

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MKUYE, J.A., MAKUNGU, J.A. And MDEMU, J.A.)

CRIMINAL APPEAL NO. 331 OF 2021

CHARLES ERNEST 1ST APPELLANT

ENOS ADAM KALENZO 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court of Tanzania
at Bukoba)**

(Kilekamajenga, J)

dated the 23rd day of April, 2021

In

Criminal Sessions Case No. 91 of 2016

JUDGMENT OF THE COURT

13th & 26th March, 2024

MAKUNGU, J.A.:

The appellants, Charles Ernest and Enos Adam Kalenzo, along with two other persons, Isaya Theonas and Adam Kalenzo, who are not parties to this appeal, were tried by the High Court of Tanzania at Bukoba (Kilekamajenga, J.) for murdering Felician Kinyoni ("the deceased") on 16th February, 2016 at Nyabugambe Village within the District of Biharamulo in Kagera Region. While the said Isaya Theonas and Adam Kalenzo was dropped by the Director of Public Prosecutions, the appellants were found guilty as charged. They were consequently

convicted and sentenced to suffer death. They now appeal against conviction.

To establish its case, the prosecution produced seven witnesses and six exhibits. Briefly, the prosecution case tended to show that on 16th February, 2016 the deceased spent his night in his second wife Jules Amos Heneriko's (PW4) house since the deceased had two wives. PW4 confirmed that the deceased went outside to the toilet. While there PW4 heard the deceased speaking with someone who she could not recognize and later he returned inside the house. Before they could sleep, their door was opened, the stone used to break the door was there and she saw two people who stood next to the deceased and another was holding a torch. PW4 heard them saying they were Police officers, so the deceased had to surrender his weapon. They were told by the deceased to wait for him outside so that he could wear clothes. Surprisingly, the deceased was cut on the head and fell down, PW4 was pushed to bed and the deceased was pulled outside the house. After that she experienced silence and no further torch light. PW4 recognised none, but one of the perpetrators has worn a helmet.

F. 613 Detective Staff Sergeant Experious (PW2) was notified on the deceased murder and assigned to fetch a doctor to examine the body.

He took doctor Methew Kasigara (PW5) to the scene of crime where they found the body lying down. Accordingly to the postmortem examination report (Exhibit P3) that was unveiled at the trial, the deceased death was due to multiple injuries on the head and neck. In essence, there was no dispute as to the cause and incident of the deceased's death. That the death was certainly homicidal appeared too plain for argument.

As to who were the perpetrators of the killing, PW4 pointed an accusing finger at the first wife Kolotrida Felician. She suspected her because she had a conflict with the deceased but she could not prove that the said first wife was involved in the murder. She thereafter pointed her finger at the appellants.

That hypothesis was reinforced by two extra-judicial statements that PW7 Edward Samara, a Justice of the Peace, tendared in evidence, saying that he recorded them from the first appellant (Exhibit P6) and the second appellant (Exhibit P7). The statements were retracted but the trial court admitted them after conducting mini-trials according to the procedure. In essence, the statements depicted the appellants confessing to have killed the deceased.

A Police Investigator, PW3 F. 5757 Detective Corporal Yoyo, tendered at the trial a cautioned statement attributed to the second

appellant. The statement was retracted but the trial court admitted it after conducting a trial within a trial according to the procedure. It was admitted as exhibit P2.

Another Police Investigator PW6 F. 6548 Detective Corporal Deusdedith, tendered at the trial a cautioned statement attributed to the first appellant. The statement was also retracted but the trial court admitted it after conducting a trial within a trial and it was admitted as exhibit P5.

When put to their defence, the first appellant distanced himself from the killing, he alleged being forced to sign the documents at the Police Station. On whether he confessed, he insisted that he did not but he alleged to have been tortured by the Police. Similarly, the second appellant denied having killed the deceased but he alleged to be tortured by the Police until he became unconscious, and denied being taken before a Justice of the Peace for confession.

In his judgment, the learned trial Judge mainly acted on the extra-judicial statements (Exhibits P6 and P7) and cautioned statements (Exhibits P2 and P5) to convict the appellants of murder. However, he found, rightly so, that the appellants could not be convicted solely on the

statements without corroboration. There ought to be corroboration from independent evidence. He therefore based on the evidence of PW4.

Mr. Mathias Rweyemamu, learned counsel for the appellants, lodged a supplementary memorandum of appeal on 11th March, 2024 in substitution of the submitted memorandum of appeal lodged by the appellants on 29th September, 2021 and 29th November, 2021. The supplementary memorandum cites four grounds, which we paraphrase as follows:

- 1. That, the respondent failed to prove the case beyond reasonable doubt.*
- 2. That, the learned trial Judge erred in law and in fact by convicting the appellants upon uncorroborated extra judicial statements and cautioned statements which were irregularly procured and wrongly admitted.*
- 3. That, the learned trial Judge erred in law for not dismissing the information of murder after Justice of peace had discovered a fresh wound and denial of confession when conducting extra judicial statements of the appellants.*
- 4. That, the trial Judge failed to sum up to the assessors on vital points of law leading to prove the offence of murder of the deceased by the appellants*

At the hearing of the appeal, Mr. Rweyemamu represented the appellants who also featured in Court whereas Mr. Grey Uhagile, Ms.

Evarista Kimaro and Ms. Gloria Lugeye, all learned State Attorneys appeared for the respondent, Republic.

In his oral submission, Mr. Rweyemamu based his arguments on the second ground of appeal which challenged the validity of the extra-judicial statements (Exhibits P6 and P7) and the cautioned statements (Exhibits P2 and P5) and dropped the three remaining grounds of appeal.

Submitting in support of that ground, Mr. Rweyemamu attacked the extra-judicial statements contending that they did not comply with the Chief Justice's Guide for Justice of Peace ("the CJ's Guide"). To bolster his submission, he relied on the cases of **Mashiku Kidesheni and Another v. The Republic**, Criminal Appeal No. 586 of 2017 and **Petro Sule and Three Others v. The Republic**, Criminal Appeal No. 475 of 2020 (both unreported). He submitted that the two cases emphasize the importance of observing the CJ's Guide and non-compliance will normally render the statements not have been taken voluntarily.

The learned counsel forcefully contended that PW7 Edward Samara, the Justice of the Peace did not follow any of the required steps before he started recording the two statements. He added that there was no evidence that the statements were read over and confirmed by the appellants to be correct. In the circumstances, he submitted that it was

unclear if the statements were voluntarily made. He thus urged us to expunge exhibits P6 and P7 from the record.

Based on the above argument, the learned counsel argued that once the two exhibits are discounted, the only evidence upon which to sustain the impugned convictions are cautioned statements (Exhibits P2 and P5). The learned counsel challenged the cautioned statements on three other fronts; **one;** the statements were not properly recorded according to law, **two;** the statements were not signed by the appellants and **three;** the statements were uncorroborated by an independent witness at the trial, therefore they lack evidential value. He referred us to the case of **Mashimba Dotto @ Lukubanja v. The Republic**, Criminal Appeal No. 317 of 2013 (unreported), which emphasises on the importance of corroboration. He thus urged us to expunge the statements (Exhibits P2 and P5) from the record.

The learned counsel argued further that, once exhibits P2, P5, P6 and P7 are expunged, there would be no evidence upon which to sustain convictions. Accordingly, he urged us to allow the appeal and proceed to release the appellants from custody.

Mr. Uhagile learned State Attorney for the respondent who had initially resisted the appeal but in the midst of his submission upon a short

dialogue with the Court on modalities for compliance with the CJ's Guide, backtracked stating that the extra-judicial statements evidence which was heavily relied upon by the trial court to convict the appellants for the offence charged should not have been accorded any value since its recording and admissibility was tainted with irregularities and thus in contravention with the directives provided in the CJ's Guide. He mentioned one example of those irregularities appeared at pages 79 and 80 of the record of appeal where PW7 admitted to receive those forms from Police to fill in. It seems that the forms were not from the court, which was not proper, he added.

As regards the cautioned statements, the learned State Attorney expressed his disagreement with his learned friend when he said the statements were improperly recorded and uncorroborated. He submitted that both statements were properly recorded and well corroborated by the evidence of PW4 who stated that one of the appellant wore a helmet which was in the statements of the appellants. He argued that the statements were also corroborated by a postmortem examination report (Exhibit P3) adduced by PW5. To bolster his argument he referred us to the case of **Nzwelele Lugaila v. The Republic**, Criminal Appeal No. 140 of 2020 (unreported). He concluded that the trial Judge before

convicting the appellants warned himself of the danger to convict the appellants based on the confession statements which give weight to his judgment. From those reasons, he prayed the Court to sustain the impugned conviction and dismiss the appeal.

The rejoinder by Mr. Rweyemamu was in fact a reiteration of his earlier submission adding that the confession was not free agent before the Police and exhibits P2 and P5 were not competent before the Court and therefore the appeal has merit and be allowed as prayed.

We have examined the record of appeal and considered the submissions by the learned counsel, we are of the view that the crucial issue for our determination is whether the charge against the appellants was proven to the standard required. At the outset, we wish to express our agreement with the learned counsel that the impugned convictions in this case hinged on the tenability of the extra-judicial statements and cautioned statements and nothing else. For none of the prosecution witnesses gave a cogent account that directly linked the appellants to the murder. So, the main issue before us is whether those statements were proper and reliable.

To begin with, we wish to express our agreement with Mr. Rweyemamu that, on the authorities he cited, it is imperative on the part of a Justice of the Peace to ensure substantial compliance with the CJ's

Guide in recording the suspects extra – judicial statement so as to guarantee that was freely and voluntarily given – see also **Petro Teophan v. Republic**, Criminal Appeal No. 58 of 2012; **Jackson Daudi v. Republic**, Criminal Appeal No. 111 of 2002; **Geoffrey Sichizya v. Republic**, Criminal Appeal No. 176 of 2017 (all unreported).

Having examined the extra – judicial statements complained of, we think the Justice of the Peace (PW7) who recorded the statements appears to have been completely unaware of the CJ's Guide. For he did not comply with most parts of it. As he admitted in his evidence at pages 79 and 80 of the record of appeal that the forms were brought by Police. At page 79 line 17 he said: "The Police came with the form to fill in about the particular of that person". And at page 80 line 9 he said "The Police had a form for me to fill in".

It is evident from both statements that the forms came from Police and not from the court, which, we think was not proper.

The record also at page 80 shows that both appellants signed the forms first before their statements were recorded. PW7 on the first appellant said that:

*"He signed by punching using his finger print.
Thereafter I recorded his particulars and other
information".*

And on the second appellant, he said:

"He signed on the form and he was ready for recording the extra – judicial statement".

As submitted by both counsel, none of the statements states whether it was read over and confirmed by the maker to be correct before it was signed. We firmly view these omissions as grave infractions that cannot be glossed over as they render the statements involuntary. It cannot be said, in the circumstances, that the appellants voluntarily confessed to the offence of murder they stood charged. In consequence, we find merit in the appellant counsel's submission and proceed to discount the two extra – judicial statements.

By dint of the outcome on the submission above, we are compelled to allow the second submission on the cautioned statements (exhibits P2 and P5) as well. We found that **one;** the recording of the statements was in contravention of section 57 (2) (a) of the Criminal Procedure Act, Chapter 20, **two;** there is no evidence that the statements were read over to the appellants before signing them, and **three;** there is no corroboration from independent witness. Similarly, fate should also bore on the current confessional statements having found they were procured through torture as found by PW7.

In sum, we are of the view that the appellants' convictions are unsafe. We, therefore, feel constrained to allow the appeal and proceed to quash the conviction and set aside the death sentence imposed against the appellants. The appellants are to be set free forthwith unless they held for some other lawful cause.

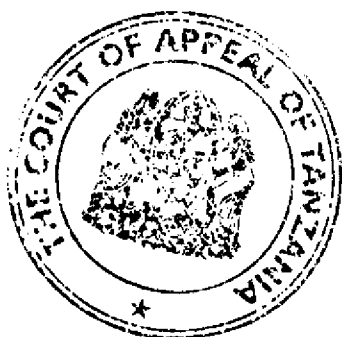
DATED at **BUKOB**A this 22nd day of March, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 26nd day of March, 2024 in the presence of Mr. Emmanuel Rweyemamu, learned counsel for the Appellant and Ms. Alice Mutungi, learned State Attorney for the respondent / Republic via video link from Bukoba High Court, is hereby certified as a true copy of the original.




O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL