IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 385 OF 2020

JACKSON PROTAZ ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrates Court of Bukoba, at Bukoba, Ext. Jurisdiction)

(Minde, SRM Ext. Jurisdiction)

dated the 12th day of June 2020
in
Criminal Sessions Case No. 2 of 2018

.....

JUDGMENT OF THE COURT

22nd & 29th November, 2021

KOROSSO, J.A.:

In this appeal, Jackson Protaz, the appellant is appealing against the decision of the Resident Magistrates Court of Bukoba at Bukoba (Minde, SRM Ext. J.) in Criminal Sessions Case No. 2 of 2018 where he was charged and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002 (the Penal Code). Upon conviction, he was sentenced to the mandatory sentence of death by hanging. The particulars of the offence stated that, on 7/1/2014 on or about noon hours at Bujara village, Karagwe District in Kagera Region, the appellant did murder one Protaz Ikwatabusha.

For easy appreciation of the sequence of events leading to the instant appeal, the background will be outlined, albeit in brief. The prosecution side presented 4 witnesses to prove their case, that is, Lucase Maganya (PW1), Nicholaus Emmanuel Rubambula (PW2), Cleophace Protaz (PW3) and Florian Buberwa (PW4). In total 3 exhibits were also admitted into evidence to support the case: the Sketch Map (exhibit P1), Postmortem Examination Report (exhibit P2) and the appellant's extra judicial statement (exhibit P3).

According to PW3, the deceased, Protaz Ikwatabusha, lived in the same house together with the appellant and granddaughter named Anita aged about 3 or 4 years. It was in evidence that each morning the deceased and Anita went for breakfast at PW3's house. On the night of 6/1/2015, PW3 visited the deceased's house and met the deceased, the appellant and Anita and had a chat with them. Around 20.30hours he left for his homestead which was about 30 paces away. In the morning of 7/1/2015 around 8.00-9.00hrs, while at home, PW3 saw a lone Anita and when asked where the deceased was, she replied that she had left him home sleeping and her attempts to call him had borne no response. Having become apprehensive, PW3 accompanied by Anita, went to the deceased's house and upon arrival there, his calls met silence and inside

the house he kept calling. When they reached the deceased room he continued calling the deceased's name and he was entrenched by a strange smell of blood. He moved to open the window and it was then that he saw the deceased lying on his bed covered with a blanket. PW3 also saw a spear on the deceased's left side of the chest, and a head that was swollen and that his skull was smashed, and a big stone laid near him. It was then that PW3 called for help, which ushered in many people including PW1. The incident was reported to the police who arrived at the scene of crime the next day on the 8/1/2015 accompanied by the clinical officer (PW4) who conducted the postmortem examination which established that the cause of death was due to internal bleeding, hypovolemic and neurogenic shock. PW1 testified that some of the deceased's relatives suspected the appellant who lived with the deceased to be the culprit to have killed him since he was not within the crime scene vicinity. This led to targeted efforts by the villagers to trace him and ultimately to arrest him at Nkwenda Village on 14/1/2015 and hand him over to the police. He was subsequently arraigned and charged as stated hereinabove.

On the part of the defence, the appellant who was the lone witness categorically denied the allegations facing him. He expounded on how

he lived with the deceased, his father and the circumstances leading to his arrest. He also gave evidence on what transpired while he was in police custody and his arraignment in court facing the charges stated hereinabove. After both sides presented their cases, the trial court, on being satisfied that the prosecution had proven their case beyond reasonable doub,t found him to be guilty as charged. Dissatisfied with the decision, the appellant through a memorandum of appeal filed on 17/8/2020 comprising six grounds of appeal preferred an appeal to this Court which read as follows:

1. *That, the appellate SRM-EXJ erred in law and fact to convict the appellant basing on the Extra judicial statement without any corroboration linking the appellant with the crime.*
2. *That, the appellate SRM-EXJ erred both in law and fact to convict the appellant basing on circumstantial evidence which was not proved as the law required.*
3. *That, the evidence of PW1 and PW3 itself required corroboration to be used to corroborate other evidence.*
4. *That, the prosecution did not offer any explanation as to why the witness who was mentioned by PW3 as ANITA*

was not featured as a witness and it is, thus inferable under sec. 122 of the Tanzania Evidence Act.

5. *That, the appellant was convicted on a defective charge.*
6. *That, the case against the appellant was not proved beyond a reasonable doubt.*

At the hearing of the appeal, the appellant who was present, was represented by Mr. Josephat Rweyemamu, learned Advocate whereas, the respondent Republic was represented by Mr. Emmanuel Kahigi and Mr. Amani Kilua, both learned State Attorneys.

Mr. Rweyemamu prefaced his submissions by adopting the grounds of appeal and thereafter sought and was granted leave to abandon grounds 3, 4 and 5 and thus argue grounds 1, 2 and 6. He contended that essentially grounds 1, 2 and 6 expound grievances faulting the trial court for convicting the appellant whilst the prosecution failed to prove the case beyond reasonable doubt as required by the law. He implored the Court to find the conviction wrong on the basis that: first, the fact that the trial court relied on the appellant's extrajudicial statement (Exh. P3) to sustain conviction even though its admissibility was tainted with irregularities. Second, that there was no

other credible evidence presented by the prosecution to prove the charges against the appellant nor to support the confession statement.

Amplifying on the first concern, the learned Advocate argued that the modality of taking extrajudicial statement was erroneous, since PW2 who recorded it, did not follow the instructions prescribed by the Chief Justice's instructions contained in "*a Guide for Justices of Peace*" (the CJ's Guide) promulgated under the Magistrates Court Act, 1964, and supposed to be followed to the hilt as held in the case of **Peter Charles Makupila @Askofu vs Republic**, Criminal Appeal No. 21 of 2019 (unreported). In the said case, the Court stated that, the prescribed format for recording an extrajudicial statement provided in the Guide, prescribes modality for the appointment of the Justice of the Peace Justice of the Peace and that upon appointment, the justice of peace is expected to comply with the prescribed format therein including the requirement for an appointed JoP to be assigned to a District or Primary Court. He emphasized its import being conducting the functions of the justice of the peace including recording the statement of an accused person, the task which must be done in the courthouse of which the justice of the peace is associated.

Mr. Rweyemamu reasoned that in the instant case there was no evidence provided that PW2 was ever appointed in line with the CJ's Guide or upon being appointed was associated with any Primary or District Court. According to him, worse still, Exh. P3 was not recorded in the premises of the District or Primary Court as prescribed in the CJ's Guide and instead, was taken in PW2's office, the office of Kanyaga Ward Executive Officer and thus rendering the recording of Exh. P3 improper.

For the learned counsel, another infraction was that the trial court's finding that the said statement was recorded voluntarily, was not supported by the evidence presented and that no value should have been accorded to it by the trial court had it carefully considered the evidence before it. The learned counsel invited us to revisit exhibit P3 at page 83 of the record of appeal where PW2 stated that he observed that the appellant had fresh wounds/scars. Mr. Rweyemamu pointed out that Exh. P3 also shows that the statement was recorded on the fourth day after the appellant's arrest. Thus, he argued, had the SRM, Ex.J. properly analyzed the evidence on this, it should have led her to find that the appellant was tortured as revealed signs of the said torture when the appellant was before PW2 and thus it was not voluntary and

should not have been accorded any value. The learned counsel thus implored us to find that exhibit P2 was procured un-procedurally and illegally, and that it should be expunged.

Additionally, the learned counsel argued that if the Court expunges exhibit P2, there is no further evidence presented by the prosecution which can lead the court to convict the appellant of the offence charged. He argued that the remaining available evidence is circumstantial and very weak to sustain conviction considering that the young girl one Anita who was said to have been also staying with the deceased was not called to give evidence and that the evidence by PW3, on what he was told by Anita about how she left the deceased was mere hearsay.

The learned counsel maintained that there is no doubt that apart from the evidence of the appellant who denied the charges and explained his whereabouts on the day of incident, evidence which has not been controverted by any prosecution witness and that he had left his father alive. There is no other evidence which can give light as to what transpired at the deceased's house that ended with the killing of the deceased or that can draw an inference that it was the appellant who killed the deceased. Mr. Rweyemamu further contended that, the prosecution even failed to give clear evidence to remove doubts on

whether the referred to child's name was Anita or Alpha aged 4-5 or 7-9 years. He concluded by urging us to allow the appeal and set free the appellant.

Mr. Kahigi for the respondent Republic who had initially resisted the appeal but in the midst of his submissions upon a short dialogue with the Court on modalities for compliance with the CJ's Guide, backtracked stating that the extra judicial statement, evidence which was heavily relied upon by the trial court to convict the appellant 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.

The rejoinder by Mr. Rweyemamu was in fact a reiteration of his earlier submissions and prayer for us to clarify on the procedure for appointment of JoPs and places they are supposed to conduct their functions upon appointment.

In light of the submissions by the learned counsel for the appellant, the learned State Attorney on the grounds of appeal before us and the record of appeal, we are of the view that the crucial issue for our determination is whether the charge against the appellant was proven to the standard required. When deliberating on the issue, we

shall be guided by the following sub issues; **one**, the propriety of admitting and the value to be accorded to the extra judicial statement (exhibit P3); **two**, whether in the absence of the extrajudicial statement the remaining evidence can sustain the appellant's conviction; and **three**, failure to call Anita to testify, who apart from the appellant, was the only other person who slept in the same house with the deceased.

On issue number one, we start by first satisfying ourselves whether as contended by learned counsel for the appellant, the trial court relied on the retracted extrajudicial statement of the appellant to sustain conviction. The fact that in the present case, there was a retraction of the confession by the appellant and a trial within trial was conducted is not an issue. What we have been implored to determine is whether the said confession founded on exhibit P3 was properly founded, the argument being that it was taken contrary to the format or guidance provided in the CJ's Guide to record extra judicial statements.

We are alive to the fact that the CJ's Guide was propagated by the Chief Justice under section 56(2) of the repealed Magistrates' Courts Act, 1963 Cap 537 which is *in pari materia* with section 62(2) of the Magistrates" Courts Act, Cap. 11 R.E 2002, now 2019 (the MCA). The said instructions have now been revised and updated in a booklet titled

"*A Handbook for Magistrates in the Primary Courts*" published by the Judiciary of Tanzania dated January 2019.

We are aware that this Court has previously discussed the importance of the instructions provided in the Guide. The Court in the case of **Japhet Thadei Msigwa vs Republic**, Criminal Appeal No. 367 of 2008 (unreported) stated thus:

> "*So, when Justices of the Peace are recording confessions of persons in custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms.*"

The Court stated further:

> "*We think the need to observe the Chief Justices instructions are two-fold. One, if the suspect decided to give such statement, he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily.*"

(See Also, **Mapuji Mtogwashinge vs Republic**, Criminal Appeal No. 162 of 2015 (unreported) and **Peter Charles Makupila** (supra))

According to the case of **Japhet Thadei Msigwa** (supra) when Justices of Peace are recording confessions of persons in the custody of police, the Guide provides the steps to be observed:

(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 or violence has persuaded him to give the statement.

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he makes a statement, the same may be used as evidence against him.

Our perusal of exhibit P3 at pages 104-108 of the record reveals that, the form used was originally written "Katika Mahakama ya Mwanzo/Wilaya..." but was amended to read "*Katika Ofisi ya Afisa Mtendaji wa Kata, Kayanga*" without showing the Justice of the Peace being a Ward Officer, which Primary or District Court he was assigned to in line with the CJ's Guide. The evidence of PW2 in Court did not show that he was one assigned or linked to any of the mentioned courts.

In item 5, which the accused is to be told when he is before a JoP and asked whether he is ready to state anything – there is no mark or words to reveal whether the accused stated yes or no, it is silent.

Item 6 of exhibit P3 reproduced states:

> "6. *Kwa hiari ya mtuhumiwa amechunguza mwili wa mtuhumiwa, matokeo ya uchunguzi wangu ni kama ifuatavyo:*
>
> *ANA MAKOVU SEHEMU ZIFUATAZO*
>
> *(i)* *ANA KOVU JIPYA UPANDE WA MONO WA KULIA (BEGANI)*
>
> *(ii)* *ANA KOVU JIPYA UPANDE WA MKONO WA KUSHOTO (BEGANI)*
>
> *(iii)* *ANA KOVU JIPYA USONI UPANDE WA KULIA*
>
> (iv) *ANAYO MAKOVU SABA MGONGONI YOTE MAPYA*"

When summing up to assessors on the fresh wounds seen by PW2 prior to recording exhibit P3 and the appellants defence that he had been tortured and threatened to give his statement, the trial SRM Ext. J. stated:

> "... *Unfortunately, the defence side did not clarified (sic) on whether the accused person informed the (IPI) Justice of Peace that he was tortured or forced to state what he stated. The*

accused person further repudiated the stated as IPI did not bother to inquire about the injuries observed from the accused person. When IPI testified he explained to observe scars from the deceased body aged about four days and not wounds as the defence side explained. Basically I found IPI a credible and reliable witness with no interest ot save (sic) as some of the contents tally with PW3 Cleophace testimony that the family was also possessed farm at Mishenyi. In his testimony the accused person further battled the extra judicial statement explained also to be beaten by the people of militia before Justice of Peace as he failed to answer some of the Justice of Peace questions. In my ruling I deliberated the defence to have no weight since the general explanation that the beaten (sic) was resulted form the accused failure to answer some questions did not make this court in conclusion that the was asked and failed to give an answer were material facts to the accused person confession to kill the deceased..."

The trial SRM Ext. J. concluded by finding the appellant's complaints of being tortured to be an afterthought and that he failed to disprove the prosecution evidence. On whether PW2 abided with the

Chief Justice guidelines, trial SRM Ext. J. found that the guidelines were fully complied with.

Having examined exhibit P3, there is no doubt that the contents of the form were new to P2 as discerned from the evidence when he stated he was told that there was a special form to fill, and his lack of understanding of the import of the form, led him to misconceive the import of his findings of the fresh wounds on the appellant's body.

We have given due consideration to the allegations of torture and especially where the record reveal that before making his confession, the appellant had fresh scars or marks on his shoulders both right and left side, on his back and that they were recent inflicted as they looked to be about 4 days old. At this juncture it is important to restate the settled position, that as the first appellate court, we have the responsibility to re-evaluate the evidence and arrive at our own conclusion as held in **Juma Kilimo vs The Republic**, Criminal Appeal No. 70 of 2012 (unreported).

We are of the view that the holding of the trial court in finding the appellant's claim of being tortured not proved and an afterthought, with due respect, to be misconceived and not supported by evidence. There is clearly the evidence of PW2 who testified to have seen the fresh scars

but found not to be linked with the arrest of the appellant even though by the time he appeared before then him the appellant had been under arrest for four days. Exhibit P3, as we have highlighted above, shows the fact that P2 recorded to have witnessed fresh scars. The trial court also erred by shifting the burden to the appellant to prove he was tortured or injured while it was the duty of the respondent Republic to prove that the extrajudicial statement was recorded voluntarily. We are of the firm view that had the SRM Ext. J. considered the evidence on record, and the appellant's constant claims of having been tortured at the time of arrest and while in custody, she would not have admitted the extrajudicial statement guided by the decision of this Court in **Stephen Jason and Others vs Republic**, Criminal Appeal No.79 of 1999 (unreported) where we stated that:

> *"Where an accused claims that he was tortured and is backed by visible marks of injuries it is incumbent upon the trial court to be more cautious in the evaluation and consideration of the cautioned statement even if its admissibility had not been objected to; and such cautioned statement should be given little if no weight at all".*

Indeed, we are aware that in that case the confessional statement addressed was a cautioned statement and it was one which was not objected but we believe the principle is relevant to the instant appeal and especially since the extra judicial statement was retracted. (See, **Richard Lubilo and Another vs Republic**, Criminal Appeal No. 10 of 1995 and **Marcus Kisuku vs Republic**, Criminal Appeal No. 146 of 1003 (both unreported).

On whether upon admitting the confessional statement the trial SRM Ext. J. should have accorded any weight, apart from what we have already alluded hereinabove, there is the fact that the trial SRM Ext J. found exhibit P3 to contain the truth alleging that some contents were like the testimony of PW3 on matters related to ownership of a shamba. Suffice to say, even if that was the fact, we are of the view that, that by itself was not sufficient to find the statement truthful especially having regard to some contradictions we have discerned. One, whilst the postmortem report (exhibit P2) and the testimony of PW4 shows that the deceased was found with cut wounds on the chest and lung tissues together with signs of head injury, exhibit P3, it is recorded as follows:

> "... *Mimi roho yangu ilikuwa inapenda nikae Mishenyi na Mama. Kukawepo Kelele nikatoa uamuzi wa kumuua baba yangu* ***kwa kutumia***

mkuki nilimchoma mkuki tumboni na kichwani *niliweza kutoroka*..." [Emphasis added]

From the above excerpt it clearly states that the spear was used to injure the deceased on the stomach and head, and no tthe chest as stated in the autopsy report. Similarly, the evidence of PW3 and PW4 and somewhat exhibit P2 infers that a stone was used to hit the deceased on the head while exhibit P3 as shown above, the appellant states that he used a spear in the stomach and head. We revisited PW3's evidence and found nothing in his testimony stating any purchase of a shamba at Mishenyi, PW3 stated that the appellant's mother lived in Bugabo, Mishenyi. The import of our finding above is that had the SRM ext. J. carefully and holistically considered the evidence before her, she would not have concluded that exhibit P3 was truthful and thus sufficient by itself to lead to the conviction of the appellant.

Worthy to note is that in **Thadei Mlomo and Others vs Republic** [1995] T.L.R. 187, the Court emphasized that the provision allowing an involuntary confession to be admissible if the Court believes it to be true (that is section 29 of the Tanzania Evidence Cap 6 R.E. 2002, now 2019), cannot be invoked where actual torture is proved to have been applied. Similarly, fate should also bore on the current confessional statement having found it was procured through torture.

We agree with the learned counsel for the appellant that the extrajudicial statement was improperly admitted and relied upon to convict the appellant. For the foregoing, we expunge the extra judicial statement (exhibit P3) from the record.

The remaining issue for determination is whether the remaining evidence can sustain the conviction. Apart from the confessional statement, the trial court found the circumstantial evidence supported the confessional statement. Undoubtedly, there was no eyewitness to the killing of the deceased. The circumstantial evidence considered was that of PW3, who testified that the day before the death of the deceased, he had joined the deceased, the appellant and a child Anita and left them around 8.30pm, and that on the next day the deceased did not take breakfast as usual and upon following him up, he was found dead, having been killed, and the appellant was nowhere to be seen. The other person residing in the deceased house, one Anita who was not called to testify, thus the trial court was not privy to her direct evidence on what she witnessed. We are thus of the view that as rightly propounded by the learned counsel for the appellant and conceded by the learned State Attorney, there is no cogent evidence to sustain the conviction of the appellant.

For reasons we have endeavored to demonstrate, we allow the appeal, quash the conviction, and set aside the sentence imposed against the appellant. We order that, he should be released from prison forthwith unless otherwise held for other lawful cause.

DATED at **BUKOBA** this 29th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 29th day of November, 2021 in the presence of the appellant in person and Emmanuel Kahigi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL