IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 539 OF 2021

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

JILALA MAHEMBO JIHUSA ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya

(Mbagwa, J.)

dated 29th August, 2021

in

Criminal Sessions Case No. 32 of 2017

JUDGMENT OF THE COURT

9th & 14th February, 2024

RUMANYIKA, J.A.:

Before the High Court of Tanzania at Mbeya, Jilala Mahembo Jihusa, the respondent was acquitted from the charge of murdering Mbuga Masanja (the deceased), contrary to sections 196 and 197 of the Penal Code. The respondent, The Director of Public Prosecutions (DPP) is appealing before us against the acquittal.

It was alleged that on 4th August, 2016 (the material day), at Kapunga village within Mbarali District in Mbeya Region, the respondent

killed the deceased. The prosecution lined up six witnesses and produced three exhibits for their case. Dr. Peter Kigombola (PW1) is a medical doctor of Chimala Mission Hospital who conducted autopsy on the dead body and tendered the respective report (Exhibit P1). He established an excessive bleeding through a deep cut wound on the deceased's head to be cause of the death. Majid Masanja (PW2) is younger brother of the deceased who allegedly saw the respondent and deceased at the latter's house, as the former offered to buy three head of cattle from the deceased. That the two agreed the price to be TZS 1,650,000/= which the respondent promised to pay him away at Chimala center and the two went there. However, the deceased was never seen back until on 10th August, 2016 when his body was found abandoned in the bush in Kapunga forest brutally murdered. It was further alleged that prior to discovery of the dead body, the missing of the deceased was reported to the local village chair and the police authorities. Being reported the last person seen to be with the deceased, the respondent was charged, as highlighted above.

Braiton Adriano (PW3), the respective local village chair testified to have the missing of the deceased reported to him by some of the deceased's relatives. G 1009 DC Athumani (PW4) is a police man from investigation department who submitted the respondent to Justice of the

peace. Mutalla Sadiki Mbilu (PW5) recorded the respective extra judicial statement of the respondent (exhibit P2). DC Charles (PW6) successfully led the arresting team on 28/10/2016 at Kabuje Guest House in the municipality of Mbeya. He also recorded the respondent's cautioned statement (exhibit P3).

The respondent was the sole defence witness for himself. He denied liability stating that at the alleged material time he was away from the village together with his parents attending their relative's marriage ceremonies. He disassociated himself from the said two confessional statements, asserting that they were procured through serious torture.

The trial court on its part, after hearing the evidence of both sides called two court witnesses but only one of them, Dowo Jandika Kisinza (CW1) turned up. In the end, it found that the prosecution case lacked proof beyond any reasonable doubt and acquitted the respondent. Aggrieved by that decision, the DPP is now appealing on the following points:

1. *That the trial court erred in law and fact by failing to apply the doctrine of last seen against the respondent properly and acquitted him.*

2. *That the trial court erred in law and fact by accepting the respondent's belatedly raised defence of alibi.*
3. *That the trial court erred in law and fact by acquitting the respondent allegedly due to material contradictions in the prosecution case which never existed.*
4. *That the trial court erred in law and fact by acquitting the respondent holding that PW2, PW3 and PW6 were not credible witnesses.*
5. *That the trial court erred in law and fact by holding that the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, Ms. Mwajabu Tengeneza learned Senior State Attorney was assisted by Ms. Veneranda Masai, learned State Attorney representing the appellant whereas Mr. Simon Mwakolo learned Counsel opposed the appeal for the respondent.

Submitting on the 1st point, and having referred us to the testimony of PW2 at pages 39-42 of the record of appeal, Ms. Tengeneza contended that the respondent was the last person seen to be with the deceased going to Kapunga for cattle business. And that this evidence was not sufficiently challenged. She faulted the trial court for not believing PW2 thereby finding that the respondent is not responsible for murdering the

deceased. On the PW2's failure to name the respondent to PW3 and PW6 before the dead body was discovered, Ms. Tengeneza submitted that at that time naming the respondent would be premature and was uncalled for. In her view also, she did not see any point for PW2 to have called the respondent asking the deceased's whereabouts before much as, she asserted, yet it is only the information supplied by PW2 which led to the arrest of the respondent on 28/10/2016 and later to the discovery of the dead body.

For the 2nd ground, Ms. Tengeneza abandoned it rightly on the way.

Regarding the 4th point about the court finding that PW2, PW3 and PW6 were not credible witnesses, Ms. Tengeneza opposed it stoutly. For instance, as to when exactly the respondent was arrested, she contended that PW6 erred as human being. She stated that as human being as was expected, PW6 may have reasonably forgotten such trivial details of the case, given the lapse of about five years which is execusable. She cited our decision in **Emmanuel Lyabonga v. Republic** (Criminal Appeal No. 257 of 2019) [2021] TZCA 152 (29 April 2021: TanzLII) to substantiate her point. In that case she argued, the Court overlooked some similar mistaken details of the case due to a lapse of three years for being trivial, unlike in

the instant case where there was a lapse of about five years. She implored us to find the alleged contradiction immaterial as it did not go to the root of the case. On the failure of PW6 to tender the knife which the respondent was allegedly found in possession of, Ms. Tengeneza argued that the omission was too insignificant to dent the prosecution case.

Further, referring to the conduct of the respondent after the incident, Ms. Tengeneza contended that according to report of the cyber-crimes officers as adduced by PW6 the respondent fled to Lindi and later to Gongolamboto area in Dar es Salaam avoiding the consequences until such time he was arrested in a guest house back at Mbeya. Further, she contended that the respondent's conduct apart, the evidence of PW2-PW6 sufficiently corroborated the respondent's retracted cautioned and extra-judicial statements (exhibits P3 and P2), respectively.

On the 5th ground of appeal, Ms. Tengeneza urged us to find that the summation of her submission on the preceding grounds of appeal could suggest a proof of the prosecution case beyond reasonable doubt. She prayed for an order to allow the appeal.

Responding to the appellant's 1st point of grievance, Mr. Mwakolo contended that with respect to evidence by PW2 the doctrine of last seen

cannot apply against the respondent. Since, if anything, he asserted, the information allegedly supplied by Mrs. Nzuo that she saw the respondent and the deceased together later at Kapunga could be relevant and material. However, the alleged lady did not appear to testify at the trial.

Responding on the 4th ground, Mr. Mwakolo supported the trial court's finding and decision in holding that PW6 is not a credible witness for his failure to state the exact date of the respondent's arrest. He wondered if such an experienced policeman would commit that unusual error.

As regards the issue of the respondent's conduct after the incident, namely disappearance or hiding, Mr. Mwakolo contended that unless the prosecution established the respondent's permanent place of abode, which was not done, the respondent was at liberty to move around and to abroad. He urged the Court to dismiss that complaint for being unfounded.

As for the retracted cautioned and extra judicial statements (exhibits P3 and P2), respectively, Mr. Mwakolo contended that those statements could not be corroborated by evidence of any one of the prosecution witnesses because themselves were not credible in the first place. On the principle referred by Ms. Tengeneza, with respect to PW6 that to err is

human, Mr. Mwakolo urged us to distinguish the present case from **Issa Hassan Uki v. Republic** (Criminal Appeal No. 129 of 2017) [2018] TZCA 361 (9 May 2018: TanzLII). Because, he argued, in the instant case the trial judge rightly assessed demeanour of PW6 in the witness box and found him not credible. Further, it was Mr. Mwakolo's contention that the contradiction posed by PW6 during examination in chief did not bother the prosecution to clear it during re-examination.

Whereas, the central issue before us is whether there was enough evidence to corroborate the respondent's retracted statements, we propose to begin with the first ground regarding application of the doctrine of last seen. On that issue, there is a plethora of the Court's decisions. See- **Amani Rabi Kalinga v. Republic** (Criminal Appeal No. 474 of 2019) [2022] TZCA 633 (18 0ctober 2022) in which we cited **Mathayo Mwalimu and Another v. R**, Criminal Appeal No. 147 of 2008 (unreported) that:

> *"...where a person is alleged to have been the last to be seen with the deceased, in the absence of the plausible examination to explain away the circumstances leading to the death he/she will be presumed to be the killer."*

Applying the proposition above to the present case, we wish to point out at this stage that there are two pieces of evidence; one, the account

given by PW2 as narrated above on one side, and the evidence of PW7 that at a later stage Mrs. Nzuo saw the deceased only accompanied by the respondent at Kapunga for some cattle business. With respect, we agree with Mr. Mwakolo that at least from there, the evidence of PW2 on the doctrine of last seen was weak and inapplicable against the respondent. Nonetheless, Mrs. Nzuo whose specific name was not disclosed did not appear at the trial to identifying the respondent as the last person who may have been seen to be with the deceased as alleged. The first ground fails.

As regards the 2nd ground of appeal about acquittal of the respondent basing on the untimely raised defence of alibi, fortunately, the learned counsel dropped it on the way on reflection.

The appellant's 3rd point of grievance is about the trial judge holding that the evidence by PW6 posed contradictions which went to the root of the case. With respect, we do not see it to be a proper conclusion. Whether the respondent was arrested on 28/10/2016 or four days later is immaterial. We are saying so for the following main reasons: one, in his evidence at page 96 of the record with respect to the charge, the respondent admitted that indeed he was arrested on 28/10/2016, two, the

discrepancy is trivial in our considered view which we are entitled to overlook. On that proposition, see our decisions in **Issa Hassan Uki** (supra) and **John Gilikola v. Republic,** Criminal Appeal No. 31 of 1999 (unreported). In the latter case the Court stated that:

> *"...due to the frailty of human memory and* ***if the discrepancies are on details, the court may overlook such discrepancies...****"* [Emphasis added]

It follows therefore that the alleged discrepancies raised by the PW6 were too immaterial to impeach his evidence. He was credible and reliable along with PW2 and PW3. We wish to reiterate that powers of the Court not to accept evidence by a witness are no longer unconditional. It is until when it meets the threshold which has been set by the Court, on several occasions including in **Goodlack Kyando v. R** [2006] T.L.R 363, that every witness is entitled to credence of his evidence if there is no good cause for a court to hold vice versa. The 3rd and 4th grounds of appeal have merits.

We now turn to the issue of the said two retracted confessional statements of the respondent (exhibits P3 and P2) and their strength to the prosecution case. It is a settled law that it is unsafe for a court to convict solely basing on repudiated or in this case retracted confessions

unless they are corroborated with any other independent piece of evidence. See- our decisions in **Alex Ndendya v. R** [2020] 2 T.L.R. 79, **Nyerere Nyague v. Republic** (Criminal Appeal No. 67 of 2010) [2012] TZCA 103 (21 May 2012: TanzLII) and **Paulo Maduka And Others v. Republic** (Criminal Appeal No. 110 of 2007) [2009] TZCA 69 (28 October 2009: TanzLII) to mention but few. Moreover, it is worth noting that a piece of evidence which requires corroboration cannot corroborate the otherwise insufficient evidence.

Indeed PW2 was not credible except to the extent shown earlier on. Moreover, the evidence by PW3 and PW6 has significant corroborative value on the said retracted statements. We are holding so for four main reasons: one, the stories related to the alleged cattle business between the respondent and the deceased are similar and common features in the respondent's statements and oral evidence adduced by PW1, PW2, PW3, PW4, PW5 and PW6. Two, those stories incriminate the respondent. Three, in terms of the plot allegedly pre-arranged by the respondent, the motive of the killer, vulnerability of the part of the deceased's body attacked by the killer significantly correspond to each other. And four, the conduct of the respondent that he fled his home after the incident is not a mere coincidence. He was trying to evade the long arm of justice as he was

aware of his criminal act. Therefore, we are settled in our minds that for the reasons shown above, the evidence by PW1, PW3 and PW6 sufficiently corroborated the two retracted statements and properly grounded the conviction of the respondent.

Fortunately, the requirement and effect of corroborating evidence has been stated by the Court now and again. For instance in **Fredy Jasson Shelela @ Masoud and Another v. Republic** (Criminal Appeal No. 628 of 2020) TZCA 27 [12 February 2024: TanzLII], the Court held:

> *"....it is trite law that the corroborating evidence does not necessarily need to confirm or validate all the details and particulars in the confession."*

In other words, corroborating evidence does not necessarily need to meet the standards of evidence by a first class eye witness but rather, such evidence which may add value, however remotely beefing up and strengthening the otherwise insufficient evidence.

Having said so, we are satisfied in the present case that the respondent's two retracted statements were sufficiently corroborated to found the respondent's conviction. As such the prosecution case was proved beyond reasonable doubt. The 5th ground of appeal succeeds.

In conclusion, we find merit in the appeal, which we hereby allow. Consequently, we quash the High Court's decision acquitting the respondent and replace it with a conviction for murder along with the mandatory death penalty against the respondent.

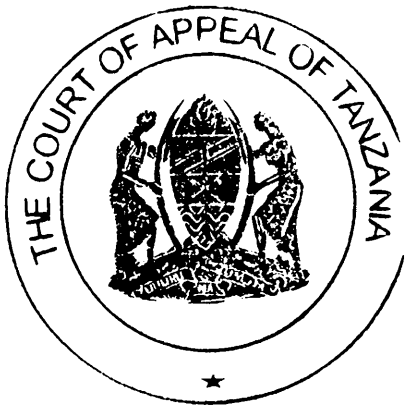
DATED at **MBEYA** this 13th day of February, 2024

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

Judgment delivered this 14th day of February, 2024 in the presence of Ms. Veneranda Masai, learned State Attorney for the Appellant, Mr. Simon Mwakolo, learned counsel for the Respondent and also in the presence of Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL