

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: MWANDAMBO, J.A, MAIGE, J.A. And MGEYEKWA, J.A.)**

**CRIMINAL APPEAL NO. 331 OF 2020**

**MICHAEL JOHN MASIFAE @ BABUU.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Moshi)**

**(Mkapa, J.)**

**dated the 23<sup>rd</sup> day of June, 2020**

**in**

**Criminal Sessions Case No. 13 of 2018**

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**JUDGMENT OF THE COURT**

11<sup>th</sup> & 22<sup>nd</sup> March, 2024

**MWANDAMBO, J.A.:**

The appellant Michael John Masifae @ Babuu and two others not parties to this appeal stood charged before the High Court the offence of murder of Neema Lenduka Ndemela at a place called Mbokomu Tema, in Moshi District Kilimanjaro Region on 20 July, 2016. At the conclusion of the trial, the trial High Court (Mkapa, J.) sitting at Moshi found insufficient evidence to convict Musa s/o Issa @ Senyenge @ Mgosi (second accused) and Fausta d/o Naftali Mshanga (third accused) and acquitted them. Conversely, the trial court convicted the appellant having been satisfied that there was evidence against him proving the

case beyond reasonable doubt. Upon conviction, the trial court sentenced the appellant to the mandatory death sentence by hanging. Dissatisfied, the appellant has preferred the instant appeal protesting his innocence.

The facts leading to the arraignment, trial and conviction of the appellant are not straight forward. Culled from the prosecution evidence, they run as follows: until her mysterious death, the deceased Neema Ndemela was a resident of Tema Mbokomu staying alone in a house where she had a shamba, cattle, goats and chicken. The deceased had two children; Amani Eliud Moshi (PW5) staying in Dar es Salaam and Jeniffer Eliud Moshi; her elder sister staying in Arusha. According to PW5, he used to communicate regularly with his mother by mobile phone but, to his surprise, he experienced communication breakdown with his mother who could not longer be reached through her phone number. Such a stalemate compelled PW5 to travel from Dar es Salaam to Moshi on 10 August, 2016. Since he arrived late in the evening in Moshi, he could not go straight to the village until early in the morning on 11 August, 2016.

After his arrival at the deceased's home, he could not find her but, the appellant who was found staying in the deceased house with the

third accused who happened to be her paramour. Upon inquiry on the whereabouts of the deceased, the appellant who introduced himself as a domestic worker **instructed by one Evance**, told PW5 that his mother had gone to visit her daughter at a place called Kiwala. As he looked around the compound, PW5 could not see her mother's cattle, goats and chicken which were all missing. Upon inquiring their whereabouts, the appellant replied that the cattle had been sent to one John Foya for breeding whilst goats were sold and chicken sent to Magreth; his mother. With such suspicious explanation, PW5 took the appellant to PW5 John Fanuel Kimambo who was, by that time a local Village Executive Officer (VEO) for necessary steps who interrogated him in his office.

In the course of interrogation and search, a sim card was found in the appellant's trousers pocket which later turned out to bear the phone number of the deceased. The appellants explained the possession of the sim card that the deceased left it behind with her mobile phone before departing to Kiwalaa for easy communication with him while she was away. He (the appellant) disclosed to PW1 and PW5 that the mobile phone was with his mother but could not offer any explanation why that phone was found its way to his mother. It turned out later that, the

appellant had sold the phone to his mother. Regarding the cattle, the appellant had sold it to John Foya at the instance of one Evance @ Mafantaa who is said to have informed him that the proceeds of the sale were required for footing the deceased's medical bills at Muhimbili hospital, where she was admitted receiving treatment. However, that story made no sense to PW5 because, her mother had never been admitted at the said hospital.

On PW1's advice, PW5 reported the matter to the police at Majengo police station for further investigation which he did. Later on, directed PW1 Wilbard Mshana, (PW2) the Chairman Hamlet to raise an alarm. PW2 raised an alarm and people assembled in search of the deceased who had gone missing for some time. The search involving villagers resulted into a discovery of a pit latrine in the deceased's compound which appeared to have been recently renovated with a heap of fresh sand. After digging out the fresh sand, the villagers discovered parts of a human being; a woman's head, shoulder and part of neck with a knife stuck in it.

With the assistance of police officers accompanied by Fire Rescue squad and doctor called for their assistance, they retrieved the deceased's body recognized to be that of Neema Ndemela. Upon

examination by Dr. John Damian Mrina, (PW8), a deceased's relatives allowed to proceed with burial arrangements.

Subsequently, police investigation which entailed interrogation of several suspects involved in the death of the deceased, commenced in earnest resulting into an information of murder whereby, three people were charged as behind it. It is noteworthy that, Evance Mrema who was one of the suspects involved in the murder of the deceased died at the early stages of investigation. At the end of it all, the appellant, Mussa s/o Issa@Senyenge @ Mgosi and Fausta d/o Naftali Mshanga were charged and stood trial of the murder of the deceased Neema Ndemela.

The trial involved 11 witnesses for the prosecution who, apart from their oral testimony, tendered in evidence 6 exhibits both documentary and objects. Among the documentary exhibits were two extra judicial statement (exhibit P.5) and (6) recorded from Fausta Naftali Mshanga (third accused) by a primary court Magistrate; and the other one by Amina Abdalla Mshanga (PW4). Through exhibit P5, the third accused who happened to be the appellant's paramour, mentioned Evance @ Mafantaa and the appellant as the persons who stabbed Neema

Ndemela to her death before dumping her body in a pit latrine located across the main house.

The other extra judicial statement (exh. P6) was recorded from the second accused by PW1 Bertha Godfrey Malisa showing that the appellant and one Mafantaa are the ones who stabbed the deceased to death on following her persistent inquiry on the appellant over her missing heard of cow sold in her absence by the appellant who was left behind to take care of the house.

In their defence, all accused persons denied having killed the deceased. However, the appellant admitted assisting the deceased Evance Michael Mrema sell a head of cow entrusted to him by Neema Ndemela who was away in Arusha and wanted some money. He too admitted having worked in the deceased Neema's shamba as a casual labourer on the instructions of Evance's Michael Mrema. He explained that, he slept over at Neema's house on 10 August, 2016 at Evance's instance as they had worked very late in the shamba day that day justifying his presence when PW5 found him in his deceased mother's house together with the third accused who was his lover. He too admitted having been found in possession of a sim card which he picked from the deceased's shamba.

Despite being found by PW5 at the deceased Neema's home on 11 August, 2016, the appellant feigned ignorance of the owner as he was only instructed by Evans to work in her shamba and sleep over the previous night so he could wake up early on the following day for shamba work.

Having heard the case, and received, opinions from the lay assessors who sat with the teamed judge, she found the case against the second and third accused not sufficiently proved resulting in their acquittal. That was notwithstanding their extra judicial statements (exhibits P5 and 6). Significantly, the trial court found exh. P5 as not amounting to confession against the third accused. As for exhibit P6, involving the second accused, the learned trial judge observed that despite it constituting self-implication on the commission of the offence, since the maker repudiated it, it could not be relied upon to convict him unless there was independent corroborative evidence which was wanting. Regarding the appellant, the learned trial judge found sufficient circumstantial evidence to link him with the deceased's killing through PW1 and PW5 coupled with the sim card (exh. P1) found in his possession.

Similarly, even though the trial judge declined acting on a repudiated extra judicial statement vide exh. P6 recorded by PW1 of the to convict the second accused, the trial court was satisfied that the appellant was involved in the commission of the offence. Having warned herself against grounding conviction on the basis of his weak defence, the trial court reasoned that, in a case where an accused tells lies, such lies must be taken into account as intended to hide something and, in this regard, the circumstances in which the appellant came into possession of exhibit P1, disappearance of deceased's cattle and whereabouts of the deceased were sufficient to conclude that he was hiding something to conceal the murder which were inconsistent with his innocence. On the basis of that finding, the appellant was convicted as charged and sentenced accordingly.

The appellant's appeal before the Court is predicated on six grounds of appeal and one ground in his supplementary memorandum he subsequently lodged. At the hearing of the appeal, Mr. David Shilatu, learned advocate who had a dock brief to represent the appellant, abandoned ground two in the memorandum of appeal and the sole ground in the supplementary memorandum. The remaining grounds, 1,3, 4, 5 and 6 boil down to three grievances faulting the trial court for;



one, convicting the appellant based solely on an uncorroborated repudiated confession of a co-accused; **two**, acting on weak circumstantial evidence; and **three**, grounding conviction against the appellant based on evidence which did not prove the case on the required standard.

For the respondent Republic Ms. Sabina Silayo, learned Senior State Attorney who teamed up with Ms. Neema Moshi, learned State Attorney, appeared resisting the appeal.

Mr. Shilatu's submission on the first ground was that the trial court wrongly convicted the appellant on the basis of the second accused's repudiated confession without independent evidence to that effect in line with the Court's decision in **Muhidin Lila & 3 Others**, Criminal Appeal No. 443 of 2015 (unreported). The learned advocate argued that mere possession of a sim card (exhibit P1) was not sufficient to conclude that the appellant committed the offence considering that according to PW1, he picked it in a shamba without knowledge of the owner. At any rate, he forcefully argued that, there was no independent evidence from the service provider; Vodacom that the sim card was indeed issued to the deceased and registered in her name.

For her part, Ms. Silayo supported the trial court's finding on the guilt of the appellant relying on the confession of the second accused as the same was in accordance with section 33 (1) of the Evidence Act, subject to corroboration. The learned Senior State Attorney argued that there was sufficient corroborating evidence particularly the appellant's possession of the deceased's sim card. Mr. Shilatu's submission in rebuttal in this ground was that the corroborative evidence was wanting and so, reliance on exhibit P6 in convicting the appellant was wrong.

For a start, we wish to make it clear that contrary to the appellant, his conviction was not solely grounded on the repudiated confession of his co-accused (second accused). It was based on some other evidence, in particular, circumstantial evidence, subject of the appellant's complaint in the merged grounds 3, 4 and 5. Be it as it may, the issue is whether the appellant's conviction based on the second accused's repudiated confession was proper in law. To answer that issue, we shall have to examine section 33 of the Evidence Act which provides as follows:

*33.-(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the*

*court may take that confession into consideration against that other person.*

*(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused”.*

Counsel are agreed that, as a matter of law, an accused person can only be convicted on the co-accused's confession if there is independent evidence to corroborate it. However, the nagging question for our consideration and determination in this appeal is whether an accused can be convicted on a repudiated confession of his co-accused who, the trial court does not find him guilty for lack of corroborative evidence. It is common knowledge in this appeal that the trial court acquitted the second accused for lack of evidence corroborating his repudiated confession in exhibit P6.

The learned counsel did not sufficiently address us on the point. All the same, in our construction of examination of section 33(1) of the Evidence Act, we are of the firm view that in as much as a repudiated confession of a co-accused cannot found conviction against the maker unless it is corroborated by independent evidence, it cannot ground conviction against an accused person who is only implicated in the statement by the maker. In **Prakash Dhawal Khaimar (Patil) vs**

**State of Maharashtra**, Criminal Appeal Nos. 238-239 of 2001, the Supreme Court of India reiterated the conditions for the reliance on a confession of a co-accused as evidence against a co-accused set out earlier in **State vs. Nalini** [(1999)] which are directly relevant to this appeal. They are; **one**, there must be two or more persons being tried jointly in the same offence, **two**, a confession was made by one of such persons, **three**, such confession must affect the maker as well as his co-accused and, **four**, such confession if proved in court, the court may take into consideration such confession as well as the co-accused persons. In a more or less similar circumstances, the Court made reference to the two Indian cases to which we subscribe mindful that section 33(1) of the Evidence Act is in *pari maeteria* with section 30 of the Indian Evidence Act.

What we gather from the foregoing is that, for a confession of a co-accused to be taken into consideration as against the other accused persons(s), it must have been proved as against the maker. It is plain that the second accused's confession was not proved against him, hence his acquittal. Consequently, the unproven confession of the second accused could not have been taken into consideration against the appellant. With respect, it was not legally correct for the learned trial

judge to take into consideration the second accused's unproven confession exhibit P6 in finding the appellant of the offence. In our view, since the second accused's confession was not proved against him, the learned trial judge should have ended there. Accordingly, we find merit in ground one albeit for reasons other than those canvassed by Mr. Shilatu.

Next on the second grievance against the trial court for grounding conviction on weak circumstantial evidence, subject of grounds 3, 4 and 5 reliance on weak circumstantial evidence. It is remarkable that, in effect, the complaint in this ground is a precursor to ground 3 and so it will be convenient to deal with both of them conjointly.

Mr. Shilatu began his submissions with the general rule on the quality of circumstantial evidence capable of supporting a finding of guilt and conviction expressed by case. Two decisions of the Court were cited in that regard; **Everina D/O Ngatala v. Republic**, Criminal Appeal No. 11 of 2008 and **Jumanne Hamis @ Upepo v. Republic**, Criminal Appeal No. 329 of 2009 (both unreported) for the proposition that, to justify conviction solely on circumstantial evidence, the inference of guilt should not be incompatible with the innocence of the accused and, the chain link connecting the accused with the commission of the offence

should not be broken. Based on the above, Mr. Shilatu argued that, whereas there was no dispute that the appellant was found in possession of exhibit P1, the evidence by PW1 and PW5 that the sim card belonged to the deceased was insufficient in the absence of independent evidence from the service provider; Vodacom.

With regard to ground 3, the learned advocate argued that in view of the gaps in the repudiated confession of the co accused and circumstantial evidence, the case was not proved. In addition, counsel argued that, the appellant was not an employee of the deceased as he was only assigned work by Evance who passed away at the earliest stages of the investigation. On the other hand, Mr. Shilatu contended that, PW4's evidence based on Evance's confession to him that he participated in the killing of Neema, diluted the evidence of PW1 and PW5 that it was the appellant who committed the offence. According to him, Evance's death left a lot of hypothesis because, everything which the appellant narrated to PW1 and PW5 was based on information he received from Evans particularly, Neema's travel to Kiwalaa and the sale of cattle to foot her medical bills at Muhimbili Hospital. To buttress his argument, Mr. Shilatu cited our decision in **William Ntumbi v. Republic**, Criminal Appeal No. 320 of 2019 (unreported), citing

**Magendo Paul and Another v. Republic** [1993] T.L.R 219 to argue that, conviction must be based on strong evidence against the accused. He thus implored the Court to find merit in the appeal and allow it.

Responding, the learned Senior State Attorney argued that, the circumstantial evidence relied upon in grounding conviction against the appellant was watertight as rightly found by the trial court. She relied on the Court's decision in **Menroof January Haule v. Republic**, Criminal Appeal No. 121 of 2022 (unreported) on the factors to be considered by trial courts before relying on circumstantial evidence to ground conviction and argued that the appellant's conviction was well founded.

Submitting further, she pointed out the following pieces of evidence; **one**, that the appellant used to work at the deceased home as a houseboy based on the evidence through PW1, PW3 and PW5; **two**, appellant's unsatisfactory explanation on the possession of the deceased's sim card; **three**, sale of the deceased's mobile telephone set to the appellant's mother which phone was duly identified by PW5; **four**, sale of the deceased's animals, in particular a head of cow to PW6 in collaboration with Evance, **five**, appellant's lies on the deceased's whereabouts and the fact that the deceased left her phone with the

appellant for ease of communication. Ms. Silayo cited **Kija Nestory @ Jinjanu v. Republic**, Criminal Appeal No. 455 of 2007 (unreported) on the presumption of guilt in murder where an accused is found in possession of the deceased's property without satisfactory explanation.

With regard to ground 3, counsel argued that there was sufficient evidence through PW1, PW3, PW4, PW5 and PW11 to that effect. She thus invited the court to dismiss this ground as well and ultimately the appeal. In rebuttal, reiterated his stance that the co-accused repudiated confession was sufficient nor the circumstantial evidence was capable of grounding conviction.

It is common knowledge as the trial court observed, there was no direct evidence on the death of the deceased. Apart from confessional statements which were found to be insufficient to convict the makers, the prosecution case solely depended on circumstantial evidence. From case law including decided cases the trial court considered and those the learned counsel placed before us, conviction on circumstantial evidence must be water tight and incapable of any other explanation incompatible with the accused's innocence.

There is a thick wall of authorities on this including the cases cited to us by both counsel largely anchored on **R v. Kipkering Arap Koske**



**and Another** (1949) 16 E.A CA 135, in which, the Court of Appeal for Eastern Africa quoted with approval an excerpt from a book by **Wills on Circumstantial Evidence**, 6<sup>th</sup> Edition at page 311 thus:

*"In order to justify the inference of guilt, the inculpatory facts, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused"*

Apparently, counsel are not at issue on the law but on its application to the facts and evidence before the trial court. Whereas the learned advocate for the appellant would have the Court hold that the link of the chain in circumstantial evidence was broken, Ms. Silayo took an opposite view. She argued that at no point was the link broken and so the trial court properly convicted the appellant on circumstantial evidence.

Regarding ground 3, Ms. Silayo supported the trial court's finding that the case against the appellant was proved beyond reasonable doubt by way of oral confession to PW 11 on how he participated with his

colleagues in killing the deceased. In support, the Court's decision in the **Director of Public Prosecutions. v. Fadhili Chengula**, Criminal Appeal No. 565 of 2019 (unreported), was cited on the admissibility of oral confessions.

We shall address ourselves on the two interrelated issues in the two grounds. To start with, the suggestion that the appellant was not an employee of the deceased Neema immediately before her death is, with respect not correct, contrary to Mr. Shilatu, the evidence against that suggestion is plenty through PW1, PW2 Wilbard Elisamon Mshanga pw3 Benson Abel Mrema PW5 that the appellant was an employee of the deceased, Neema and that is the only reason he was found by PW5 with the third accused (DW3) in her house early in the morning on 11<sup>th</sup> August, 2016. Besides, the appellant told PW5 that the deceased had travelled to Kiwalaa and left behind him to look after the house. This evidence was not contradicted in cross-examination. So, his explanation in defence linking his presence at the deceased's house with Evance, allegedly the actual employee was, but an afterthought. **Secondly**, despite the urging by Mr. Shilatu on the possession of a sim card with the appellant, we are satisfied that that evidence linked him with the charged offence considering his own explanation to PW5 and later to

PW1 that the deceased had left her phone with him for ease of communication while she was away. The fact that the deceased's phone and the charger (exh. P2) were found with the appellant's mother to whom it was sold by the appellant connects him with the offence. If indeed the deceased left her phone with him for ease of communication, we fail to understand if it was left with him for communication, why the appellant removed the sim card and sold the handset to his mother. The third piece of evidence relates to the sale of the deceased's head of cow to PW6 allegedly for footing her medical bills at Muhimbili hospital. Despite his denials and blaming it on Evance, the sale of the cow in such mysterious circumstances placed the appellee within the chain of circumstances linking him with the commission of the offence charged be it alone or in participation with other persons.

**Fourthly**, there is evidence that the appellant made several lies to PW5 particularly, regarding the deceased's whereabouts the allegation that the deceased left with him her phone for ease of communication and the allegation that the deceased cattle had been sent to PW6 for breeding a fact which turned out to be untrue. The trial court addressed herself on this relying on the court's decision in **Hassan Fadhili v. Republic** [1994] T.LR 89 in support of the finding that the appellant's

lies corroborated the prosecution evidence linking the him with the commission of the offence.

Cumulatively, the pieces of circumstances pointed out above connected the chain linking the appellant with the deceased murder. Consequently, we find no merit in this ground and dismiss it. That will save us from belabouring on ground 3 because our discussion in ground 2 is sufficient to make our dissent against the appellant's complaint in that ground. We only wish to say something on Mr. Shilatu's argument predicated upon our decision in **Magendo Paul** cited in **William Ntumbi v. Director of Public Prosecutions**. In effect, that decision echoes a rule of law laid down in **Miller v. Minister of Pensions** [1947] 2 All. ER 372 in which, Lord Denning stated:

*`The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of Justices. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt."*

The Court has reiterated that rule in many of its subsequent decisions including **Chandrakant Joshubhai Patel v. Republic,**

Criminal Appeal No. 13 of 1998 (unreported) as well as **William Ntumbi** cited by Mr. Shilatu.

On the whole and, mindful of the foregoing, we are satisfied and agree with the learned Senior State Attorney as the chain linking the appellant with the commission of the charged offence, the attempt by his advocate pointing an accusing finger at the deceased Evance is, but a fanciful and remote possibility incapable of extricating the appellant from the finding of guilt.

In the event, we find no merit in the appeal and dismiss it.

**DATED at MOSHI** this 22<sup>nd</sup> day of March, 2024.



L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Judgment delivered this 22<sup>nd</sup> day of March, 2024 in the presence of Mr. David Shilatu, learned advocate for the appellant, Ms. Bertina Tarimo, learned State Attorney for the respondent - Republic and the appellant in person is hereby certified as a true copy of the original.

A handwritten signature in blue ink, appearing to be "W. A. Hamza".

W. A. HAMZA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**