

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

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MDEMU, J.A.)

CRIMINAL APPEAL NO. 115 OF 2020

**TABU S/O MALEBETI @ MEDARD FIRST APPELLANT
BAYA S/O LUSHEGANYA SECOND APPELLANT
BULYEHU S/O MASANJA KISINZA THIRD APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

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

(Ismail, J.)

dated the 3rd day of February 2020

in

Criminal Sessions Case No. 193 of 2014

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JUDGMENT OF THE COURT

4th & 12th December 2023

NDIKA, J.A.:

Tabu s/o Malebeti @ Medard, Baya s/o Lusheganya and Bulyehu s/o Masanja Kisinza, respectively, the first, second and third appellants, were convicted of murder and sentenced to death by the High Court of Tanzania at Mwanza (Ismail, J. as he then was). They now appeal principally on the ground that oral confessions imputed to them were too weak to sustain the convictions.

It was the case for the prosecution that on 11th March 2013 at an unknown time at night at Runele village within Kwimba District in Mwanza

Region, the appellants jointly and together murdered Malebeti Sakai ("the deceased").

At the trial as well as before this Court, it was essentially not in question that the deceased met a violent death. Francisco Shata (PW1), a medic from Runele Health Centre who visited the scene of the crime at a rice field and examined the deceased's decomposed body on 14th March 2013, estimated that the death occurred more than seventy-two hours before the examination. He cited severe bleeding, caused by multiple cut wounds, as the cause of death. These findings were unveiled in a postmortem examination report dated 14th March 2013 that he tendered at the trial (Exhibit P1).

In addition to PW1's expert opinion, six prosecution witnesses, who visited the scene of the crime between 13th and 14th March 2013, adduced in common that they found the deceased's decayed body stashed in a rice field and that, it bore visible cut wounds on the neck, head, and legs. These witnesses were: PW2 Jilala Malebeti (the deceased's son and brother to the first appellant); PW3 Makelemo Bucheyeki (village commander of the vigilante group famously known as *Sungusungu*); PW4 Mpina Bugomola who lived close to the scene of the crime; PW5 Masabuda Ntiga (the deceased's widow); PW6 Anthony Michael Mazozo (Hamlet Chair of the

locality in which the incident occurred); and Police Officer No. D.6814 Detective Sergeant Someke (PW7) from Hungumalwa Police Station who was the investigator of the case. Certainly, their evidence was, indeed, uncontroverted so far as it related to the cause and incident of the death.

What was hotly contested at the trial, and remains at issue before us, is whether the appellants are the perpetrators of the homicide. To appreciate the context in which this issue arises, we propose to revisit the evidence on record, albeit briefly.

PW2 recalled that on 13th March 2013 the first appellant came to the deceased's home around 09:00 hours and informed him that he had just come from PW4's local brew shop where he found the deceased's body stashed in an adjoining rice field. PW2 dashed to the *Sungusungu* commander (PW3) and reported the distressing news. PW3 accompanied PW2 to the deceased's home where they found the first appellant who then led them to the rice field where they found the deceased's mutilated and decomposed body. PW2 testified that upon interrogating the first appellant, he confessed to the killing, claiming that he wanted to inherit the deceased's cattle, which, he intended to sell to raise money. PW3 confirmed that the first appellant owned up to the killing and mentioned his co-appellants as his partners in the crime. The first appellant's mother (PW5)

also claimed to have been at the scene of the crime at the material time and that she heard her son verbally admitting having killed his father with whom he had a frosty relationship. There and then, PW3 and his team apprehended the first and third appellants as well as PW4 while a search for the second appellant went on until the following day when he too was arrested.

On the part of PW4, he testified that in the evening of 11th March 2013, the appellants came to his local brew shop for a drink along with the deceased. The drinking went on, but around midnight, he left his customers still drinking in the kitchen and went to sleep. Subsequently, he heard a loud bang outside against the kitchen door that woke him up and he lit a torch. He saw the appellants outside carrying what looked like a luggage heading towards the rice fields. A few moments later, the appellants came back and knocked the door and faced him while confessing that they had committed a "bad thing." They warned him against spilling the beans. The following day, PW4 walked to the rice field to find out, out of curiosity, what luggage was dumped by the appellants the previous night. At that point, he discovered the deceased's body stashed in the field. Later that day, he was called to the scene of the crime where he found a throng of people gathered along with the first appellant. He adduced further that,

the first appellant was quizzed about the incident, but he prevaricated. It is at this point that PW4 disclosed to the people the appellants' involvement in the killing.

The Hamlet Chair Anthony Michael Mazozo (PW6) told the trial court that when he arrived at the scene of the crime on 13th March 2013, he found the first and third appellants had been apprehended along with PW4. He interrogated the first appellant who admitted to him to have killed the deceased to inherit his cattle and that, he implicated his co-appellants in the crime.

Sergeant Someke (PW7) was the last prosecution witness. As the investigator of the case, he visited the scene of the crime on 13th March 2013 and interrogated the appellants, who he said, confessed to the crime. He testified further that after recording their cautioned statements, the appellants were taken to a justice of the peace where they recorded their extrajudicial statements.

The appellants gave sworn testimonies but did not call any additional witnesses. They all denied having killed the deceased. For his part, the first appellant claimed, contrary to the prosecution case, that he had cordial relations with his deceased father. He acknowledged having gone to PW4's local brew pub, along with his co-appellants and a few other people, but

then, he averred that, around 21:00 hours he left for his home, leaving behind the deceased, his co-appellants, and other people. Having described the deceased as a person who would spend days if not a whole week in local brew selling outlets, he told the trial court that upon noticing that the deceased had not returned home the previous night, he began his search for him at all outlets where he used to drink. The search eventually took him to PW4's local brew shop where he noticed that the compound was foul-smelling. He went to the adjoining rice fields where he found the deceased's body. Thereafter, he rushed home and informed his family members that their father's body was rotting in the fields. The information was eventually relayed to PW3 as *Sungusungu* commander, who, along with the family members, went to the scene. He averred further that PW4 was apprehended and was coerced to name him (the first appellant) as one of the murderers of the deceased.

Both the second and third appellants also acknowledged having been at the local brew shop at the material time. However, each asserted that, having partaken of the drink, they left separately for their respective homes, leaving behind the deceased and other persons. Whereas the third respondent stated that the first and second appellants remained at the shop when he left, the second appellant said he left the outlet at 19:00

hours. Insisting that he was not responsible for the killing, the second respondent avowed that the deceased was his friend for over a decade.

Accepting the unanimous verdict of guilty returned by the three assessors he sat with, the learned trial Judge convicted the appellants of murder based upon the oral confessions, as stated earlier. Before coming to that conclusion, the learned Judge duly considered that in terms of section 3 (1) (a) of the Evidence Act, Cap. 6, a confession to a crime in criminal cases may be oral, written, by conduct, and or a combination of all or some of these. He discussed quite incisively the validity, cogency, and reliability of that strand of evidence relying on several decisions of this Court: **Patrick Sanga v. Republic**, Criminal Appeal No. 42 of 2007; **Paul Maduka & 4 Others v. Republic**, Criminal Appeal No. 110 of 2007; **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015; **Mohamed Manguku v. Republic**, Criminal Appeal No. 194 of 2004 (all unreported); and **Emmanuel Lohay & Another v. Republic**, Criminal Appeal No. 278 of 2010 [2013] TZCA 292 [4 March 2013; TanzLII]. Guided by these authorities, he analysed the evidence on record and held that the confessions were credible and reliable:

"As stated earlier on, the accused's confessions were made orally to almost all of the prosecution's witnesses and, by and large, they were confessions

*made to civilians. In assessing the veracity of the confessions, the question to be asked is whether such confessions were made before people who are reliable. Assessing the demeanour and credibility of the prosecution's witnesses, **nothing convinces me that any of the said witnesses was lacking in reliability.** They were all people of integrity and their [evidence] was cogent and displayed a high degree of coherence and reliability. **Significant, as well, is the fact that two of the witnesses were close family members i.e., 1st accused's mother and his sibling.** They both testified that the 1st accused confessed that he and fellow accused persons killed the deceased in order to take control of the herd of cattle." [Emphasis added]*

Concerning the voluntariness of the confessions, the learned trial Judge was satisfied that there was not even a semblance of evidence suggesting that force or intimidation or threat or inducement was employed to extract the confessions. He cogitated that PW2, PW3, PW4, PW5 and PW6 testified that none of the appellants was subjected to any threat or torture before or at the time they owned up to the killing and that none of these witnesses was meaningfully cross-examined on that aspect. Ultimately, the learned trial Judge concluded that the words imputed to the

appellants by PW2, PW3, PW4, PW5 and PW6 in respect of the deceased's death amounted to confessions within the meaning ascribed under section 3 (1) (a) of the Evidence Act.

It is also necessary to remark that the trial court also considered the appellants' defences, but it was unimpressed. It found them peppered with *"loads of blatant lies, evasive denials, pregnant disharmonies and needless concealments."* In the end, the trial court found that the killing was committed with malice aforethought as defined under section 200 of the Penal Code, Cap. 16 and proceeded to convict and sentence the appellants, as hinted earlier.

At the hearing of the appeal before us, the first and third appellants, who were also in attendance, were advocated for, respectively, by Messrs. Kassim Gilla and Cosmas Tuthuru, learned counsel. The respondent, on the other hand, had the services of Mr. Frank Nchanila, Mr. Adam Murusuli, Mr. Evance Kaiza and Ms. Tabitha Zakayo, learned State Attorneys.

Ahead of the hearing, it was brought to the attention of the Court that the second appellant died on 4th February 2020 while receiving treatment at Sekou Toure Regional Referral Hospital, Mwanza. The death notification to the Court was contained in a letter dated 21st November 2023 referenced as No. 209B/MZ/1/XX/99 from the Superintendent of

Butimba Central Prison where the second appellant sojourned. Having heard the learned counsel on the issue, we duly marked the second appellant's appeal abated pursuant to rule 78 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

Mr. Gilla for the first appellant lodged two grounds of appeal, namely:

- 1. That, the trial court erred in law and fact in convicting and sentencing the first appellant for murder based upon oral confessions that were too weak to lead to a conviction.*
- 2. That, the trial court erred in law and fact in convicting the first appellant while the offence against him was not proved to the required standard.*

For the third appellant, Mr. Tuthuru raised three grounds of complaint, which, for clarity, we took the liberty to rephrase as follows:

- 1. That, the High Court Judge erred in law to convict and sentence the third appellant of murder based on the doctrine of last seen without strong corroboration from the prosecution witnesses.*
- 2. That, the alleged oral confessions by the appellants were not valid and reliable to warrant conviction of the third appellant of murder.*
- 3. That, the circumstantial evidence tending to link the third appellant with murder falls short of proving the offence.*

We feel obliged to remark, at the outset, that during Mr. Tuthuru's oral argument, we queried him over the aptness and tenability of the first and third grounds of appeal above. We did so cognizant of the dictates of rule 72 (2) of the Rules that a proper ground of appeal must specify a point

or points of law or fact alleged to have been wrongly decided. For ease of reference, we reproduce the said provision:

*"(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against specifying, in the case of a first appeal, **the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided.**"*

[Emphasis added]

Although Mr. Tuthuru contended, rather faintly, that the two grounds were valid and compliant, he failed to point out any part of the impugned judgment of the High Court containing the two points allegedly wrongly decided. With respect, we are of the view that the two complaints are manifestly misconceived because the trial court neither discussed and determined the case on the doctrine of last seen nor did it anchor the impugned convictions upon circumstantial evidence. Accordingly, without any hesitation, we hold that the two grounds are without substance and proceed to dismiss them.

What, then, emerges for our consideration is the common complaint that the alleged oral confessions attributed to the appellants were invalid

and unreliable. That they did not warrant the convictions against the first and third appellants.

Mr. Gilla began his submissions by citing a passage in **Sikujua Idd v. Republic**, Criminal Appeal No. 484 of 2019 [2021] TZCA 427 [27 August 2021; TanzLII] that a verbal confession cannot stand alone to sustain a conviction based on circumstantial evidence:

*"We think that a verbal confession cannot stand along to convict the appellant based on circumstantial evidence. Where the prosecution case relies on circumstantial evidence, proof of oral confession is only one several links in the chain of circumstantial evidence requiring proof beyond reasonable doubt. It cannot stand alone to sustain a conviction. We made this point very clear in **SAID BAKARI V. R.**, CRIMINAL APPEAL NO. 422 OF 2013 (unreported)."*

The learned counsel then reviewed the evidence of PW2, PW3, PW4, PW5 and PW6 who asserted that they heard the first appellant uttering words amounting to self-incrimination. Apart from contending that, none of the witnesses stated the actual words attributed to the first appellant, it was not clear in the evidence when the said words were uttered. More particularly, he argued that the evidence of PW4, who also adduced that

he saw the appellants in the fateful night dumping in the rice field what was later confirmed to be the deceased's body, should have been treated with circumspection given that at some point, he allegedly confessed to the murder and hence he was one of the suspects at the earliest stages of the investigations.

Having associated himself with Mr. Gilla's submissions, Mr. Tuthuru added that the third appellant did not confess to the murder at any given point and that the verbal statements attributed to the first appellant could not be relied upon against him without any corroboration. Citing **Vasco Lwanje & Another v. Director of Public Prosecutions**, Criminal Appeal No. 220 of 2020 [2022] TZCA 786 [8 December 2022; TanzLII], he argued, more particularly that, the oral confessions allegedly made by the first appellant in the presence of PW3, a *Sungusungu* commander, were not valid because the first appellant was not a free agent. He then referred to the testimony of the police investigator (PW7) who told the trial court that the appellants made cautioned and extrajudicial statements which were listed and read out during committal proceedings as part of the exhibits intended to be unveiled at the trial in support of the prosecution case. He wondered why the prosecution failed to tender any of the said statements to support the alleged verbal confessions. He implored us to

draw an adverse inference against the prosecution case for that unexplained failure to introduce any of the statements.

For the respondent, Mr. Nchanila resolutely resisted the appeal. He prefaced his oral argument by referring to **Chamuriho Kirenge @ Chamuriho Julius v. Republic**, Criminal Appeal No. 597 of 2017 [2022] TZCA 98 [7 March 2022; TanzLII] as well as the cases cited therein: **The Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82, **Mohamed Manguku** (*supra*), **Tumaini Daudi Ikera v. Republic**, Criminal Appeal No. 613 of 2015 (unreported) and **Posolo Mwalyego** (*supra*). Based on these authorities, he posited that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient to ground a conviction against the suspect if the suspect was a free agent when he said the words imputed to him. Based on this proposition, he reviewed the evidence on record.

Referring us to various parts of the evidence on record adduced by PW2, PW3, PW5 and PW6, the learned State Counsel contended that it was in the evidence that the appellants uttered words admitting that they killed the deceased. So far as the first appellant was concerned, he submitted that, he confessed to the killing before and after he reached the scene of

the crime. On both occasions, Mr. Nchanila added; the first appellant named his two confederates.

When we probed Mr. Nchanila on whether the appellants were free agents at the material time, he spiritedly replied in the affirmative and went on to discount the effect of the presence of a multitude of people at the scene, encircling the appellants at the time, on the voluntariness of the statements attributed to them. The fact that PW3 was the village *Sungusungu* commander who placed the first appellant and other suspects under restraint at the scene was for the learned State Attorney of no moment. He submitted that it was crucial that none of the above prosecution witnesses was effectively cross-examined on that aspect of the evidence. To reinforce his point, he cited **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 [2012] TZCA 103 [21 May 2012; TanzLII] for the settled principle that an omission or neglect to assail the evidence-in-chief of a witness on a material or essential point by cross-examination would infer an acceptance of that evidence as truthful subject to its being challenged as inherently implausible or probably untrue. Rounding off his submissions with the appellants' defences, he dismissed them as a pack of lies and urged us to attach no weight to them.

As we begin our deliberations on the issue at hand, we wish to observe that the exposition by the learned counsel of the law on validity and reliability of oral confessions is quite correct. As we held in **Patrick Sanga** (*supra*):

"Under section 3 (1) (a), (b), (c) and (d) of the Evidence Act, Cap. 6 a confession to a crime may be oral, written, by conduct, and/or a combination of all of these or some of these. In short, a confession need not be in writing and can be made to anybody provided it is voluntarily made."

It is evident that in his judgment, the learned trial Judge was alive to the stance in **Posolo Wilson** (*supra*) where, following our earlier decision in **Nuru Mohamed Gulamrasul** (*supra*), we observed that:

"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspect."

In **Posolo Wilson** (*supra*), we cautioned, citing **Mohamed Manguku** (*supra*), that for such a confession to be valid it must be shown that the suspect was a free agent when he said the words imputed to him. Moreover, in **Boniface Mathew Malyango @ Shetani Hana Huruma & Another vs Republic**, Criminal Appeal No. 358 of 2018 [2020] TZCA

314 [18 June 2020; TanzLII] we recalled what we reiterated in **Tumaini Daud Ikera v. Republic**, Criminal Appeal No. 158 of 2009 (unreported):

*"... with due respect, we agree with Mr. Wasonga that in **TUMAINI DAUD IKERA V. R** (supra) we reiterated that oral confessions of guilt are admissible and can be acted upon, but we also emphasized that great caution is required before courts rely on oral confession to convict. Admissibility of oral confession does not automatically mean this genre of evidence carries sufficient weight to convict. **Even where the court is satisfied that an accused person made an oral confession, the court must take an extra distance to determine whether the oral confession is voluntary.**"*

[Emphasis added]

As the first appellate court, we dispassionately reviewed the testimonies of PW2, PW3, PW4, PW5 and PW6 forming the basis of the alleged oral confessions. Contrary to Mr. Nchanila's submission that the first appellant confessed to the crime twice, that is before and after he led PW2 and PW3 to the scene of the crime, it is in the evidence that the alleged confessional words were uttered at the scene where the first appellant led PW2 and PW3. This occurred after the deceased's body had

been discovered and his widow (PW5) had joined the party at the scene. To be sure, PW4 and PW6 arrived at the scene much later.

We also recall that Mr. Tuthuru submitted that none of the prosecution witnesses stated that the third appellant uttered any confessional words. With respect, we agree with Mr. Nchanila that PW3 adduced that the third appellant too confessed to the crime at the scene where he was brought after being named by the first appellant.

Although the learned trial Judge gave full credence to the above witnesses having assessed them as credible, coherent, and reliable witnesses, and concluded that the alleged verbal confessions were made, we think the sticking issue was whether the imputed words were uttered while the appellants were free agents. To resolve this issue, we propose to examine the testimonies of each of the above five witnesses.

We begin with PW2. Having stated in his evidence-in-chief that the first appellant said he killed the deceased, he prevaricated in cross-examination on whether the verbal confession was made before or after the first appellant was arrested by the *Sungusungu* vigilantes. Certainly, initially in cross-questioning he adduced that:

*"It is Tabu [the first appellant] himself who admitted to have killed the deceased. **Tabu***

confessed before he was arrested by Sungusungu. "[Emphasis added]

In further response to cross-examination, PW2 appeared to change tack and testified that:

*"When Tabu confessed he was not under restraint and what has been stated is true. **He was under restraint. There were many people.** I did not beat him up and nobody beat him up. He was put under restraint because he told us that he has killed our father."* [Emphasis added]

The same pattern of equivocation and evasiveness by PW2 is discernible from his further testimony a moment later:

*"It is true that we blew the whistle when were at the scene of the crime. **It is also true that many people responded to the alarm. It is true that after that Tabu was put under restraint. He had already admitted before the whistle. He was under restraint when he confessed. He confessed when he was under restraint....** It is true that Mpina Bugomola [PW4 herein] was arrested.... I don't know if Mpina was beaten by Sungusungu. Tabu was not beaten. Both were put under restraint. **Mpina admitted that he participated in the killing.**"* [Emphasis added]

On the part of PW3, who, as indicated earlier, was the village *Sungusungu* commander, he adduced as follows:

*"We arrested Mpina who by then had gone to graze his cattle. We took him to the scene of the crime and questioned him. Mpina said that [the deceased] had been attacked by Tabu [the first appellant herein]. Tabu was at the scene of the crime at the time. **Tabu admitted that he killed [the deceased]. He said they were three in the killing. Others were Buiyehu [the third appellant herein] and Baya [the second appellant herein].**"*[Emphasis added]

PW3 adduced further that the second and third appellants admitted to the killing upon being interrogated after their arrest.

Turning to PW4, who, as stated earlier, was himself one of the suspects at the earliest stage of the investigations, also affirmed that the first appellant admitted having killed his father. Upon cross-examination, he attested that:

*"I only found Tabu under restraint. Tabu was under arrest because he killed. I don't know if this secret was shared. People know that Tabu killed his father. **Sungusungu were many. They were more than 200.** Nobody was beaten by *Sungusungu*."*[Emphasis added]

In her tale to the trial court, the deceased's widow (PW5) testified in cross-questioning so pertinently that:

*"It is Tabu himself who confessed to the killing of [the deceased]. Tabu said he saw a dead person whose attire was that of his father but when we told him to go and verify, he refused. Tabu confessed that he killed his father. **It was during the time we went to the scene that he confessed to the killing.... There were many people gathered.**"*[Emphasis added]

The Hamlet Chair Mazozo (PW6) arrived at the scene of the crime much later that fateful day. He found the first and third appellants as well as PW4 enclosed by a throng of people under arrest. He told the court of trial that he quizzed the first appellant who admitted to him to have killed the deceased. To illustrate his description of the scene of the crime as he found it, we extract a portion of his testimony upon cross-examination:

*"I found Mpina already arrested. I was not there when Mpina was arrested... I found Tabu under restraint. **People were many, drawn from the entire locality.** People were in a sombre mood."*
[Emphasis added]

Flowing from the above excerpts are, at least, two points: one, that the alleged oral confessional statements were made by the appellants at

the scene of the crime when they were under restraint by the village *Sungusungu* vigilantes led by their commander, PW3. By PW4's estimate, there were more than 200 Sungusungu militiamen. Two, that at some point the appellants were also encircled by a crowd of people, drawn, most probably, from the entire village.

We indicated earlier that the trial court took the view that it was in the evidence that none of the appellants was subjected to any torture or intimidation before or at the time they owned up to the killing and that the prosecution witnesses were not meaningfully cross-examined on that aspect. He thus concluded that the verbal admissions imputed to the appellants amounted to incriminating confessions voluntarily made.

With respect, we think that the trial court slipped into error. The absence of torture or intimidation to the appellants was not the only factor that should have been considered. Given that the alleged statements were given when the appellants were under restraint by the *Sungusungu* and that they were enclosed by a throng of villagers whom we can presume to have been agitated, the atmosphere was not conducive for them to give self-incriminating statements voluntarily. They simply were not free agents volunteering to give confessional revelations.

In **Kija Iseme v. Republic**, Criminal Appeal No. 175 of 2015 [2016] TZCA 223 [12 April 2016; TanzLII], we quoted the stance we took in **Regina Karantini & Another v. Republic**, Criminal Appeal No. 10 of 1998 (unreported) that:

*"... the confessions of the appellants were made in the presence of a big group of village vigilantes (sungusungu). Although they are not policemen according to law, they have more coercive power than ordinary citizens and, for that reason, **the presence of such vigilantes is not conducive to the making of a voluntary and truthful confession by a suspect. There must be corroborative evidence.**"*[Emphasis added]

We took a similar stance in **Inota Gishi & 3 Others v. Republic**, Criminal Appeal No. 5 of 2008. See also **Vasco Lwanje** (*supra*) following **Ntobangi Kelya & Another v. Republic**, Criminal Appeal No. 256 of 2017 [2021] TZCA 393 [23 August 2021; TanzLII] quoting **Ndalahwa Shilanga & Another v. Republic**, Criminal Appeal No. 247 of 2008 [2011] TZCA 159 [15 November 2011; TanzLII].

In **Kija Iseme** (*supra*), we also signalled that the presence of a throng of people would not be conducive for an interrogation of a suspect as a free agent:

“Although ... the exact number of the sungusungu who were involved is not disclosed, the evidence is to the effect that the interrogation was made in the presence and hearing of crowd of 400 or so villagers! That, in itself, we are afraid to remark, militated against a relaxed atmosphere which is an essential prerequisite for the making of a voluntary confession.”

Based on the foregoing discussion, we uphold the submissions by the learned counsel for the appellants and proceed to hold, as we must, that the oral confessions against the appellants should not, on themselves, have been relied upon to convict the appellants who were not free agents when they said the words imputed to them. The confessions needed to be corroborated or substantiated by independent evidence, which was lacking in the instant case.

We recall that, Mr. Tuthuru drew our attention to the testimony of the police investigator (PW7) who told the trial court that the appellants made cautioned and extrajudicial statements. These were listed and read out during committal proceedings as part of the exhibits intended to be produced at the trial against the appellants. We agree with the learned counsel that the failure or neglect by the prosecution to tender any of the said statements to corroborate the oral confessions is as inexplicable as it

gets. In the circumstances, we draw an adverse inference that had any of the said statements been introduced into the evidence it would have disproved the oral confessions.

For completeness, we feel enjoined to remark, albeit briefly, that we are not surprised that the trial court did not rely on PW4's storyline of what happened in the night the deceased was supposedly killed, and his body dumped in the rice field. According to this witness, he saw the appellants stashing in the field what he discovered on the following day to be the deceased's corpse, and that moments later they came to him face to face and said they had committed a "bad thing." Although on the face of it, this strand of evidence constituted a forceful piece of circumstantial evidence, its veracity was doubtful, at least for two grounds. First, that PW4 did not report the incident to anybody even after he had visited the scene the following day and confirmed that the luggage stashed in the field was, in fact, the deceased's body. He must have hidden the truth for reasons best known to himself. That is why he came out and gave his side of the story only after he was apprehended by the *Sungusungu* led by PW3. Secondly, it is in the evidence by PW2 that PW4 too confessed to the killing and named the appellants as his accomplices. Therefore, PW4 was, by any

yardstick, a witness with an interest to serve and that his storyline would have been treated by any court of justice with circumspection.

In the final analysis, we find merit in the appeal, which we hereby allow. Accordingly, we quash the convictions, set aside the sentences and order that, Tabu s/o Malebeti @ Medard and Bulyehu s/o Masanja Kisinza, the first and third appellants respectively, be released from prison if they are not otherwise lawfully held.

DATED at **MWANZA** this 11th day of December 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered on this 12th day of December, 2023 in the presence of the 1st and 3rd appellants in person, unrepresented and Mr. Adam Murusuli, State Attorney for the respondent, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL