were also other pieces of evidence from the prosecution that were relied upon to ground the conviction. They were the disputed confessional cautioned statement of the first appellant (Exhibit P4), which was recorded and tendered by PW1, and the disputed confessional cautioned statement of the second appellant (Exhibit P5) which was recorded and tendered by PW2.

As to the appellants who testified under oath as the only witnesses, their defence evidence was characterized by a general denial distancing themselves from the charge. They testified as to how they were arrested and beaten up by villagers on 29th May, 2016. They all testified how they were taken to Sikonge Police Station, tortured, and forcibly made to sign the cautioned statements after being kept under restraint for so long. They both testified not to have known each other before. They complained of delays in recording the cautioned statements and disowned the substance of the said statements.

In his reasoning along the lines of the above evidence as he was grounding the conviction, the trial Judge saw the discrepancies between the evidence of PW1 and PW3 as to who was the first person at the scene of crime to whom the dying declaration was made. He, however,

considered the discrepancies to be immaterial because PW3 was, in his view, consistent in his testimony and therefore credible.

The trial Judge was further of the view that the testimony of PW3 was supported by the postmortem report of the second deceased (Exhibit P2) which evidenced his participation at the scene of crime when the body of the second deceased was examined. While showing how the evidence grounded the conviction, the trial court from page 158 to page 160 of the record of appeal observed that:

"The dying declaration was corroborated by cautioned statements of Charles Ngeleja @ Jojo Noni and Moshi Alexander @ Chikoti admitted as Exhibits P4 and P5 respectively.....From the evaluation of the evidence on the record, I am satisfied that the dying declaration of Ngolo Jandika was sufficiently corroborated by Exhibits P4 and P5 and to a lesser extent by Exhibit P2 which proved presence of Said Ramadhan Kibibi (PW3) at the scene immediately after the incident."

The appellants' memoranda of appeal which were lodged by the appellants on 12th October, 2021 listed three identical grounds of complaint. When the appeal was called on for hearing before us, Mr.

Kanani Aloyce Chombala, learned advocate, who appeared for the appellants sought and was granted leave to file a joint supplementary memorandum of appeal. It contained only three grounds of complaint which the learned advocate at the outset informed us that he would argue instead of the grounds which were lodged by the appellants earlier. Mr. Emmanuel Lvinga, learned Senior State Attorney, who appeared for the respondent Republic supported the appeal.

The first ground sought to fault the trial court in its finding that the appellants were, by virtue of the second deceased's dying declaration, identified and named as the assailants. In his submission, Mr. Chombala, referred us to the testimony of PW3. He submitted that it was in PW3's evidence that PW3 was at the scene immediately after the incident. He talked to the second deceased at the scene before she died, and that the deceased named to him the appellants as the assailants before she died. PW3 also said that with one Kalemela @ Daniel, he took the said deceased to hospital.

In relation to the identification of the appellants as the assailants, the learned advocate had it that there was nothing from PW3 as to how the deceased correctly identified the appellants at the scene given that the

incident took place after midnight. In doing so, the learned advocate added that the evidence as to description of the light and its intensity which enabled the deceased to correctly identify and recognize the appellants as the assailants were nowhere to be found on the record. Moreover, PW3 said nothing as to an indication of timeframe that the deceased spent observing the assailants.

In fortification, Mr. Chombala referred us to the case of **Godlisten Raymond and Another v. Republic** [2015] TZCA 155. In that case, there was a dying declaration which did not give sufficient description of the assailant. There was also no evidence that conditions at the scene were favourable for correct identification of the appellant as the assailant. The Court held that it was in the circumstances unsafe to rely on the dying declaration to find that the appellant was correctly identified as the assailant.

In relation to the instant case and based on the above authority, it was argued by the learned advocate that since there was no evidence that conditions at the scene were favourable for correct identification, it cannot be said that the appellants were correctly identified as the assailants. The learned advocate urged us to uphold the first ground.

Supporting the submission by the learned advocate on the first ground of complaint, Mr. Luinga elaborated on the above ground further. He submitted that given the apparent weaknesses in the dying declaration which was the basis of the identification of the appellants as the assailants, it is seriously doubtful that the appellants were correctly identified. Accordingly, it was submitted that the doubts have, in the circumstances, to be resolved in favour of the appellants.

On the testimony of PW3 who testified on the dying declaration made by the second deceased, the learned Senior State Attorney argued that the said witness was not credible and his evidence as to the dying declaration was, for reasons that would follow hereinafter, highly suspect. While PW3 said that the second deceased named to him the appellants as the assailants, it was not in his evidence that he named the appellants as the suspects at the earliest opportunity to the police given his position as the Chairman of the Hamlet.

On the other hand, none of those who arrested the appellants was called to testify as to how they identified the appellants as the suspects and on whether they were told by PW3 or anybody else of the dying

declaration identifying the appellants as the assailants. At this juncture, the learned Senior State Attorney urged us to find merit in the first ground.

As to the second ground of complaint, we took the view that both learned counsel in a nutshell assailed the cautioned statements of the appellants (Exhibits P4 and P5) on the ground of violation of law. While Mr. Chombala relied on section 57 (2) (e) and (4) (d) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the CPA) which in his submission was not complied with as the statements lacked proper certifications, Mr. Luvinga invoked section 50 (1) of the CPA arguing that the statements were both recorded out of time. They both, albeit on different reasons, prayed that the cautioned statements be expunged. Once they are so expunged, both learned counsel submitted, there would be no sufficient evidence left to ground the conviction.

On the third ground of appeal which assailed the prosecution evidence that it was tainted with material discrepancies, Mr. Chombala was quick to bring our attention to discrepancies apparent in the evidence of PW1 and PW3. To exemplify his argument, he singled out one instance that related to the testimony of PW1 that he found two bodies at the scene, while PW3 said he took the second deceased to hospital before she

died and remained busy in hospital such that when the appellants were arrested, he was still in hospital.

It was argued also that the testimony of PW3 is equally contradicted by Exhibits P1, P2 and P3, which were prepared on 29th May 2016 at around 12:00 hours at the scene, which indicated that there were two bodies at the scene. As to when the body of the second deceased was brought back at the scene, and if at all, why it had to be examined at the scene of crime as per Exhibit P2, remained unanswered by the evidence on the record, hence raising doubts that dent the credibility and reliability of not only PW3 but the entire prosecution evidence.

To further expound on the third ground, the learned advocate referred us to English words appearing in Exhibit P4 which PW1 in his evidence made us to understand and believe that it was the first appellant's statement (Exhibit P4) which he recorded in accordance with the requirements of the law. Referring us to line 19 of Exhibit P4 at page 67 of the record of appeal, the learned advocate showed us the very English words appearing in the text of Exhibit P4 as part of the statement of the first appellant recorded by PW1.

Having shown us the English text which we need not reproduce here, the learned advocate took us to line 16 and 17 of the record of appeal in which PW1 made it clear, under oath, that the first appellant did not utter any English word in his statement. The English words in the said statement were admittedly inserted in the said Exhibit by PW1 who recorded the statement. Yet, the certification was completely silent about such additions as it wholesale certified the contents constituting the first appellant's statement without exception. With this, Mr. Chombala asked us to find that there are serious doubts that the statement was truly made by the first appellant and equally doubt the credibility of PW1 as a witness.

It was in the end argued by the appellant's advocate that since such contradictions materially affected the credibility of the key prosecution witnesses, they render the testimonies of PW1 and PW3 unreliable and the the Court ought not to act on them. We were thus asked to discount the testimonies, resolve the doubts in the prosecution witnesses in favour of the appellants and find that the prosecution did not prove the charge laid against the appellants beyond reasonable doubt.

Responding to the submission on the third ground by the learned advocate, Mr. Luvunga was of the submission that despite the existence of

the contradictions shown by the learned advocate for the appellants, the same were minor and did not go to the root of the case. He so submitted notwithstanding that he was in support of the appeal. He thought that once the cautioned statements are expunged from the record for reason of being recorded out of time contrary to the law, there would be no evidence left to corroborate the alleged dying declaration. It was in such context that the learned Senior State Attorney urged us to allow the appeal.

We gave a critical thought the findings of the trial court as we pondered on the submissions by both learned counsel on whether the appellants were unmistakably identified by the second deceased person if we go by her alleged dying declaration; whether the cautioned statements (Exhibits P4 and P5) were recorded without complying with the law; and whether the prosecution evidence was truly tainted with material discrepancies.

Our starting point is the dying declaration allegedly made by the second deceased before she died which allegedly identified the appellants as the assailants. We propose to deal with the alleged dying declaration from its very base as we also consider the discrepancies in the prosecution evidence as alleged.

Indeed, from the evidence of the prosecution, the dying declaration emerged from the testimony of PW1 and PW3. While PW1 was the police officer who conducted investigation about the incident, PW3 was the Chairman of Misonge Hamlet within which the incident occurred. PW1 did not testify to have been informed by PW3 that the second deceased made a dying declaration before him at the scene of the crime. It is equally not in the evidence of PW3 that he ably named the appellants to PW1 as the suspects based on the dying declaration that was made by the second deceased before him. Equally, it is not in the evidence of PW3 that he named the appellants as the suspects to the villagers who arrested the appellants.

If at all it was true that the second deceased made such declaration before PW3 prior to her death, it is not clear in his evidence why he kept the information for himself, only to reveal it at the trial as he was testifying against the appellants. Given his position as the Hamlet Chairman, the failure raises doubts which must be resolved in the appellants' favour. As a matter of law, we are settled that the failure would render the evidence of PW3 against the appellants highly suspect and unreliable as we hereby in the circumstances so find and hold. See, **Festo Mawata v. Republic**, Criminal Appeal No. 229 of 2007 (unreported).

On the other hand, the evidence of PW1 that the second deceased made a dying declaration is merely hearsay. We say so because PW1 was told by one, Hassan Ally, who was the VEO for the village within which the incident occurred, that one, Bugwijihile Nzega, told him that the second deceased made a dying declaration at the scene identifying by names the appellants as the assailants.

Unfortunately, neither Hassan Ally (VEO), nor Bugwijihile Nzega was called to testify on the dying declaration and identification of the appellants as the assailants. It is on the record of appeal at page 47 that during the preliminary hearing, the prosecution side listed names and addresses of the would be witnesses who included the above named persons. They were for no apparent reason not called to testify. The failure to call them without good cause being shown on the record did, in our view, prejudice the course of justice in this case.

We are, as we hereby do so, entitled to draw adverse inference against the prosecution for failure to call such material witnesses. It is particularly so with Bugwijihile Nzega, who was the first person to arrive at the scene after the occurrence of the incident if we go by the evidence of PW1. We are, accordingly, invoking the principle as restated in our earlier

decision in **Aziz Abdallah v. Republic** [1991] TLR 71 as we find it to be very relevant to the instant case.

Although the trial court considered at page 158 of the record the failure to call one, Bugwiji Nzege, it did not pursue it as it thought that the failure was cured by the testimony of PW3. We do not think that was proper. As we have already held herein above, the evidence of PW3 was highly suspect and unreliable. It could not for such reason be relied upon without corroboration, of which, we have failed to find any on the record of appeal.

As shown by the learned advocate, there are discrepancies involving the evidence of PW1 and PW3, and Exhibits P1, P2, and P3 with regard to the second deceased person. While PW3 said that upon arriving at the scene, he took the second deceased to hospital as he found her still alive, there was no evidence as to where the deceased died, and when, if at all, the body of the deceased was brought back to the scene.

On the other hand, exhibits P1, P2 and P3 are evident that at the scene, there were two bodies of the deceased persons. Having assessed the evidence of PW3 in the light of the other evidence, we were satisfied that these discrepancies raise serious doubts which dent even further

credibility of the prosecution witnesses. The discrepancies are material as they go to the credibility of the important witnesses of the prosecution, namely, PW1 and PW3 who testified on the existence of the dying declaration of the second deceased. It is to be recalled that the essence of the case rested on the alleged dying declaration of the second deceased.

Having dealt with the dying declaration, we are at this juncture satisfied that its evidential base is so weak that it could hardly be relied upon to ground conviction. We say so as we are mindful of the credibility of the testimony of PW1 and PW3 alluded to herein above. We now move to the identification of the appellants pursuant to the alleged dying declaration.

We are in our consideration in agreement with both learned counsel that there is nothing from the dying declaration about the description of the assailants other than the mentioning of their names. PW1 said that he was told that the second deceased named the assailants as Charles Ngeleja and Moshi Alexander and one Nsolezi Makolobela. On the other hand, PW3 said that the second deceased named Jojo, Moshi, and Nsoleji as the assailants.

Other than such names, which vary in their very nature, there was nothing unmistakably pointing to the appellants as the ones that were referred to by the deceased, if at all she made the dying declaration. Again, if at all, such names were truly referring to the appellants as the assailants, we could not find anything from the evidence of PW1 and PW3 which enabled the second deceased to identify by names the appellants considering that the incident occurred at around 04:00 hours when it was still dark.

Undoubtedly, there was no evidence given by any of the prosecution witnesses as to the source of light and its intensity at the scene of crime that enabled the second deceased to correctly identify the appellants as the assailants. See **Waziri Amani v. Republic** [1980] TLR 250, **Raymond Francis v. Republic** [1994] TLR 100, and **Godlisten Raymond and Another v. Republic** (supra). Such evidence is neither forthcoming from PW1 who conducted the investigation at the scene, nor from PW3 who purported to be amongst those who arrived at the scene early enough to find the second deceased still alive.

In the absence of such evidence, we are in agreement with both learned counsel that it was unsafe due to possibility of mistaken identity to

rely on the names of the alleged assailants allegedly mentioned by the second deceased in finding that the appellants were correctly identified as the assailants.

As to the cautioned statements, namely, Exhibits P4 and P5, we were urged albeit on different reasons to find that the same were in violation of the law. We think, it is prudent to consider the submission given by the learned Senior State Attorney that the statements were recorded outside the prescribed period of four hours reckoned from the moment a person is taken under restraint. They were therefore, according to the learned Senior State Attorney, recorded in violation of section 50 (1) of the CPA.

We considered the argument in the light of what pertains on the record. The appellants were arrested by the villagers on 29th May, 2016 at around 12:00 hours and taken to Sikonge Police Station at 2.00 pm if we go by the evidence of PW1, DW1 and DW2. Our scrutiny of the Exhibits P4 and P5 revealed that they were recorded at Sikonge Police Station on 29th May, 2016 from 20:15 hours and 20:00 hours respectively.

The foregoing means that Exhibits P4 and P5 were recorded after a lapse of two hours after the expiry of the basic period of four hours, if we reckon from the moment the appellants arrived at Sikonge Police Station as

testified by PW1, and after a lapse of four hours, if we reckon from the time they were arrested by the villagers and handed over to the police before they left for Sikonge Police Station. It is also noteworthy that the appellants in their evidence which was not cross-examined by the prosecution side testified on the delays in recording their statements. As for the first appellant, he said that his statement was recorded a day after he was placed in the custody at Sikonge Police station on 29th May 2016, while the second appellant said his statement was recorded three days after. Either way, we are of the firm finding that the said Exhibits P4 and P5 were, indeed, recorded outside the prescribed time without obtaining extension.

We recalled that the trial judge at pages 158 up to 160 of the record of appeal made a finding that the cautioned statements corroborated the dying declaration of the second deceased. Had the trial Judge properly scrutinized the evidence before him, particularly, the evidence of PW1 and PW2 and the defence evidence as to the complained delay in recording the cautioned statements, he would not have given weight and credence to the cautioned statements and would not have arrived at that finding. Rather, he would have expunged the cautioned statements from the record. Nonetheless, the trial Judge would have found that the evidence on the

record does not establish that there was, indeed, a dying declaration made by the second deceased before PW3 or before Bugwijihile Nzega for reasons that we have shown herein above.

We are in the end in agreement with the learned Senior State Attorney that the cautioned statements (Exhibits P4 and P5) were recorded out of time contrary to the requirements of section 50 (1) of the CPA. We thus proceed to expunge the said exhibits from the record in line with the settled position of the law which we restated in a good number of our previous decisions. See, **Mohamed Juma @ Mpakama v. Republic** (Criminal Appeal No.385 of 2017) [2019] TZCA 518; **Shilinga Bunzali v. Republic** (Criminal Appeal No. 600 of 2020) [2022] TZCA 750; **Mashaka Pastory Paulo Mahengi @ Uhuru and Others v. Republic** (Criminal Appeal No. 49 of 2015) [2015] TZCA 52; and **Justine Hamis Juma Chamashine v. Republic** (Criminal Appeal No. 669 of 2021) [2023] TZCA 214, which extensively discussed timelines available for recording caution statements under sections 50 and 51 of the CPA. Indeed, the provisions strictly regulate extensions of period the police have for interviews of accused persons.

In the result, we agree with both learned counsel for the appellants and respondent Republic that, the conviction against the appellants in both counts is unsustainable in view of what we have found herein above on the grounds of complaint canvassed and herein allowed. The conviction cannot therefore be allowed to stand.

We allow the appeal, quash the conviction and set aside the sentences imposed by the trial court on the appellants. We further order that the appellants be released from prison forthwith unless otherwise lawfully held.

DATED at **TABORA** this 3rd day of October, 2023.


R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of October, 2023 in the presence of Mr. Kanani Chombala, learned counsel for the appellants and Mr. Nurdin Mmary, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL