

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

(CORAM: JUMA, C.J., MKUYE, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 380 OF 2020

SIMON DALALI @ THOMAS JAMES..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Geita)**

(Ismail, J.)

dated the 3rd day of June, 2019

in

Criminal Session No. 59 of 2015

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JUDGMENT OF THE COURT

16th & 19th February, 2024

JUMA, C.J.:

The appellant, Simon Dalali (also known as Thomas James), was taken before the High Court sitting at Geita, where the prosecution charged him with murder contrary to Sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002. The prosecution alleged that on 14/11/2011, at Nyamibanga Village, Chato District, he murdered Magoja s/o Kamuli (the deceased). The appellant pleaded not guilty to the charge. After hearing evidence from three prosecution witnesses and the appellant's defence,

the learned trial Judge (Ismail, J. as he then was) found the appellant guilty of murder, convicted, and sentenced him to suffer death by hanging.

At his trial and the subsequent trial within the trial, the appellant reiterated that he neither killed the deceased nor was he involved in the deceased's death in any way. He testified that police arrested him at Kizuguangoma village in Sengerema District around 08:00 a.m. on 18/02/2012. They handcuffed him and first took him to Sengerema Police Station. Later, around 07:00 p.m., they transferred him to Buseresere Police Station, and on 19/2/2012, around 06:00 a.m., police took him to Chato Police Station, where the police interrogated him about the death of the deceased and those of one Chandika, another known as Zanzibar, to which he replied that he was not aware. According to the appellant, the police officer tied up his hands and assaulted him to extract a confession to murder. Due to the resulting severe pain, the appellant confessed. On 20/2/2012, the police took the appellant to Chato Hospital for treatment. He informed the doctor treating him about his beatings by the police. The police returned him to the police station, where, on 21/2/2012, he signed a confession statement.

For the prosecution, D/CPL Jishosha (PW3) testified that on 15/11/2011, he was at his place of work at Bwanga Police Station when his officer in charge, ASP Alex Mukama, directed him to visit a scene of a crime of murder at Nyamibanga village. Detective Constable Majani (PW1) and clinical officer Joseph Msafiri (PW2) accompanied him to see the body of the deceased. The deceased's body lay in a pool of blood several metres from his home near Faida Kalidushi's home, a neighbour. The deceased's wife informed the police that the assailants attacked her husband while they were having their dinner. PW3 drew a sketch map (exhibit P2) showing the points where the deceased was having his dinner, where the assailants hid before they attacked, where the deceased's died, and the neighbour's house. PW1 testified how he interrogated the appellant, who confessed to killing the deceased, and recorded the appellant's caution statement. Following the appellant's objection against the admission of the caution statement, the trial court conducted a trial within a trial and admitted the statement as exhibit P1.

The clinical officer, PW2, conducted a post-mortem examination of the deceased body and prepared a post-mortem report (exhibit P2). According to this report, the deceased body was lying on its right side with multiple

massive wounds on the left forehead, back, and left hand. He concluded that excessive bleeding and numerous injuries caused the deceased's death.

His conviction by the trial High Court and death sentence aggrieved the appellant. He appealed to this Court.

When this appeal came up for hearing on 16/02/2024, Mr. Elias Rachuonyo Hezron learned counsel appeared for the appellant. Mr. Castuce Clemence Ndamugoba, learned Senior State Attorney, and Ms. Jaines Kihwelo and Ms. Naila Chamba, learned State Attorneys, represented the respondent Republic.

Mr. Hezron, the appellant's learned counsel, informed us that there are two sets of memoranda of appeal, each with grounds of appeal. The appellant filed his first set containing eight grounds on 21/07/2020 without assistance from learned counsel. After receiving instructions to represent the appellant and after consultations, the appellant and Mr. Hezron agreed to rely on three grounds of appeal in the supplementary memorandum of appeal the learned counsel filed on 12/02/2024. Thus, Mr. Hezron

restricted his submissions to the three grounds in the supplementary memorandum of appeal.

The first ground of appeal faults the trial Judge for admitting the appellant's cautioned statement as evidence despite police recording it outside the four hours available to the police to interview suspects after their arrests. The second ground also touches on the cautioned statement. This ground blames the trial Judge for relying on the cautioned statement that PW1 recorded outside the four hours to convict the appellant without requiring corroborative evidence. In his third ground, the appellant blames the trial Judge for convicting him based on the prosecution evidence that did not prove his guilt of murder to the required standard.

To expound the first ground of appeal that the trial Judge erred in admitting a cautioned statement (exhibit P1) contrary to the law, Mr. Hezron submitted that the police arrested the appellant on 18/2/2012, and Detective Constable Majani (PW1) recorded his caution statement on 21/02/2012, which was four days after his arrest, which was well beyond the four hours law prescribes. He referred to section 50 (1) (a) of the Criminal Procedure Act Cap 20 R.E. 2002 [now R.E. 2022] (the CPA), in

which four hours is a basic period after arrest, available for police to interview suspects who are under the police restraint. It states:

"50- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;"

The learned counsel for the appellant similarly referred to the decision of this Court in **JANTA JOSEPH KOMBA, ADAMU OMARY, SEIF OMARY MFAUME, AND CUTHBERT MHAGAMA VS. R.** CRIMINAL APPEAL NO. 95 OF 2006 (unreported), which expounds on the consequences of contravening the four-hour window under section 50(1)(a) of the CPA. Our decision reiterated that restraining suspects in police custody for a period beyond the prescribed time amounts to torture. Mr. Hezron expressed his concern over how the trial Judge, on page 61 of the appeal record, suggested that there were circumstances he did not elaborate that led to the delay in recording the appellant's cautioned

statement. He pointed out that no prosecution witness explained why the police delayed recording the caution statement.

Mr. Hezron rounded up his submissions on the first ground of appeal by urging us to expunge from the record of prosecution evidence the confession statement (exhibit P1), whose admission as evidence contravened the law, prejudicing the appellant.

Submitting in support of the second ground of appeal, the appellant's counsel faulted the trial Judge for basing the appellant's conviction on a confessional statement that lacked independent corroborative evidence. He added that since the appellant repudiated that confession, the trial Judge should have asked for independent evidence for corroboration, especially in this appeal where no prosecution witness testified how, where, and when police arrested the appellant.

Mr. Hezron considered that the trial within a trial which preceded the admission of exhibit P1 in evidence, should also have alerted the trial Judge to demand corroboration of this confessional evidence. During the trial within trial, the learned counsel pointed out, it emerged that the police did not restrict their interview to the deceased's death. The police,

in addition, interrogated the appellant concerning two separate deaths: of one Chandika and another deceased known as "Zanzibar." Because the trial Judge over-relied on repudiated confessional evidence that lacked corroboration, the learned counsel for the appellant urged us to allow the appellant's second ground of appeal.

Concerning the third ground of appeal, Mr. Hezron maintained that with the expunging of the appellant's cautioned statement (exhibit P1) from the record of prosecution evidence, there remains no scintilla evidence to prove the case against the appellant beyond a reasonable doubt. He urged us to allow the appeal and set the appellant free.

Before Mr. Hezron sat down, the Court referred him to the record of committal proceedings in the District Court of Chato. We prodded him whether the prosecution listed the appellant's caution statement (exhibit P1) as one of its exhibits for impending trial and whether the prosecution read out Exhibit P1 to inform the appellant of its substance.

After reviewing pages 25 and 26 of the record of committal proceedings, he submitted that the prosecution did not include the appellant's confessional statement (exhibit P1) in the list of exhibits

appearing on page 26. The prosecution listed only two exhibits: A sketch map of the crime scene and the post-mortem report. He urged us that the trial Judge was wrong to rely on the cautioned statement (exhibit P1) that the prosecution did not, in the first place, list as one of the prosecution exhibits. Mr. Hezron submitted that failure to include exhibit P1 in committal proceedings is another reason for us to expunge exhibit P1 from the appeal record.

In reply to Hezron's submissions, Mr. Castuce Ndamugoba, the learned Senior State Attorney, supported the appellant's appeal. He submitted that the appellant's cautioned statement (exhibit P1) was material evidence that the trial Judge used to convict the appellant. It follows, therefore, he added, that failure to list exhibit P1 as one of the exhibits at the appellant's committal for his trial to the High Court was a fatal irregularity for offending subsection (2) of section 246 of the CPA.

This provision directs subordinate courts committing accused persons for trial in the High Court to read and explain to the accused person the information brought against him, as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial. According to Mr.

Ndamugoba, failure to read exhibit P1 denied the appellant his chance to know the information in the cautioned statement to enable him to prepare for his trial in the High Court. Section 246 (2) of the CPA states:

"246 (2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."

The learned Senior State Attorney informed us that the prosecution did not invoke section 289(1) of the CPA to rectify the irregularity of failing to read and explain the cautioned statement to the appellant during his committal proceedings in the District Court of Chato. This provision, he added, allows the prosecution to read the appellant's confessional statement, which it failed to read at the committal proceedings by giving the accused person or his advocate reasonable notice in writing. Section 289 (1) of the CPA states:

289.-(1) A witness whose statement or substance of evidence was not read at committal proceedings shall not be called by the prosecution at the trial unless the prosecution

has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.

In urging us to expunge exhibit P1, Mr. Ndamugoba sought the support of our decisions in **KRISTINA BISKASEVSKAJA V. R**, CRIMINAL APPEAL NO. 65 OF 2018 (unreported), which cited another decision in **SAID SHABANI MALIKITA VS REPUBLIC** [2023] TZCA 17302 (TANZLII 5 June 2023). In these two decisions, we reiterated that all physical or documentary evidence the prosecution intends to tender at the trial against the accused should be on the list of exhibits during committal proceedings. The listing at committal proceedings informs the accused of the type of evidence to expect at the subsequent trial in the High Court.

We considered the submissions of Mr. Elias Hezron, the learned counsel for the appellant, and those of Mr. Castuce Ndamugoba, learned Senior State Attorney for the respondent Republic. We have also re-evaluated the evidence regarding the central issue of whether the appellant murdered one Magoja s/o Kamuli. The common ground by the two learned counsel is that during the committal proceedings in the District Court of Chato, the prosecution neither listed the appellant's

caution statement in P.I. CASE NO. 06 OF 2012 nor read its contents to the appellant. This irregularity is sufficient ground to dispose of this appeal.

On page 129 of his considered Judgment, the trial Judge recognized the significance of the appellant's confession statement (exhibit P1) in convicting the appellant, describing it as the most decisive piece of evidence on which the prosecution case hangs. It was the basis of the appellant's conviction. For the instant appeal before us, the trial court, despite recognizing the significance of the confessional statement (exhibit P1), erred in convicting the appellant based on this exhibit, whose information was neither listed nor read at the committal proceedings in the District Court of Chato, contravening section 246 (2) of the CPA. As a result, we expunge the appellant's cautioned statement (exhibits P1) from the record of this appeal.

With the appellant's cautioned statement out of the record of appeal, the two learned counsel are correct to submit that there remains no evidence to sustain the prosecution's case of murder against the appellant beyond a reasonable doubt.

Accordingly, we allow this appeal, quash and set aside the appellant's conviction for murder and sentence of death. We order his immediate release from prison unless he is lawfully in custody.

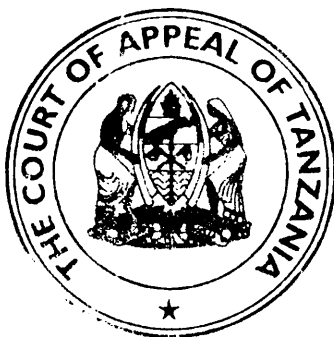
DATED at **MWANZA** this 18th day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 19th day of February, 2024 in the presence of the appellant appeared in person and Ms. Stella Minja, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL