



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF BUKOBA  
AT BIHARAMULO**

**CRIMINAL SESSIONS CASE NO. 13 OF 2017**

**THE REPUBLIC**

***VERSUS***

**DANIEL NDABABONYE**

**JUDGMENT**

*Date of last order 06/05/2021*

*Date of judgment 07/05/2021*

***Kilekamajenga, J.***

The accused person was harboured in the land of Justus Bahati John (PW2) where he stayed for free though he assisted Justus some *shamba* works. It is alleged that, in October 2012, the accused person received his friend called Selestine Kiribata and a woman whose name was not identified. The woman and Selestine were coming from Uganda and decided to rest for a while before proceeding to Rwanyango village. Later, Selestine shared with the accused person the information that the woman had a lot of money and therefore wanted the assistance of the accused person to kill her and rob the money. Few days

later, i.e. on 13<sup>th</sup> October 2012 at mid-night hours, the accused person and Selestine lured the woman outside the room and strangled her to death using a *kanga*. The accused person and Selestine later searched the deceased's belongings and found Tshs. 50,000/=. Selestine took Tshs.30,000/= while the accused person got Tshs. 20,000/=. The accused person and Selestine buried the deceased within the plot where the accused person lived. On the same night, Selestine disappeared to an unknown place. Few days later, when the children were coming from fetching water, they spotted the deceased's hand protruding from the ground. They informed the wife of Justus and people finally gathered. The body was exhumed and identified to be the woman who visited the accused person. The accused person was arrested and interrogated and confessed to participate in the murder of the deceased. He was charged with murder contrary to **section 196 of the Penal Code, Cap. 16 RE 2002.**

The information before the court showed that the accused person did murder a female whose name was not identified. The murder is alleged to occur on 13<sup>th</sup> October 2012 at Businde Village within Kyerwa District in Kagera Region. The trial commenced by the republic being represented by the learned State Attorney, Mr. Emmanuel Kahigi but concluded by the learned State Attorney, Ms. Naila Chamba. Initially, the accused person was represented by the learned advocate, Mr. Baraka Abel but concluded by the learned advocate, Mr. Christian

Byamungu. During the trial, the accused person pleaded not guilty to the information of murder prompting the prosecution to summon five witnesses to prove the case to the required standard. The prosecution also tendered four exhibits namely, the accused person's caution statement (Exhibit P1), the sketch map of the scene of the crime (Exhibit P2), order of exhumation of the deceased's body (Exhibit P3) and the Postmortem Examination Report (Exhibit P4).

During the trial, Detective Corporal Jumanne with force number E. 2928 (PW1) who worked in the investigation department at Mulongo Police station testified that, on 21<sup>st</sup> October 2012, he was informed by the Officer Commanding Section (OCS) of Mulongo Police Station about the murder at Businde village. PW1 together with other police officers went to the scene of the crime and arrived at around 6pm. He witnessed the body of the deceased buried but the hand protruded from the grave. PW1 was informed that Daniel Ndababonye killed the deceased. At that time the accused person was already arrested and locked in the village office. The police secured the crime scene and later left with the accused person for interrogation. PW1 arrived at the police station at 10pm. As the police station had no electricity, the accused person was put under custody until the next morning when he was interrogated.

On 22<sup>nd</sup> October 2012, PW1 interviewed the accused person about the murder. Before the interview, PW1 informed the accused person about his rights such as the right to call a friend, lawyer or relative before the interview. The accused person understood his rights and signed using his finger print. Thereafter, PW1 recorded the accused's statement. The statement was read to the accused person who again signed. PW1 tendered the accused's cautioned statement which was objected by the defence. After conducting trial within trial, the Court was fully convinced that the statement was admitted as exhibit P1.

PW1 further informed the court that on 23<sup>rd</sup> October 2012, the body of the deceased was exhumed for further medical examination. The body had started to decompose and it was difficult to recognise it. Villagers also failed to identify the name of the deceased but they identified her as the female who stayed at the accused's house. PW1 later drew the sketch map of the scene of the crime under the assistance of the hamlet leader of the respective area. He prayed to tender the sketch map which was admitted as exhibit P2.

PW1 further averred that he interrogated some of the witnesses including the accused person's son called Elia Daniel who stated that the deceased came at their home accompanied by another person. Elia Daniel told PW1 that he witnessed the accused person and Selestine taking the deceased out of the house. The door house was locked from outside, so Elia Daniel did not see what

happened from outside. From that date, Elia Daniel never saw the deceased until the day when her body was discovered buried within their compound.

During cross examination, PW1 insisted that Elia Daniel who is the son of the accused person witnessed the event that led to the death of the deceased. However, Elia Daniel was where to be found. He further told the Court that the deceased was not identified by her name but some people knew her as the woman who visited the accused's home.

The second prosecution witness (PW2) was Justus Bahati John who owned the *shamba* where the deceased's body was found buried. However, he gave the *shamba* to the accused person for care taking. On 21<sup>st</sup> October 2012, PW2 was informed by his wife that the body of the deceased was spotted buried but the deceased's hand could be seen from outside. PW2 reported the incident to the hamlet leader called Barnabas Paschal Bugongoro. Later, PW2 and the hamlet leader went to the scene of the crime and found three children of the accused person. They were informed by the accused's children that the accused went to the church. The hamlet chairman ordered the arrest of the accused person; he was arrested and taken to the scene of the crime. The accused person confessed the killing of the deceased in assistance with Selestine. The body was exhumed on 23<sup>rd</sup> October 2012 and identified to be a woman who came from Uganda.

During cross examination, PW2 insisted that the accused person confessed to kill the deceased.

The third prosecution witness (PW3) was Barnabas Paschal alias Bugongoro who was the hamlet chairman of Nyarugongo. On 21<sup>st</sup> October 2012, he was informed by PW2 that the shamba where the accused person lived, there was a hand seen from the grave. PW3 went to the scene of the crime and witnessed the hand of a person on the grave. The accused person's children informed PW3 that the accused person went to church. PW3 took militiamen to arrest the accused person. After a brief interrogation, the accused person confessed to kill the deceased while assisted by another person. PW3 took the accused person to the Ward's office and thereafter reported the matter to the police.

In the evening, the police from Mulongo police station arrived at the scene of the crime and took the accused. On 23<sup>rd</sup> October 2012, the police arrived at the scene of the crime with a Medical Doctor and exhumed the deceased's body. The body was examined and villagers were allowed to bury her. PW3 identified the deceased as a female though he did not know her name as she was not known in the village. The deceased came from Uganda and lived with the accused person. PW3 further informed the Court that the accused person told him that the deceased was his visitor.

Upon cross examination, PW3 told the Court that he was informed by the older son of the accused person that he heard somebody crying at night.

The fourth prosecution witness (PW4) was retired Inspector Richard Victor. In 2012, he was the OCS of Mulongo Police Station in Kyerwa District. On 21<sup>st</sup> October 2012, he received a phone call from the village chairman of Businde that they spotted a hand of a person buried from the ground. He went to the scene of the crime and arrived at 6pm. He was informed that the accused person committed the murder. By that time, the accused person was arrested and locked in the office of the village. PW4 interrogated the accused person who said that a female visitor came at his house from Uganda. The female visitor stayed at the accused's house for some days. The deceased had money; so, the accused person and Selestine attacked the deceased and robbed her Tshs. 50,000/=. The accused person got Tshs. 20,000/= while Selestine took Tshs. 30,000/=. The accused person and Selestine strangled the deceased and buried her within the accused's compound.

On 22<sup>nd</sup> October 2012, PW4 travelled to Karagwe for permission to exhume the deceased body. He applied for the exhumation order from the District Court of Karagwe. PW4 tendered the exhumation order which was admitted and marked as exhibit P3.

On 23<sup>rd</sup> October 2012, PW4 took the Doctor to the scene of the crime and they were assisted by villagers to exhume the body which had started to decompose. The deceased seemed to have been strangled. The deceased was a female.

Upon cross-examination, PW4 informed the Court that the name of the deceased was not identified. PW4 was informed by the accused person's children that the deceased person and Selestine visited their house. Also, the children witnessed the accused person and Selestine killing the deceased. The deceased seemed to have been strangled using a *Kanga* and the same was still on the deceased's neck. After the murder, Selestine disappeared to an unknown place.

The fifth prosecution witness (PW5) was Arobogust Kabyemalila who was a medical doctor that examined the deceased's body. He testified that, in 2012 he was working at Mulongo Health Centre at Kyerwa District. On 23<sup>rd</sup> October 2012, he received information from the OCS (PW4) of Mulongo Police Station that he should go and examine the deceased's body at Businde village. PW5 went to the scene and found the body of the deceased buried but the hand could be seen. The body was exhumed and it was decomposed. He identified the body to be that of a female. He further stated that it was difficult to recognise the face of the deceased. In his examination, PW5 found out that the deceased was strangled using a *kanga* which was still tied on the deceased's neck. He



thereafter filled-in the Postmortem Examination Report which he prayed to tender before the Court. The report was admitted and marked exhibit P4.

On cross-examination, PW5 stated that it was difficult to identify the deceased because the body decomposed. The body was buried for more than seven days.

During the defence, the accused person informed the court that he was married and had three children. He further confirmed that Selestine was his friend; they met in Ngara before meeting again in Karagwe. Without mentioning some particular dates, the accused person testified that Selestine passed through his home when going to Uganda. Selestine's mother later came from Uganda and informed the accused person that Selestine remained in Uganda for work. Later, Selestine came from Uganda and stayed with the accused person for a while. The two worked for PW2 in order to get money because Selestine owed some money in his village. When they got the payment from PW2, Selestine left and went to his village. Sometimes later, the accused person went to Nkwenda for fish and stayed there for three days. When he came back, his children informed him that Selestine passed by and spent a night with a woman in his house and left the next morning.

The accused person testified further that, he was arrested from the church and taken to his house; he was beaten by the police and just confessed due to

torture. He retracted his confession because he just gave a wrong story due to torture. The Tshs. 50,000/= stated in the confession was the money he received from PW2 when they worked with Selestine. He consistently denied killing.

It is pertinent at this stage to determine whether the accused person in this case committed the offence of murder. As one of the offences, the proof of murder requires the standard of proof beyond reasonable doubt. See, **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2002**. The requirement of proving a criminal case beyond reasonable doubt is not an invention of the court but the requirement of the law and the same has been stressed in a number of cases including the case of **Hemed v. Republic [1987] TLR 117**. In this case, the court stated that:

*'...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance or probabilities.'*

The burden of proving the case beyond reasonable doubt rests on the prosecution as it was stated in the case of **Mohamed Matula v. Republic [1995] TLR 3** thus:

*'Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence.'*

In the instant case, the accused person was charged with murder contrary to **section 196 of the Penal Code, Cap. 16 RE 2002**. The prosecution case solely depended on the cautioned statement of the accused person. I understand the danger of grounding a conviction based on a repudiated or retracted confession of an accused person. Such a warning was stressed in the case of **Kashindye Meli v. Republic [2002] TLR 374**, the Court of Appeal of Tanzania stated that:

*'...it is now settled law that although it is dangerous to act upon a repudiated or retracted confession, unless such confession is corroborated, the court may still act upon such a confession if it is satisfied that the confession could not but be true.'*

There is a plethora of authorities on the danger of leaning on retracted/repudiated confession for a conviction. The land mark case of **Tuwamoi v. Uganda (1967) EA 84** provided the warning and the how the court may invoke the accused person's confession for conviction. The court stated that:

*'A trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular*

*by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.'*

The case of **Hemed Abdallah v. Republic [1995] TLR 172** further stressed on the danger.

*'Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances is satisfied that the confession must but be true.'*

What may be gleaned from the above cases is the danger of convicting an accused person based on the confession which was retracted or repudiated. To avoid such a danger, such a confession must be corroborated by the evidence of an independent witness. However, the court may convict an accused person based on a repudiated or retracted confession where such confession contains true story about the offence. Possibly, the major test is whether the court is able to believe the story contained in the caution statement. If the court finds that the caution statement contains information which is coherent and clearly explains how the incident happened, it may base a conviction on the statement.

Furthermore, in Tanzania, practice shows that where an accused person confesses before the police, he/she should also be taken to the justice of the peace for extra judicial statement. The extra-judicial statement does not operate as an alternative to the confession given before the police, but rather a supplement. In my view, in absence of the extra-judicial statement, the danger of relying on the caution statement becomes higher, but it does not do away the fact that the court may believe a caution statement even in absence of the extra-judicial statement. In the case of **Ndorosi Kudekei v. R, Criminal Appeal No. 318 of 2016**, CAT at Arusha (unreported) where the Court stated that:

*With the absence of the extra-judicial statement, the trial judge was not placed in a better position of assessing as to whether the appellant had confessed to having killed the deceased or not."*

In the instant case, the accused person's caution statement presented a story on how the deceased was killed. However, the accused person was not taken to the justice of the peace for recording of the extra judicial statement. Therefore, this court is not in a better position to assess whether the accused person killed or he only confessed after the torture as alleged during the trial.

On the other hand, the caution statement that this court wishes to rely on was recorded after the expiry of four hours as required by **section 50(1) of the**

**Criminal Procedure Act.** There is a plethora of cases on the above stance of the law. I wish to reiterate the principles of the law stated in different cases on the application of the above section of the law. In the case of **Pambano Mfilinge v. The Republic, Criminal Appeal No. 283 of 2009**, the trial court stated that:

*"In this case section 50 of the Criminal Act was not abided to clearly, the cautioned statement was taken in contravention of section 50 of the Act in that it was taken long after 4 hours had elapsed. However, **I am looking at the caution statement itself. It contains information which is relevant to the fact in issue. In other words, it goes to the root of the issue in question. The way it is, it cannot be said that failure by PW4 to comply with the provisions of section 50 of the Criminal Procedure Act and lack of certificate amounted to an irregularity which goes to the root of the matter so as to invalidate the caution statement in question. What was contravened was a procedural matter which does not affect the weight to the substance in the caution statement...**"* (emphasis is mine).

On appeal, the Court of Appeal of Tanzania had the following observation:

*'...there is more to the non-compliance than just a mere procedural deviation. The period available for custodial interviews by the police is regulated under sections 50 and 51 of the Criminal Procedure Act.*

Finally, the Court of Appeal decided that *'...non - compliance vitiated the particular cautioned statement.'*

Also, in the case of **Mohamed Juma Mpakama v. The Republic, Criminal Appeal No. 385 of 2017** which was decided in 2019, the Court of Appeal of Tanzania had the following to say:

*'We would like to support the learned Counsel's rejection of caution statement (exhibit PE2) which should not, have been admitted in the first place. The statutory periods available for the police to interview persons suspected to have committed offences are closely regulated by the law under sections 50(1) and 51(1) of the CPA. Section 50(1) (a) of the CPA has prescribed the initial period of four hours for a police interview, counted from the time when the accused person is placed under restraint in respect of the offence.'*

The Court of Appeal went further stating that:

*'Courts in Tanzania have undeniable duty to ensure that caution statements which were taken beyond the times prescribed by the law are first cleared before they are exhibited as evidence. This is a legal question which cannot be shifted to the accused person, even if he does not object to the admission of a belated caution statement.'*

Therefore, based on the principles of law stated in the above cases, it may easily be stated that the court should reject a caution statement which contravenes

**section 50(1) of the Criminal Procedure Act, Cap. 20 RE 2019** even in absence of an objection raised by the parties. However, I always subscribe to the principle of law provided in the case of **Chacha Jeremiah Murimi and 3 others v. The Republic, Criminal Appeal No. 551 of 2015, CAT at Mwanza** (unreported), where the Court of Appeal of Tanzania stated that:

*However, the nature of the matter being of high public interest and taking into account the complications in its investigation and **having looked at the cautioned statements in issue, which contains information relevant to the fact in issue, there is no way, the way they are can be said that the omission to comply with the provisions of section 50 of the CPA and lack of certificate amounted to an irregularity which goes to the root of the matter so as to invalidate the cautioned statements in question. What was contravened was a procedural matter which does not affect the weight attached to the substance in the cautioned statements. Also, we looked as to whether the failure to record the said cautioned statements within a period of four hours prejudiced the appellants*** (emphasis is mine).

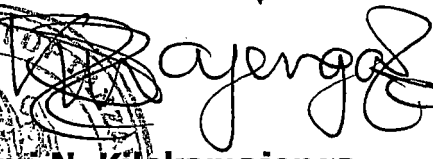
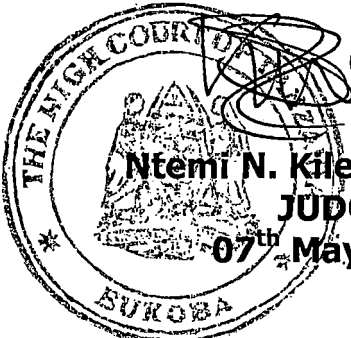
In the case of **Chacha Jeremiah** (*supra*), the Court of Appeal of Tanzania did not expunge the caution statement though the same statement contravened **section 50(1) of the Criminal Procedure Act, Cap. 20 RE 2002**. The reasoning of the Court of Appeal was grounded on the fact that the caution



statement contained information which was very relevant to the case. Overall, the maker of the statement was not prejudiced by the failure to record the statement within four hours. In my view, this position of law abide to the principle of overriding objective and the constitution of the United Republic of Tanzania that obliges courts to determine cases without leaning on technicalities that do not go into the root of the case. What is more overriding before this court is the desire to do justice and minimise the technicalities that do not favour the direction of justice. In my view, a technicality whichever well framed should not take away the desire to test whether the accused person committed the offence or not. The obvious question is could the accused person have changed the story if the statement was recorded within four hours. If the statement was voluntarily given and the statements is a clear explanation of the offence, failure to comply with **section 50(1) of the Criminal Procedure Act** does not affect the contents of the statement and therefore relevant.

In conclusion, in this case, the prosecution has failed to convince the court that the accused person killed the deceased. Despite having gaps in the prosecution evidence, the defence made by the accused person casted more doubt on the prosecution evidence. **First**, there was no eye witness among the prosecution witnesses. **Second**, the deceased was exhumed and her body started decomposing. Identifying the deceased was a challenge and there was doubt

whether the woman who alleged to visit the accused person was actually the one who was found killed. The only identification made after the exhumation was the gender of the deceased. Her clear identity and her name was not identified. **Third**, the accused person testified that he coined a story about the murder because of torture. In other words, he did not give a correct confession. In the words of the accused person, the confession was a false testimony made after torture in order to save his life. Generally, the accused person's defence put the court in serious doubt and this court of justice may not afford to enter convict in doubt. I have also considered the opinion of assessors who all opined that the prosecution evidence was weak to sustain a conviction. I therefore declare that the prosecution has failed to prove the case beyond reasonable doubt that the accused person killed. I hereby set him free unless held for other lawful reasons. Order accordingly.

  
  
**Ntemi N. Kilekamajenga**  
**JUDGE**  
**07<sup>th</sup> May 2021**

**Court:**

Judgment delivered this 07/05/2021 in the presence of the learned State Attorney and counsel for the accused person. Right of appeal explained to the parties.

