

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 482 OF 2020

SEKO MASALU @ MAKOYE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Manyanda, J.)

dated the 12th day of August, 2020

in

Criminal Sessions Case No. 149 of 2015

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JUDGMENT OF THE COURT

13th & 21st February, 2024

LEVIRA, J.A.:

On 12th August, 2020, the High Court of Tanzania at Mwanza (the trial court) pronounced death sentence to the appellant, Seko Masalu @ Makoye having convicted him of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R. E. 2002; now R.E. 2022 (the Penal Code). The particulars of offence revealed that, the appellant on 1st August, 2014 at Ihushi Village within Magu District in Mwanza Region, murdered one Ramadhani Said @ Mchafukuoga (the deceased). Aggrieved by the conviction and sentence, the appellant has come before the Court on appeal.

In a bid of proving its case against the appellant during trial, the prosecution paraded five witnesses and tendered four exhibits. The first prosecution witness was Deogratias Frimatus (PW1), Village Executive Officer (VEO) of Ihushi Village. On 4th August, 2014, PW1 received a phone call from the hamlet Chairman of Kisabo one Petro Zacharia informing him about the dead body of human being found in his area. He went to the scene of crime and found the said body of a male person at paddy molds. He reported the incident to the police who came to investigate. The dead body was not identified. Since it started decomposing, the police ordered the body to be buried at the place where it was found.

On 18th September, 2014, PW1 attended a meeting at Kisabo hamlet where it was revealed that the appellant went to a woman in the Village looking for fatty oil of a dead person commonly known as "msukule". Following that information, commotion occurred as people who gathered at the meeting started to attack the appellant who also had attended the meeting. The appellant was taken to Kisesa Police Station for his security as the situation was tense against him. At the police, the appellant was interrogated by D. 7603 D/SSgt Rajab (PW3) and he confessed before the police; and later before PW1 and Daud Enos (PW2) to have been involved in killing **Said** after being paid money to execute the killing. His cautioned statement was admitted as exhibit P2. In his testimony, PW2 confirmed what

was stated by PW1. Later, the appellant was sent before Rose Mashalla (PW4), the Justice of the Peace where he recorded his extra judicial statement (exhibit P3) confessing further that he killed one **Ramadhani**.

On his side, PW3 corroborated the testimony of PW1 to the extent that he received his call informing him about the incident. He went to the scene of crime in company with A/Insp. Emmanuel Rogers and a Medical Officer of Ihushi Village, one Philipo Filbert (PW5). They found the dead body which was examined by PW5 before he ordered the same to be buried. PW5 conducted post mortem examination and discovered the cause of death to be severe hemorrhage. He prepared Post Mortem Examination Report, which was admitted as exhibit P4.

Apart from the dead body, there were a hat commonly known as "baraghashia", a small hand bag and plastic shoes found at the scene of crime. PW3 testified further that, inside the said hand bag they found two mobile phones of Nokia make and herbal medicine. He switched on one of the mobile phones and it depicted its owner's name as Ramadhani Said @ Mchafukuoga and a short message appeared from Pili James, asking the deceased's whereabouts. PW3 called the said Pili using his telephone. After a short dialogue, she identified herself as a wife of the deceased and that, her husband had travelled from Bunda on 31st July, 2014 after being followed by two young men from Ihushi Village to go to Ihushi to treat a

sick person, since he was a witchdoctor (traditional healer). She described her husband and identified the dressing which resembled the ones PW3 and his fellows saw on the dead body at the scene of crime; and thus, they concluded that the deceased was the very husband of the said Pili. PW3 drew a sketch map of the crime scene which was admitted as exhibit P1 during trial.

The appellant got an opportunity to defend his case where he denied to have been involved in murdering Ramadhani Said @ Mchafukuoga. However, he admitted to have attended the Village meeting on 18th September, 2014 and eventually, he was taken to Kisesa Police Station on allegations that he was looking for fatty oil from “msukule”. The appellant was charged and prosecuted. Upon full trial, the trial court was satisfied that the prosecution had proved the charge against the appellant to the required standard. Therefore, he was convicted and sentenced as intimated above.

Initially, on 7th January, 2021 the appellant had filed in Court a memorandum of appeal comprising five grounds of complaints. However, the same was substituted with a supplementary memorandum of appeal filed by his counsel one Kassim S. Gilla from FORTEM Advocates on 1st February, 2024, advancing the following grounds:

- 1. That, the trial court erred in law and facts in convicting the appellant basing on unsworn testimonies of PW1, PW2, PW3, PW4 and PW5;*
- 2. That, the trial court erred in law and facts in convicting the appellant of the murder offence while the prosecution failed to prove the fact that the dead body found at the paddy molds at Ihushi Village was that of the alleged Ramadhani Said @ Mchafukuoga;*
- 3. That, the trial court erred in law and facts in convicting the appellant basing on uncorroborated Exhibit P2 (cautioned statement) and Exhibit P3 (Extra – judicial statement) which were irregularly procured and wrongly admitted;*
- 4. That, the trial court erred in law and facts in convicting the appellant basing on the alleged oral confession which was too weak to lead to a conviction.*

At the hearing of the appeal, the appellant had the services of Mr. Kassim Gilla, learned advocate, whereas the respondent/Republic was represented by Ms. Gisela Alex Banturaki, learned Senior State Attorney assisted by Mr. George Ngemera and Ms. Hellena Mabula Simbo, both learned State Attorneys.

Before hearing of the appeal could take place in earnest, Mr. Gilla informed the Court that upon reflection, he decided to abandon the first ground of appeal. He thus prayed to argue the second separately and the rest grounds together. His prayer was granted which made him to argue the appeal mainly on two complaints: **First**, that the appellant was wrongly

convicted as the prosecution failed to prove that the dead body at the paddy molds at Ihushi Village was that of the alleged Ramadhani Said @ Mchafukuoga. **Second**, that the appellant was convicted on uncorroborated, irregularly procured and wrongly admitted cautioned statement (exhibit P2), extra judicial statement (exhibit P3) and the alleged oral confession of the appellant which was too weak.

Regarding the first complaint, Mr. Gilla argued that, the trial judge wrongly relied on the facts and description obtained from Pili James who introduced herself to PW3 as the deceased's wife to prove that the person alleged to have been killed was Ramadhani Said @ Mchafukuoga. He added that the prosecution did not prove that the dead body found at the scene of crime was of Ramadhani Said @ Mchafukuoga as alleged due to the following reasons: **One**, the phone which PW3 testified to have found inside the hand bag near the deceased's body, from which the phone number of Pili James was retrieved was not tendered as exhibit during trial. **Two**, there was no evidence to connect the deceased and the phone. **Three**, Pili James who was said to be the wife of the deceased was not called to testify and prove that indeed she was the wife of the deceased. **Four**, there was no scientific proof that the deceased was Ramadhani Said @ Mchafukuoga.

The arguments by Mr. Gilla were based on the fact that both PW1 and PW2 testified that, the deceased was a stranger to that area where his body

was found and since that body was decomposed, they failed to identify him. That evidence, he said, was corroborated by the Clinical Officer (PW5) who conducted post mortem examination and proved that the body of the deceased was decomposed that is why they buried him at the scene of crime.

Basing on those identified evidential gaps, Mr. Gilla concluded and urged us to hold that the prosecution failed to prove that, the deceased was Ramadhani Said @ Mchafukuoga. As a result, the appellant was wrongly convicted on a weak prosecution evidence as far as the person whom allegedly he killed, is concerned.

Submitting on the second complaint regarding the appellant's confession, Mr. Gilla argued that, although the trial Judge warned himself before relying on uncorroborated appellant's confession (exhibits P2 and P3) to convict him at page 163 – 168 of the record of appeal, the said evidence was not sufficient. It was his further argument that exhibits P2 and P3 could not corroborate each other as it was stated in **Mashimba Dotto @ Lukubanija v. Republic**, Criminal Appeal No. 317 of 2013 (unreported). Those exhibits were supposed to be corroborated by another evidence, but there was no evidence from any witness who saw the appellant while killing the deceased.

Another argument regarding exhibits P2 and P3 was that they were wrongly procured and admitted. However, in the course of arguing, he realized, his claim as far as the cautioned statement is concerned, is unfounded. Therefore, he abandoned it and concentrated on extra judicial statement (exhibit P3). The main argument was that, the Justice of the Peace who recorded the appellant's extra judicial statement did not comply with the Chief Justice Guidelines. Particularly, guideline number six. He referred us to page 22 of the record of appeal where the Justice of the Peace stated that, she forgot to inform the appellant that his statement could be used in court as evidence against him. He elaborated that, the aim of informing an accused that his statement can be used in court against him is to make sure that the statement is voluntarily made, otherwise, the statement cannot be relied upon to ground conviction. He cited the case of **Mashimba Dotto @ Lukubanija** (supra) to back up his arguments.

Regarding the appellant's oral confession relied upon by the trial court to ground his conviction, Mr. Gilla stated that PW1, PW2 and PW3 testified that the appellant confessed to be involved in killing the deceased. However, they did not state how he participated or what were his exact words. He wondered why the OCS one Inspector Emmanuel Rogers whom PW3 said was present while the appellant was confessing to have been involved in killing the deceased was not called to testify. According to Mr. Gilla, it was

wrong for the trial Judge to rely on oral confession of the appellant in his decision as it was decided in **Sikujua Idd v. Republic**, Criminal Appeal No. 484 of 2019 (unreported).

Mr. Gilla concluded his submission by stating that, the charge was not proved beyond reasonable doubt against the appellant. He insisted that the prosecution failed to prove to the required standard that the deceased was Ramadhani Said @ Mchafukuoga. Therefore, he implored us to find so and allow the appeal.

Ms. Banturaki intimated to the Court at the outset while replying to the appellant's complaints that, the respondent resists the appeal.

Responding to the first complaint, Ms. Banturaki acknowledged that it is true that Pili James was not called to testify regarding the deceased and their relationship. Nevertheless, she argued that the evidence of PW3 who visited the scene of crime was very clear on what they found and how he managed to contact Pili James through his phone having got her number from the mobile phone found in deceased's hand bag. The said Pili identified the deceased and all the features she explained resembled the body found at the scene of crime. Besides, she said, the mobile phone enabled PW3 to discover that, the deceased is Ramadhani Said @ Mchafukuoga as it displayed that name when he switched on.

Ms. Banturaki argued further that, although Pili James was not called to identify the body of the deceased at the scene of crime when post mortem was about to be conducted, the same was identified by PW1 who also saw it at the scene of crime. Another proof that the deceased was Ramadhanin Said @ Mchafukuoga according to her, was through appellant's cautioned and extra judicial statements. In those statements, she submitted, the appellant stated how he was hired together with his fellows by Juma to kill the deceased. She supported her argument with the decision of the Court in **Halfan Rajab Mohamed v. Republic**, Criminal Appeal No. 281 of 2020 (unreported) which discussed about voluntariness of cautioned statement.

In reply to the second complaint, Ms. Banturaki stated the established position that court can convict an accused person basing on cautioned or extra judicial statement after warning itself and believing that the witness was speaking the truth. She referred us to page 168 of the record of appeal where the trial Judge warned himself and believed that the appellant was speaking the truth as he was a free agent while giving his statement. In support of that position, she cited the case of **Mashimba Dotto Lukumanija** (supra) in which it was said that it is safe to convict on uncorroborated evidence if the court warns itself that the accused speaks the truth.

As regards appellant's oral confession considered at page 164 of the record of appeal, Ms. Banturaki stated that the appellant confessed that, he killed the deceased. She referred us to the testimony of PW3 found at page 46 of the record of appeal who said, the appellant confessed that they killed the deceased whose body was found at the scene of crime. She added, the evidence of PW3 was corroborated by that of PW1 and PW2 although they did not state exactly what the appellant said while confessing.

Reverting to the appellant's extra judicial statement, Ms. Banturaki submitted that, the Justice of the Peace stated at page 65 of the record of appeal that the appellant was informed that the statement may be used against him in court. Apart from that, she said, the appellant was a free agent and he volunteered to give his statement. Basing on appellant's cautioned statement, extra judicial statement and the appellant's oral confession, Ms. Banturaki was firm that, the prosecution was able to prove that the appellant was involved in killing the deceased. On strength of her submission, she urged us to find the prosecution proved the case against the appellant beyond reasonable doubt and dismiss the appeal.

We have dispassionately considered submissions by the counsel for the parties, grounds of appeal and the entire record of appeal. The main issues calling for our determination are: **One**, whether the prosecution was able to prove that the dead body found at the scene of crime was of

Ramadhani Said @ Mchafukuoga. **Two**, whether the prosecution proved that the appellant was the one who killed the deceased. For obvious reasons, we shall start with the first issue. If this issue will be answered in affirmative, we shall proceed to determine the second one. We are aware that this is a first appeal. Therefore, we have powers to reappraise the evidence tendered at the trial and if need be, come to our own conclusion- see: **Gabriel Simon Mnyele v. R**, Criminal Appeal No. 437 of 2007 (unreported).

It is common knowledge that in order for a suspect of murder to be convicted, the prosecution must prove beyond reasonable doubt, among other things, that the person alleged to be killed, is actually dead. In this appeal, while the appellant complains that the prosecution failed to prove that the dead body found at the paddy molds was of Ramadhani Said @ Mchafukuoga, the respondent maintained the contrary. According to the record of appeal, the issue regarding death of Ramadhani Said @ Mchafukuoga was not known until on 4th August, 2014 when the dead body of an adult male was found at the paddy molds at Kisabo hamlet in Ihushi Village. However, the record is very clear and there is no dispute that the said deceased was a stranger in that area. In determining whether the dead body found at the scene of crime was of Ramadhani Said @ Mchafukuoga as alleged by the prosecution, the trial court relied on the identification done through the information obtained from one Pili James. It held:

"The evidence leading to identification of the deceased body at the crime scene on 4th August, 2014 include the facts obtained from Pili James who introduced herself to PW3 as the deceased's wife. She described the deceased's last dressings he put on which matched with the ones put on the body including the "kibaraghashia" and the hand bag in which the two mobile phones were recovered. When one of the telephones was switched on depicted the owner's name as Ramadhani Said @ Mchafukuoga and short message arrived indicating it was from the deceased's wife one Pili James asking the deceased's whereabouts which provided a telephone number which was used to call the said Pili James. This piece of evidence been uncontroverted, makes me believe that the body found at the paddy molds at Kitongoji of Kisabo in Ihushi Village was that of Ramadhani Said @ Mchafukuoga".

From the excerpt above, the question to be asked which is also a controversy in this appeal is, whether such information was sufficient to prove that indeed the dead body under consideration was of Ramadhani Said @ Mchafukuoga. We have reviewed the evidence of PW3 with a view of satisfying ourselves on the identification of the deceased made by Pili James. With respect, we were unable to find what exactly did she tell PW3. What is in the record at page 44 is a general statement reporting that:

*"I inquired into the identity of her husband and the dressing, **she described identity marks including clothes which resembled the ones we found the deceased body with**, and then we concluded that the deceased was the very husband of the said Pili James".*

[Emphasis added].

It is so unfortunate that even PW3 and other prosecution witnesses did not describe what the deceased was wearing on the material day. PW3 testified that he called Pili James having got her number from the mobile phone found at the scene of crime. The very phone also displayed the name of Ramadhani Said @ Mchafukuoga. We are wondering, neither the number of the said Pili James nor of Ramadhani Said @ Mchafukuoga was mentioned in evidence. Apart from that, the two Nokia mobile phones allegedly found at the scene of crime were not tendered as exhibits during trial. Even the said Pili James was neither called to identify the body which was found at the scene of crime before burial nor testified in court at the trial. The record of appeal is silent why all those were not done.

It is more doubtful whether the dead body found at the scene of crime was of Ramadhani Saidi @ Mchafukuonga because the evidence on record as alluded to above, shows that he was a stranger in that area and according to the Postmortem Examination Report (exhibit P4), the ones who identified

the deceased to the doctor (PW5) were PW1 and PW2. These witnesses testified that they did not know the deceased as he was a stranger. The question that follows is, how did they identify him? We are aware that proof of a fact does not require a certain number of witnesses, but the weight of evidence. In **Gabriel Simon Mnyele** (supra), the Court was dealing with the issue regarding failure of the prosecution to call crucial witnesses, doctors who attended and examined the body of the deceased to testify in court to prove the cause of death. It had this to say:

*"In our view, it is no doubt the law, that under section 143 of the Evidence Act (Cap 60- RE 2002) no amount of witnesses is required to prove a fact (see **Yohana Msigwa v. Republic** (1990) TLR 148. But it is also the law (section 122 of the Evidence Act) that the Court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons. (See **Aziz Abdalla v. Republic** (1991 TLR 71). In the present case the cause of death of the deceased was in issue. It was in the interest of Justice for the prosecution to have tendered all the available medical evidence as to the cause of death".*

See also: **Halfan Ismail @ Mtepela v. Republic**, Criminal Appeal No. 38 of 2019 (unreported).

In the circumstances of the present case, we think, Pili James was a key witness, so it was incumbent upon the prosecution to call her to identify the dead body and as a witness to clear doubt, that indeed, the deceased was Ramadhani Said @ Mchafukuoga because his identity was in issue, but that was not the case.

In one hand, we were invited by Ms. Banturaki to consider, apart from the finding of the trial court on identity of the dead body, the confession of the appellant. It was her firm argument that the appellant identified the deceased to be Ramadhan Said @ Mchafukuoga. On the other hand, Mr. Gilla challenged the said confession on ground that it could not prove that the deceased alleged to be killed by the appellant, was the one found at the scene of crime due to the following reasons: **First**, in his cautioned statement, the appellant did not mention the name of a person whom they were hired by Juma Luhalula to kill. He only said was a witchdoctor from Musoma. **Second**, in his extra judicial statement (exhibit P3), (which also is challenged by the appellant for failure to comply with the Chief Justice Guidelines), the appellant mentioned the person whom they were hired to kill by the said Juma Luhalula to be a witchdoctor known as Ramadhani from Manyamanyama Bunda. Now the question is, whether by mere mentioning a single name "Ramadhani" was a sufficient proof that he was referring to

the deceased Ramadhani Said @ Mchafukuoga if we could take that exhibit P3 was properly admitted, though we do not say so.

The appellant's extra judicial statement was attacked for failure to comply with the Chief Justice Guidelines as intimated above as the appellant was not informed that the said statement may be used as evidence in court against him. In **Japhet Thadei Msigwa v. Republic**, Criminal Appeal No. 367 of 2008 (unreported), the Court held:

"When Justices of Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's instructions to the letter. The Justice of Peace ought to observe, inter alia, the following:

- i. The time and date of his arrest;*
- ii. The place he was arrested;*
- iii. The place he slept before the date he was brought to him;*
- iv. Whether any person by threat or promise violence has persuaded him to give the statement;*
- v. Whether he really wishes to make the statement on his own free will;*
- vi. If he makes a statement the same may be used as evidence against him".*

We have examined the appellant's extra judicial statement against the evidence of Rose Mashalla (PW4) the Justice of Peace and we noticed

variance. On page 65 of the record of appeal PW4 testified that, *"I informed him that his statement could be used in future as evidence in the case against him"*. However, nothing in the said statement (exhibit P3) indicates that he was so informed. In cross examination by the counsel of the appellant, on page 81 of the record of appeal, PW4 responded as follows: *"I just forgot to inform the suspect that the statement could be used as evidence; it was an oversight"*. The bottom line is, the Chief Justice Instructions were not fully observed during the time of recording the appellant's extra judicial statement and thus, inadmissible evidence contrary to what was submitted by Ms. Banturaki. See: **Geofrey Sichizya v. D.P.P.**, Criminal Appeal No. 176 of 2017 (unreported). **Third**, Ms. Banturaki invited us to consider that the appellant made oral confession before PW1 and PW2 which also proved that the deceased was Ramadhani Said @ Mchafukuoga. We have thoroughly examined the evidence of those witnesses, but we are unable to agree with her that the appellant confessed to have kill the deceased in this case. We shall let part of their evidence to speak for itself. On page 32 of the record of appeal, PW1 testified as follows:

*"After about half an hour the police called us to listen to what the accused was stating. The accused explained before us that he was involved in murdering a person known as **Said** after been paid money to execute the killing"*.

On page 38 of the record of appeal, PW2 testified that:

*"After arriving at Kisesa Police Station the police interrogated him while we were outside. Then later the Police called me and the VEO and required Seko Masalu to repeat his confession before us. He confessed that he participated at murdering the deceased at the paddy molds. That they were three of them. Seko Masalu said he had a panga. **I recall that Seko Masalu mentioned the deceased as one old man called Said who had visited Bujashi Village**". [Emphasis added].*

As it can be observed from the above excerpts, both witnesses mentioned the deceased as "Said". Can we rely on such evidence to conclude that the named 'Said' by those witnesses is the same deceased Ramadhani Said @ Mchafukuoga? Or can it be said with certitude that the appellant confessed to have killed the deceased in the present case taking into consideration that in his defence, he denied to have known Ramadhani Said @ Mchafukuoga? The answer to those questions, with respect, is certainly no! In **Hunay Langwen and Three Others v. Republic** [2005] T.L.R. 154, the Court dealt with an appeal where proof of death was in issue but the trial court did not make a finding whether the body of the victim of alleged murder was found. In its decision, it held that:

"The trial court should have made a finding on whether or not the evidence on record established beyond reasonable doubt that Gwandu was dead."

Before we conclude in this ground, we wish to comment on one thing which we must admit, exercised our minds, why the prosecution failed to prosecute the person allegedly hired the appellant and his fellows to kill the deceased? We have seen from the record that during committal proceedings Juma Luhalula was one among the five accused persons arraigned before the District Court of Magu District at Magu on 23th September, 2014. However, on 10th July, 2015, the Director of Public Prosecutions entered *nolle prosequere* and he was discharged together with all other accused persons, except the appellant. We do not intend to question his powers in deciding whom to prosecute, but it raises doubt if at all we have to believe the appellant's confession that he was among the people who were hired by Juma Luhalula to kill the deceased. We end there.

Having pointed out deficiencies in the identification of the deceased, we are satisfied and accordingly agree with Mr. Gilla that the prosecution failed to prove beyond reasonable doubt that the body found at the paddy molds was of Ramadhani Said @ Mchafukuoga. In the circumstances, we do not need to go to the other ground of appeal as the first issue has been answered in negative. Therefore, we allow the appeal, quash conviction and

set aside the appellant's death sentence. We order immediate release of the appellant from prison unless held for other lawful cause.

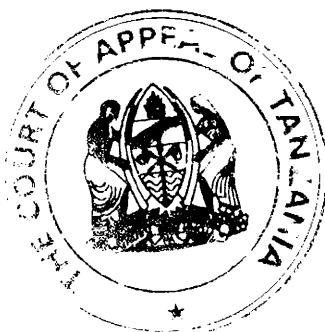
DATED at MWANZA this 20th day of February, 2024.

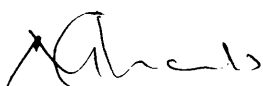
M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 21th day of February, 2024 in the presence of the appellant in person and Ms. Magreth Mwaseba, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL