

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 327 OF 2021

EMMANUEL ELIABI @ SANGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Siyani, J.)

dated the 25th day of June, 2021

in

Criminal Session No. 88 of 2017

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JUDGMENT OF THE COURT

04th December, 2023 & 2nd January, 2024

LEVIRA, J.A.:

The appellant, Emmanuel Eliabi @ Sanga and two others (not parties to this appeal) were charged with the offence of murder contrary to section 196 of the Penal Code, [Cap 16 R:E 2002] (the Penal Code). They were prosecuted before the High Court of Tanzania at Dodoma (the High Court). His co-accused persons were acquitted but the appellant was convicted of the offence with which he was charged and sentenced to suffer death by hanging. Dissatisfied, the appellant has brought this appeal challenging both, the conviction and sentence.

Briefly, it was alleged by the prosecution that on 10th January, 2016 at Lukole Village, Kingiti Ward within Mpwapwa District in Dodoma Region, the appellant and his co - accused persons maliciously killed one William Mchodo @ Bongisa (the deceased). Daniel Msihi (PW1), Dr. Jualako Nassoro (PW2), Sameera Suleman (PW3) and No. E 9168 D/C George (PW4) were the prosecution witnesses whose substance of their evidence was to the effect that, the appellant participated in causing unnatural death which the deceased encountered. PW1 testified that the deceased was admitted at Mpwapwa District Hospital after being severely injured and became unconscious on the fateful date. He took care of him at all the time he (the deceased) was admitted at the Hospital.

According to PW1, on 13th January, 2016, the deceased regained consciousness and told him that it was Emmanuel Sanga (the appellant) who attacked him. It happened that on the same day (13th January, 2016), PW4 requested WP Sophia and DC Innocencia to go to the Hospital to interrogate the deceased. Luckily, that was the day when the deceased had regained consciousness and he told them that he was attacked by Emmanuel Sanga, Chilangazi Wami and Acley Masinga by sticks and knife. However, on the same date at night, William Mchodo

@ Bongisa passed away. The evidence of PW2 together with the postmortem examination report (Exhibit P1) revealed the cause of death to be severe loss of blood due to cut wounds by a sharp object. PW4 and other police officers arranged to arrest the culprits who were mentioned by the deceased unsuccessfully. However, on 29th March, 2016 he got an information that the appellant was arrested by local militiamen from Pwaga Village and was brought to the police station. PW4 interrogated the appellant and according to him the appellant confessed that he killed William Mchodo. On 1st April, 2016, PW4 sent the appellant to PW3, the justice of peace to record his extra judicial statement (Exhibit P2). The evidence of PW3 was to the effect that the appellant narrated to her how he participated in attacking the deceased in assistance of his two fellows and escaped after the incident.

On the strength of prosecution evidence, the appellant was found to have a case to answer and thus was required to give his defence. He denied the charge and advanced a defence of alibi. However, at the end of the trial he was convicted and sentenced as intimated above. In the present appeal the appellant has presented six grounds which we paraphrase as follows: **First**, that the trial court erred in convicting the appellant upon uncorroborated extra judicial statement which was

irregularly procured and wrongly admitted. **Second**, that the extra judicial statement was made without following the steps as instructed by the Chief Justice's guide. **Third**, that the appellant was convicted on weak prosecution evidence. **Fourth**, that the trial Judge attached weight to unreliable evidence hence, erroneous decision. **Fifth**, that the prosecution failed to prove the case against the appellant beyond reasonable doubt; and **sixth** that, the trial Judge erred in basing the conviction on dying declaration without considering how the appellant was identified by the deceased taking into consideration that the incident took place at night.

At the hearing of the appeal, the appellant was represented by Mr. Leonard Mwanamonga Haule, learned advocate whereas, the respondent, Republic had the services of Ms. Lina Magoma, Senior State Attorney assisted By Mr. Francis Kesanta, learned State Attorney. Mr. Haule argued all the grounds of appeal under one complaint that, the case against the appellant was not proved beyond reasonable doubt. He commenced his submission by referring us to page 135 of the record of appeal where he said, the appellant's conviction was grounded on the dying declaration of the deceased left to PW1 and the extra judicial statement found at page 147-151 of the record of appeal.

Regarding the dying declaration, Mr. Haule submitted that the evidence of PW1 as regards the said declaration was unreliable and contradictory. It was his argument that PW1 gave unreliable evidence because he said on 13th January, 2016 the condition of the deceased improved and he was able to state that, he was stabbed by the appellant and on the same date he (the deceased) passed away. Mr. Haule questioned, how could that be possible.

He referred us to page 39 of the record of appeal and argued further that the evidence of PW1 was contradictory as he said, he gave his statement to the police after the death of William. Mr. Haule took it that the said statement was a dying declaration though the record is silent on the kind of statement which PW1 was talking about. If the said statement was a dying declaration of the deceased, Mr. Haule was of the argument that the Police Officer to whom the statement was made was not called to testify with no apparent reasons. Apart from that, he added, PW1 testified that the deceased was his uncle and thus he had an interest to serve and his evidence has to be taken with great caution. In the circumstances, he submitted, there was no dying declaration to ground the appellant's conviction.

Turning to the appellant's extra judicial statement, Mr. Haule argued that the same could not be relied upon to ground his conviction due to the following reasons; **First**, the said statement was procured contrary to the Chief Justice's Guide stated in the case of **Tabu Sita v. Republic**, Criminal Appeal No. 297 Of 2019 (unreported). He submitted further that, while recording the appellant's extra judicial statement, the justice of peace did not comply with the guide to the letter as she only complied with guidelines number four and six. Therefore, he said, exhibit P2 was wrongly admitted. **Second**, he said exhibit P2 lacks authenticity as it was not properly signed by the appellant. He questioned why the appellant pressed his thumb print in this exhibit instead of signing by writing as he did in his cautioned statement which was however not admitted in evidence. **Third**, he argued that the appellant was not a free agent when his statement was being recorded by the justice of peace as he was scared having been threatened by the police who sent him there. As a result, the appellant told the justice of peace what the said police ordered him to tell her. Nevertheless, Mr. Haule admitted that the extra judicial statement of the appellant was admitted without being objected.

Mr. Haule argued further that the prosecution did not prove the case against the appellant to the required standard because there was variance between the charge and evidence regarding the date of incident which was not rectified. He elaborated that, while the charge sheet indicated that the incident occurred on 10th January, 2016, the evidence showed that the deceased died on 13th January, 2016. He faulted the prosecution for failure to amend the charge so as to indicate the proper date. In support of his argument, he cited the case of **Rajabu Shabani @ Sanuka v. Republic**, Criminal Appeal No. 461 of 2015 (unreported).

He insisted that the prosecution failed to prove that the deceased was killed, instead, he said, the deceased died at the hospital where he was admitted on 13th January, 2016. According to Mr. Haule, the appellant was not convicted on the strength of prosecution evidence but out of suspicion citing the case of **Aidan Mwalulenga v. Republic**, Criminal appeal No. 207 of 2006 (unreported). Basing on the strength of his submission, Mr. Haule urged us to allow the appeal.

In reply, Ms. Magoma opposed the appeal on account that, the prosecution proved its case against the appellant beyond reasonable

doubt. She submitted that the appellant was convicted basing on dying declaration of the deceased and his extra judicial statement. She referred us to pages 134 and 135 of the record of appeal where the High Court apart from relying on the dying declaration, it also considered other corroborative evidence to convict the appellant. She argued, it is not true that the prosecution evidence was unreliable and contradictory as alleged by the appellant's counsel. She highlighted that at page 38 of the record of appeal, PW1 stated what he was told by the deceased on 13th January, 2016, that it was the appellant who stabbed him. Ms. Magoma argued, had it been that there was anything between the deceased and the appellant, the deceased could have told PW1 before the date he made the declaration. The deceased did not tell PW1 about the circumstances at the scene of crime. But, the evidence from the appellant's confession (extra judicial statement) reveals that the incident took place at night and the condition was not favourable for proper identification.

She went on to submit that, the confession of the appellant made him guilty because it corroborated the dying declaration that he participated in beating the victim who eventually died. According to her, the appellant's extra judicial statement was admitted in evidence at

page 49 of the record of appeal without any objection. Therefore, its admissibility cannot be questioned now. She added that had it been that the appellant intended to challenge its admissibility, he could have done so at the time of tendering the same.

Besides, she said, the Chief Justice's Guidelines were observed during recording the appellant's extra judicial statement. She referred us to page 148 of the record of appeal where the appellant was asked questions before recording his statement including whether he was forced to give his statement and he responded in negative. Apart from that, she said, the appellant signed the said statement, so it was authentic. Ms. Magoma insisted that the appellant was a free agent at the time of recording his statement and the wounds he had, was due to the beatings by civilians at the time of his arrest; she referred decisions of the Court in **Muhangwa Simon v. Republic**, Criminal Appeal No. 150 of 2005 and **Sospeter Nyanza and Another v. Republic**, Criminal Appeal No. 289 of 2018 (both unreported) in which it was stated that, the extra judicial statement did not require any corroboration as it was not repudiated.

On the strength of her submission, Ms. Magoma stated that the appellant could be convicted even without the presence of the deceased's dying declaration as he did not object his extra judicial statement. All in all, she said that the prosecution proved its case against the appellant beyond reasonable doubt and thus she urged us to dismiss the appeal.

Mr. Haule reiterated his submission in chief in rejoinder regarding the evidence of PW1. Moreover, he said, the case of **Sospeter Nyanza** (supra) cited by Ms. Magomac, is distinguishable from the circumstances of the present case because in that case, the appellant was asked and said he was ready to give his statement which is not the case in the present case. He emphasised that, in the current case there was no proper identification of the appellant at the scene of crime as the incident occurred at night. Finally, he prayed for the appeal to be allowed.

We have carefully considered the rival arguments by the counsel for the parties, grounds of appeal and the entire record of appeal. As argued by the counsel for the parties, the sole issue calling for our determination is whether the case against the appellant was proved

beyond reasonable doubt. We agree with the parties that the appellant's conviction was based mainly on the deceased's dying declaration and the appellant's extra judicial statement. Therefore, our determination of this appeal shall as well follow suit.

We shall start with the deceased's dying declaration which was relied upon by the trial court to ground the appellant's conviction. It is common knowledge that a statement made by a person who is dead is admissible when the statement is made by such a person as to the cause of his death in cases in which the cause of that person's death comes into question. However, its reliability requires corroboration. The statement of that person is what is referred to as a dying declaration. See the case of **Sadick Ally v. Republic**, Criminal Appeal No.81 of 2015 (unreported).

In the instant case, PW1 testified that on 10th January, 2016 he went to Lukole dispensary and found the deceased who had been injured in a serious condition. On that day, the deceased could not talk but on 13th January, 2016, the deceased told him that he was stabbed by the appellant, later he passed away. By this evidence, it means that the deceased left the dying declaration to PW1. We have examined the

evidence of PW1 but we could not find any further explanation on how the appellant was identified. We have as well considered the fact that the deceased was under critical condition to the extent of losing consciousness for three days and it was on the day he regained consciousness when he made that declaration. The settled position is, for the dying declaration to be considered it has to be made freely out of consciousness or while sober. The record of appeal is silent about the status of the deceased at the time of making such declaration.

Apart from the dying declaration made to PW1, the record of appeal at page 58 indicates that there was another dying declaration made on the same date of the first one to the police officers who were sent by PW4 to the hospital to interrogate the deceased. However, the said officers were not called to testify before the trial/High court. According to PW4, he was told by WP Sophia and DC Innocencia that they talked to the deceased and he told them that, he was attacked by sticks and knife by Emmanuel Sanga, Chilangazi Wami and Acley Masinga. The question that follows is whether the deceased was sober at the time of making the alleged declarations. It is not known as to why he did not mention other people who attacked him to PW1 or why he decided to add those other two people while making a declaration

to the police officers who were sent by PW4 to interrogate him. As it can be seen, these questions leave a lot to be desired more so as it is not stated why the two police officers to whom the second declaration was made were not called to testify.

The trial Judge disregarded the dying declaration allegedly made to the police officers on account that it was a hearsay as those officers were not called to testify. We agree with the learned Judge. However, we think, as intimated above, the evidence of PW4 in that respect could as well be used to gauge the weight of the alleged dying declaration to PW1.

Having so stated, we further observe that, the learned trial Judge sought corroboration of PW1's evidence from the appellant's extra judicial statement in which the appellant confessed to have participated in assaulting William Mchodo (the deceased), as he stated: "*Mimi nilimvamia William Mchodo kwa kumpiga na fimbo sehemu mbalimbali za mwili wake. Ndipo Acley Bendera naye alinyanyua fimbo yake na kumpiga William Mchodo shingoni akaanguka chini kisha Chiiangazi Wami akamrukia na kuanza kumchoma kisu.*" – See: Pages 135 – 137 of the record of appeal. With respect, as intimated above, assuming

what PW4 was told by the police officers regarding the dying declaration was true, then it means there were two dying declarations from the same deceased with different contents; the second one mentioning the three people mentioned in the extra judicial statement, while the other one mentions only the appellant. In the circumstances, it means that even the dying declaration allegedly made to PW1 by the deceased is doubtful as truly he only saw the appellant on the material night and whether he identified him. It is our considered opinion that such declaration could not have been relied upon by the trial court to ground the appellant's conviction. As the first appellate Court, we are not prepared to rely on it in determining this appeal.

We now revert to the appellant's extra judicial statement which was recorded by PW3. The settled position is that confession of an accused person whether or not retracted/ repudiated can be relied upon by the court to ground the accused's conviction with or without corroboration. The most important things to be considered in its admissibility before relying on such confession are; **one**, whether the confession was made voluntarily and properly; and **two**, whether the confession is true - see: **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007; **Ndalahwa**

Shilanga and Another v. Republic, Criminal Appeal No. 247 of 2008 and **Flano Alphonse Masalu @ Singu & 4 Others v. Republic**, Criminal Appeal No. 366 of 2018 (all unreported).

In the present appeal, the parties' rival arguments as far as the appellant's confession is concerned is based on the compliance of the Chief Justice's Guideline on the stages to be followed while recording the accused's extra judicial statement. In this regard therefore, we shall consider whether the appellant's extra judicial statement (exhibit P2) was recorded according to the Chief Justice's Guide instructions. Before we embark to consider the arguments by the parties in this aspect, we find it apposite to reproduce from our decided cases some important details which the justice of peace is required to inquire from the accused person while recording his confession or extra judicial statement as extracted from "A guide for Justice of Peace". These are: **One**, the time and date of his arrest; **two**, the place he was arrested; three, the place he slept before the date he was brought to him; **four**, whether any person by threat or promise or violence has persuaded him to give the statement; **five**, whether he really wishes to make the statement on his own free will; and **six**, that if he makes a statement, the same may be used as evidence against him – see: **Peter Charles Makupila @**

Askofu v. Republic, Criminal Appeal No. 21 of 2019 (Unreported) and **Tabu Sita (Supra)**.

The counsel for the appellant in the present appeal argued that the justice of peace while recording the appellant's extra judicial statement, she only observed the fourth and sixth instructions and neglected the rest. As a result, the appellant's confession was not authentic and that the appellant only pressed thumb print on the said statement instead of signing by writing. His argument was opposed by Ms. Magoma who submitted that all the instructions were observed. According to her, the appellant's extra judicial statement (exhibit P2) was authentic and voluntarily made.

We have thoroughly gone through the assailed extra judicial statement of the appellant (Exhibit P2) at page 147 to 151 of the record of appeal and found that the same has substantially adhered/complied with the Chief Justice Guidelines. Exhibit P2 in the instant case as it can be seen is not in a standard form but PW3 recorded it in plain papers with great consideration of the Chief Justice Guidelines. The record speak for itself, as we discern from Exhibit P2, it shows the date and time the appellant was brought before the justice of peace, the date

and place of the appellant's arrest, the appellant was warned prior to making the statement that his statement could be used against him as evidence at his trial, the appellant voluntarily gave the statement and signed on it by a thumb print and last the justice of peace (PW3) who recorded it signed the same. Thus, the appellant's complaint regarding noncompliance with the Chief Justice Guidelines in recording his extra judicial statement (Exh.P2) is unfounded.

Having found that exhibit P2 was properly recorded and the appellant voluntarily confessed to be involved in killing the deceased, thus this Court has nothing to doubt from his confession as the very best evidence in criminal trial is the voluntary confession of the accused person. See the case of **Frank Kinambo v. The Director of Public Prosecutions**, Criminal Appeal No. 47 of 2019 (unreported). Further, the statement was tendered and admitted in evidence without any objection from the appellant. However, even if the statement could be retracted or repudiated still the details contained therein give sufficient information on how the deceased's death was organised and executed by the appellant with his fellows, a thing which could not be easily given by someone with no knowledge of the same. Under the circumstances, still the appellant could be implicated/netted basing on his confession.

See the case of **Michael Mgowole and Another v. Republic**, Criminal Appeal No.205 of 2017, **Emmanuel Lohay and Another v. Republic**, Criminal Appeal No.278 of 2010 (both unreported) and **Flano Alphonse Masalu @ Singu & 2 Others v. Republic (Supra)**. Therefore, like the learned trial Judge, we are satisfied that taking into account all the circumstances of the case, the appellant's confession statement was nothing but true.

That besides, the appellant's confession statement (Exhibit P2) shows that they had common intention of slashing away the deceased's life. This is according to the nature of weapons used, the manner they inflicted injuries on the deceased's body according to the evidence of PW2 and the autopsy report (Exhibit P1) and the appellant's conduct after the incident all together prove intention (malice aforethought) of killing the deceased. See the case of **Daudi Kapeja v. The Republic**, Criminal Appeal No.195 of 2021, **Jacob Asegelile Kakune v. Republic**, Criminal Appeal No. 178 of 2017 and **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994.

Having considered the circumstances of the case at hand and the fact that the appellant voluntarily confessed to be involved in killing the

deceased through exhibit P2 (extra judicial statement), we are constrained to agree with the respondent that the prosecution managed to prove its case to the hilt and the appellant was properly netted and sentenced by the trial court. Consequently, the appellant's appeal is without merit. Accordingly, we dismiss it in its entirety.

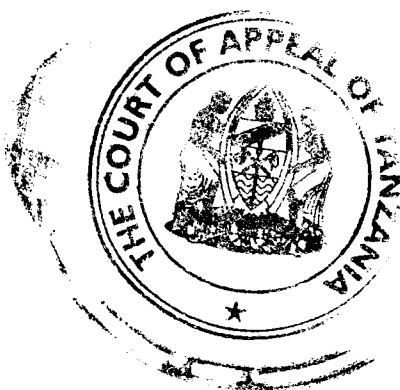
DATED at DAR ES SALAAM this 29th day of December, 2023.


S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of January, 2024 in the presence of Appellant in person and Ms. Faudhiat Mashina, learned State Attorney for the Respondent vide video link from the High Court of Tanzania at Dodoma, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL