

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSION CASE NO. 133 OF 2015**

**REPUBLIC**

**VERSUS**

**MASUMBUKO S/O JOSEPHAT ..... 1<sup>ST</sup> ACCUSED**  
**JAPHATY S/O DAUDI @ MAGILILY@NTOGWA ..... 2<sup>ND</sup> ACCUSED**  
**LUCAS S/O NTAMBI@NDULU .....3<sup>RD</sup> ACCUSED**  
**MARCO S/O LUCAS ..... 4<sup>TH</sup> ACCUSED**

**RULING**

*Date of Last Order: 08<sup>th</sup> March, 2021*

*Date of Ruling: 09<sup>th</sup> March, 2021*

**A.Z.MGEYEKWA, J**

At the closure of the prosecution case on 09<sup>th</sup> March, 2020, I have been asked to determine whether the four accused persons charged with the murder of Semeni S/O Shihumbi have a case to answer. This is in accordance with the provision of section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E 2019].

According to the charge, MASUMBUKO S/O JOSEPHAT, JAPHATY S/O DAUDI @ MAGILILY@NTOGWA and MARCO S/O LUCAS on or about the 22<sup>nd</sup> September, 2014 at Unywezini Sreet within Magu District in Mwanza Region did murder one SEMENI S/O SHIHUMBI. The three accused persons denied the charge.

In support of that charge, the prosecution called three witnesses only. They are Amos Elias, F 4152 D/C John and Rose Mashala, PW1, PW2, and PW3 respectively. Nature of their evidence as testified in Court, PW1 testified that he was invaded in his shop and three culprits entered into his shop and ordered him to that kneel down. PW1 alleged that he has identified Masumbuko S/O Josephat, the first accused. PW1 testified that he was able to identify the first accused because he knew him before the incident and because of the intensity of the light. PW1 testified that there was an electric light, a bulb light was lightening the scene of the crime and DW1 was standing near the light. PW1 further testified that DW1 was standing about four to five paces away from him. When PW1 was cross-examined he testified that he recorded a statement at the Police station and stated that he was lying down.

The Court of Appeal of Tanzania in many instances stated the legal principle regarding evidence of visual identification to include, one; the evidence of visual

identification is of the weakest kind and utmost unreliable and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistake identify are eliminated. Two, even if it is evidence of recognition that evidence must be watertight, in regard, where the offense is committed at night, and the question of light is in issue, there must be clear evidence as to the intensity of light of the said light and that bare assertions would not do. Three, in matters of identification, condition for identification alone, however ideal they may appear are no guarantee for untruthful evidence.

In the case of **Ally Mohamed Mkupa v. Republic**, Criminal Appeal No. 2 of 2008 (unreported), it was reiterated that "where one claims to have identified a person at night there must be evidence not only that there was light, but also the source and intensity of that light. This is so even if the witness purports to recognize the suspect" In the cases of **Hamis Hussein v R**, Criminal Appeal No. 86 of 2009 the Court of Appeal of Tanzania held that:-

*" We wish to stress that **even in recognition cases** when such evidence may be more reliable than the identification of a stranger, **the evidence on the source of light and its intensity is of paramount importance**, This is because as occasionally held even when the witness is purporting to recognize someone*

***he knows, as was the case here, a mistake in recognition of the close relative and friends are often made.” [Emphasize added].***

Applying the above authority, based on the circumstances of the case, it is my respectful view that the identification of the 1<sup>st</sup> accused was not watertight. For the reason that it was night hours and PW1 was lying head down and DW1 was standing 5 paces from where PW1 was standing. PW1 was already been beaten and was lying head therefore I doubt if PW1 made a correct identification.

PW2 testified to the effect that he recorded the cautioned statement of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons. The defence objected to the tendering of confessions of the 2<sup>nd</sup> accused thus a trial within trial was conducted and the cautioned statement of the 2<sup>nd</sup> accused was admitted as exhibit P3. The 3<sup>rd</sup> accused cautioned statement was admitted and the 4<sup>th</sup> accused cautioned statement was not admitted. According to the ruling which was delivered following an inquiry, the 2<sup>nd</sup> accused cautioned statement was admitted although the date of arrest of the accused was not stated in the court record.

Taking to account that the Police Officer who arrested the accused person was not called to testify in court. The same applies to the 3<sup>rd</sup> accused cautioned statement. The 4<sup>th</sup> accused cautioned statement was not admitted because there was doubt regarding the recording of the statement for reasons that, DW4

cautioned statement was recorded contrary to the requirement of section 58 (6) and section 57 and 58 of the Criminal Procedure Act, Cap.20 [R.E 2019].

Ushirikiano, kuendeleza ushirikiano, kufuata sheria, no interference slow and focused

There is no direct evidence as to when the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons were arrested. The Police Officers who arrested them were not called to testify in court. It is worth noting that the prosecution has the duty to prove their case, they were supposed to summon the Police Officers who arrested the accused person to testify in court which was not done. PW2 recorded the caution statement of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons, thus, he was not the right person to state when exactly the accused persons were arrested because he was not the arresting officer and the arresting date was not confirmed. PW2 testified that he managed to arrest the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons. However, when he was cross-examined, PW2 admitted that he did not arrest the accused persons therefore it is not known how and when they were arrested.

PW3 recorded the Extra Judicial Statement of all three accused persons in the dock. The defence objected the tendering of the statement for non-compliance of the Chief Justice Circular. Parties agreed on violation of that Circular. A refuge however was sought in the cases of **Msafiri Jumanne v R Criminal Appeal No. 187**

of 2006 and **Petro Teophan v R**, Criminal Appeal No. 58 of 2012 (unreported) the observation of the Court of Appeal of Tanzania was made to the effect that, the Chief Justice's Circular is part of the laws, the same should be observed. On seeing that the Extra Judicial Statements of the 3<sup>rd</sup> and 4<sup>th</sup> accused persons had less similar challenges to that of 2<sup>nd</sup> accused persons, however, the prosecution continued to tender it and I admitted them although I noted that the Extra Judicial Statement of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> persons were noncompliance with the Chief Justice Guideline in the sense that PW3 did not follow the conditions in recording the Extra Judicial Statement.

In the evidence of PW2, circumstances are showing that the recording of Extra Judicial Statement of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons apart from non-compliance with the Chief Justice Guideline, they were not read to the accused persons and the same does not show the willingness of the accused persons to give their statements. During cross-examination, PW3 testified to the effect that the 3<sup>rd</sup> and 4<sup>th</sup> accused persons did not confess to have committed the alleged offence of murder. The 4<sup>th</sup> accused testified to the effect that they were at the scene of the crime but when they saw the drunk person they run away. I am not fully satisfied in all the circumstances of the case that the Extra Judicial Statements of the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> accused persons (Exh.P5, Exh.P6, and Exh.P7) are wholly true and the same

cannot be left to stand therefore the same are hereby expunged from the proceedings.

In the record, I am left with the issue whether Masumbuko was identified. PW2 testified to the effect that when he interviewed the 1<sup>st</sup> accused he denied having committed the crime although he named the other suspects. Therefore the only evidence associating the 2<sup>nd</sup>, and 3<sup>rd</sup> accused persons with the offence is that the 1<sup>st</sup> accused person named them as suspects but there is no any evidence on record if the 1<sup>st</sup> accused person named the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. It was the duty of the prosecution to establish a link between the incidents of murder on which I find it missing.

Having examined the evidence tendered as above expounded, I hold that the prosecution's case hinges on the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons cautioned statements. However, it is a settled principle of law that a retracted or repudiated confession generally requires corroboration. In the case of **Ali Salehe Msustu v R** [1980] TLR 1 the court held that:-

*“ a repudiated confession, though as a matter of law may support a conviction generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted.”*

Therefore in order to call the accused person to submit into the witness box and enter a defence in terms of section 293 (2) of the Criminal Procedure Act, Cap. 20 [R.E 2019], I must be satisfied that the caution statements are corroborated. The issue for determination is whether this measure has been met.

Having heard the evidence of PW1 and PW2 I have to say that there is no any cogent evidence that would have corroborated the cautioned statement of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. First, PW2 testified that he managed to arrest the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons. During cross-examined, he admitted that he did not arrest any of the accused persons therefore it is not known how they were arrested. Secondly, Masumbuko statement could have corroborated the evidence on the record but the same was not tendered in court. PW2 testified that he was informed by the 1<sup>st</sup> accused, Masumbuko although there is no any supporting evidence since Masumbuko cautioned statement and his Extra Judicial Statement was not tendered in court the same could have corroborated the caution statement of the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons. Lack of it renders the cautioned statements of no probative value. The link between the accused person and the incident of murder equally dissipates.

Besides the cautioned statements which have not been corroborated, there is no any evidence to implicate the accused person in terms of section 293 of the



Criminal Procedure Act, Cap. 20 [R.E 2019]. Therefore, there is nothing on record to defend. The spirit of section 293 (1) of the Criminal Procedure Act, Cap. 20 [R.E 2019] is such that, the accused can only stand in a witness box if a *prima facie* case has been established and also that, the Court may convict him of the offence charged even where he opts not to defend. In the instant case, there is no such case established.

That said, MASUMBUKO S/O JOSEPHAT, JAPHATY S/O DAUDI @ MAGILILY @ NTOGWA, LUCAS NTAMBI @ NDULU, and MARCO S/O LUCAS are not guilty of the murder of SEMENI SHIMUMBI accordingly they are acquitted. I order their release unless lawfully held. I order accordingly.

Dated at Mwanza this 09<sup>th</sup> March, 2021.



**A.Z.MGEYEKWA**

**Judge**

**09.03.2021**