IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: RAMADHANI, J.A.; MSOFFE, J.A.; And KAJI, J.A.)

CRIMINAL APPEAL NO. 129 OF 2002

BETWEEN

FELIX LUCAS KISINYILA … APPELLANT

AND

THE REPUBLIC … RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Morogoro)

(Mkwawa, J.)

dated the 1st day of March, 2002
in
Criminal Session Case No. 40 of 1999
……
JUDGMENT OF THE COURT

RAMADHANI, J. A.:

The appellant and another, Dotto Lazaro Tadei, were convicted of the murder of Eson s/o Chipana at Rudewa Sisal Estate, Kilosa District, and were sentenced to suffer death. Both of them appealed but when the matter came up for hearing this Court was told that Dotto had died since 26th October, 2004, and so his appeal abated under Rule 71 (1). So, we have only Felix Lucas Kisinyila as the appellant.

On 20th November, 1997, the deceased rode a bicycle to fetch sisal poles for building their local church but he never returned home that evening and no body knew what had happened to him until his dead body was found on 23rd November. That was according to the evidence of Keneth Mzima (PW 1), the deceased's father, and Cpl Mwanga (PW 2), the investigator. PW 2 further said that the appellant was the first to be arrested and it was by *sungusungu* on 28 November, 1997, who became suspicious of the cut wound on his left wrist. PW 2 explained further that Dotto was mentioned as an accomplice by the appellant and hence Dotto's arrest.

The appellant and Dotto made cautioned statements before D/Cpl Shabani (PW 3) and also extra-judicial statements before Richard Kilaro (PW 4), ward executive officer, a Justice of Peace. They were convicted on the basis of these statements.

At the preliminary hearing on 01 August, 2000, Mr. Mbezi, learned advocate, who defended the appellant and Dotto, objected to the admission of the cautioned statements. However, when the matter came for hearing on 11 February, 2002, the same Mr. Mbezi raised no objection when PW 3 tendered the cautioned statements of Dotto and

the appellant which were admitted as Exh P3 and Exh P4 respectively. PW 3 repeatedly said that none of the two was tortured.

Mr. Mbezi also did not object to the production by PW 4 of the extra-judicial statements of Dotto and the appellant which were admitted as Exh P5 and Exh P 6 respectively. These had not been tendered earlier at the preliminary hearing. PW 4 was categorical that only Dotto complained of torture by the Police:

> Dotto showed me the wounds inflicted upon him by the Police. They were fresh wounds.

Apart from the complaints of torture by Dotto, he confessed to the killing in both Exh P3 and Exh P5. However, he did not mention the appellant in Exh P5. The appellant confessed to the killing of the deceased in the cautioned statement, Exh P4, but exculpated himself in the extra-judicial statement, Exh P6. Both declared that their intention was to rob the deceased of his bicycle.

In court, however, the appellant denied any involvement in attacking the deceased and said that the confessions were all concoctions of the prosecution who forced him to utter the statements. Then the appellant

claimed in his sworn evidence in court that he told PW 4, the Justice of Peace, about the tortures but he admitted that PW 4 did not torture him.

Two assessors found that the statements were involuntary and gave the verdict of not guilty but the third was satisfied that the confessions could not be anything but the truth and convicted them. MKWAWA, J. agreed with the third assessor and convicted them as charged.

For the appellant was Mr. M. J. T. Ngalo, learned advocate, who filed five grounds of appeal but argued them together because, as he said, they all attack the reliance on the confessions. Mr. Ngalo conceded that the admission of the cautioned statement was objected to in the preliminary hearing but not at the trial nevertheless, he submitted, there ought to have been a trial within a trial. The learned advocate queried why Dotto, who was arrested after being mentioned by the appellant, was recorded before the appellant. He pointed out further that Dotto in his extra-judicial statement (Exh P5) did not mention the appellant at all and that Dotto named one Said as the one who was cut at the wrist by the deceased. Mr. Ngalo contended that Exh P5 differs materially from Exh P3, Dotto’s caution statement.

On behalf of the respondent/Republic was Mr. William Magoma, the learned State Attorney, who said that the sequence in which statements were taken is not of significance. He submitted that there was no need of a trial within a trial as there was no objection from the learned defence counsel to the admission of the statements.

We agree with Mr. Magoma that a trial within a trial was not necessary. That is done only if there is an objection to the admission of a statement on the ground that it was not freely given. Here there was none. Again for the issue of the admission of the extra-judicial statements, which had not been tendered at the preliminary hearing, we are of the considered opinion that the defence counsel did not object to that. Apart from that there is nothing in section 192 of the Criminal Procedure Act, 1985, which provides for preliminary hearing, prohibiting the admission of a document which was not referred to at the preliminary hearing.

We are satisfied that the appellant was arrested because of the cut wound on his left wrist. He has three versions of how he came to sustain that injury: The first is his cautioned statement, Exh P4:

> Naliwaeleza kuwa nimelipata jeraha hilo baada ya kukatwa na marehemu ambae tumemuua

> huko kambini ... nilikatwa na marehemu wakati nilipotaka kumnyang'anya baiskeli yake.

This is a clear confession.

The second version is his extra-judicial statement, Exh P6:

> Nilikuwa natoka kusaga muda kama saa sita nilienda kama urefu wa heka nane hivi hamadi nikashituka nakatwa na panga na marehemu mkononi. Mimi nikaanza kukimbia.

He claims that he was attacked by the deceased for no reason at all.

The last version is his testimony in court that "I sustained the cut wound during the Police tortures." Here he completely distances himself from having anything to do with the deceased. However, the Justice of Peace, PW 4, in cross-examination, was emphatic that the appellant, unlike Dotto, did not complain of Police torture at all.

It is abundantly clear to us that the appellant is an unabashed liar: his three stands are completely irreconcilable. He claims in Exh P6 that he was attacked by the deceased. Yet in court he said that he did not know the deceased at all. How then did he know that he was attacked by the deceased?

Lies of an accused person, appellant here, may corroborate the prosecution case. That was held to be so in a Zanzibar case of Kombo bin Khamis v. The Crown 8 ZLR 122. RUBAMA, J. was of the same opinion in Salum Yusuf Lilundi v. R, Criminal Appeal No. 26 of 1984, Mtwara Registry (unreported). There three persons were accused of theft, two of them confessed while the third, a watchman, denied even being on duty on the material night while in fact he was. His lies were held to corroborate the confessions of the other two.

The appellant in Exh P6 owns to have met the deceased on the fateful day but accidentally. However, we are convinced that he gave the circumstances under which they had this encounter in Exh P4, the cautioned statement, which is so detailed that the story cannot but be true.

For avoidance of doubt, we must state here that we are not putting the burden of proof on the appellant. But this is one of the cases where a person has been killed, and there is no question about it, and the only witnesses are the accused persons. All that the prosecution can do is to bring witnesses who would tell the court that the accused persons have made confessions before them. The court would then have

to scrutinize those confessions very closely.

This is in line with the amendment in the Criminal Procedure Act, 1985 which now permits the court to draw adverse inference against an accused person who decides to keep quiet. Section 293 (3) provides:

> (3) If the accused person, after he has been informed in terms of subsection (2), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be entitled to comment on the failure by the accused to give evidence.

We are of the decided opinion that what we have said and done here are pertinent in the interest of justice. We, therefore, dismiss the appeal.

DATED at DAR ES SALAAM this 02 day of September, 2005.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR

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CRIMINAL APPEAL NO. 129 OF 2002

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(Appeal from the decision of the High Court of Tanzania at Morogoro)

(Mkwawa, J.)

dated the 1st day of March, 2002
in
Criminal Sessions Case No. 40 of 1999
Between

The Republic..... Prosecutor
And
Felix Lucas Kisinyila..... Accused

In Court this 2nd day of September, 2005

Before: The Honourable Mr. Justice A.S.L. Ramadhani, Justice of Appeal
The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal
And The Honourable Mr. Justice S.N. Kaji, Justice of Appeal

THIS APPEAL coming for hearing on the 12th day of August, 2005 in the presence of the Appellant AND UPON HEARING Mr. M.J.T. Ngalo, Counsel for the Appellant and Mr. W.C. Magoma, Principal State Attorney for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day:-

IT IS ORDERED that the appeal be and is hereby dismissed.

Dated this 2nd day of September, 2005.

Extracted on the 2nd day of September, 2005.

(S.A.N. WAMBURA)

SENIOR DEPUTY REGISTRAR