

TANZANIA / JUDGMENT

## 19890602 TZCA Mbeya1

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IN 'THE COURT OF APPEALS OF TANZANIA' AT MBAYA ... (CORAM: CHIEF JUSTICE APPEAL, IL HO. 48 OF 1989 ALLY CHALFBILO. ... FJ-PTI:LLAfit VE;HSUS THC REPUBLIC ...)

Rr.DSPOND:ii:Ifi' (Appeal from the conviction of the High Court of Tanzania at Njombe) dated the 20th day of September, 1988 in the case of J I I J11~Af..i~LA 2 J'S...~.i!...!h The appellant is convicted for the murder of his cousin Raphael Mbwayi, was based solely on a retrial confession made to Members of the Village Security Committee soon after the discovery of the deceased's body in a funeral hut. When the village gathered at the scene, the immediate suspect I was the appellant because of his connection to IITFU (the village) (P. w. 7) "he lived in the neighbourhood used to quarrel frequently with the deceased over his village; therefore asked the appellant if he had killed the deceased. The appellant denied, but according to the Chairman of the Village Security Committee: Gilf.~]110 NBENUCHI (P. W. 3) 4 ~, the appellant was eventually "pursued" to the extent that the matter would end here". It appears however from the evidence of the Ward Secretary (P. U. 6) that this prosecution took the form of military drill and possibly some beating. In 2 J.1Y event follow; this petition the appellant admitted killing; the clock, social relations, his brother in law, 1 Dickson Lufur, 10 and O.10 Lueusto Kc.duma. Dickson was to be paid a cow 21st August 1988 and was paid shs. 3,000/=. The actual physical killing was carried out; 3y- 1uc;usto. Aueusto denied the allegations; the chance (and witness [U:ictd i:r'ti the end -of the trial, 1 ... 0 ... /2. 2 As in fact there was no other evidence to support the charge against the appellant except his confession which he retracted both in his cautioned statement and in his statement. JULIUS in which he denied any involvement in the killing. Q. Yld in his defence at the trial. He said that he had decided to commit the crime because he had persuaded him to do so in order to escape from certain death if he persisted in defying the law; his leveled against him. However in dealing with this aspect of the case the learned trial judge stated, "The confession which the first accused (the appellant) made, I find to be true. 3 - :Srno::r'n ,3,11d P. i'l. 7 - Kifurugo has been retried. There was no objection to the admissibility of the evidence of confession but in the course of his defence the first accused said that he made a false confession under duress. I am of the view that the accused was, in fact, only roughly treated but I do not believe that inducement was such as would induce him to give a false confession. His confession was voluntary, true and true. When his words were read to him he was satisfied that he was satisfied to the military drill, as he said, himself, and he responded to the death of the deceased. The

w.1clispui;;od evidence ho1,rcvor is tlla;t, 3:I; the roc:uost of his ow;.1 brother Lulccm;;olo tho first &.ecU£od was taken away from the crowd a:acl questioned in :)rivdG 1:zy- P.Wo3 - Ernesto c.nd P.W.7., Kifurugo, but in tho ,resonco of his brother nnd mot.her, It ~:c,s the:1 that l:o r:1~,cle tho conf cssion. 1 • At ~110 :.102.ririg of tbs appocl Er. J.'wnkiL.1,S2,, who stood in for Mr. Tukunjobe,\_ w110 could not n,1)po.,r on account of a. sudden oorea;i,~ in the family, vigorouslyJr a. ttac:b:,cl this fincliac by th-0 l-0a.rned t.ri~ judge. We ~-pprocia:tod Mr. Nwakilai:m.' s willincnoas to appear and \ argue tho 2,ppocl at GUCli short noticeo Ifo ii.1formed us that he was ' abandoni1-ig the second grow.1d of ~ppeal n;.1d thd; he would argue only one gro1L1d on the confession -rac:.do l:zy- the o..ppellr.nt. He sulxnitted that if t:10 102,Tnecl trid jud30 found that· ttle appellant was tortur~I ~. then he should not ho.vo used the scj(JO confcssi011 to convict him. · conviction wo.,s of the scr.10 view o . The le2.rnecl jud,r:o stated i 11 the above r)::~3;.:o.t;o ;;;1:~;t the appellarrl; wus rou.;;hed up bctore mcl<i:~;{· tho collfoc ..:io111 but he went on to hold. that ho did ;:ot 1Joliovo tho il'lu.ucemc;\_~l; 1-lc'S such as would. have made him 0 ivo a fdsc confession, ~1d t:1.d tllorcfore his confession w.,s voluDtary cad true. ,... . 3 We are of the viGw th.:::~t there were two Cl.S)eciis to the a,ppellai1t 's confession which nceclocl the attention of 'the trial judge. There WM first the ctuostion of torture· ol' roUJhing up of the appello...1t and secondly the inducement 1-,hioh wns given to lumo Uc cl[\_<ree with Mr. Hw2.lcilaso.. thn.t if the trial judge found ns he did th~\_,~t the appclJ.c,nt w2,s roughed up before making the confession, then the subsecrucnt confcssi<m could not be voltmtu..ry a;\_~1d true morels because it was i~12.Cle in the presence of llis brother e.nd mother. According ·bo the appellani:f his relatives ii:rtervoned. in order to save him 0;~1d t:1ey asked to speck to him in ::\_~riv2..te in an effort to persu'---:dc lrim to stop his obstinn,cy. They feared tlin.t ho mig21t clie if th~ torture or rouching up continued. There was -t;:ms no need to continue ~orturins or roUJ~·11i:~ him up ·while this ';;Jriv;l;i;o interview continued, ancl he w.:s not subjected to furtlcr torture beoanae he had 2,lro:~;O.y clone wh2,t t~10 villo.~~e autlwri.ties wa1Ic0d him to dot,... With rc(<~;I'cl to t>o i;1duccr.le:~;1t ~:11lich the triol judge said\_ was not cap.:.i)le of r.1o;~;in& ttle a;~;r)ollant t.;ivo 0 fcls0 conf~ssion, we think with res1,ect tho:~; this ignores tho cviclonco given by f the Chairmc..n of ·bhe Villq;0 ~curity Coiilmittee - :Sr:1csto (P.i'T.3) to tho effect t~1at t:1cy l1~;cl tolcl tho o.;y.it,llnn~b -(;~1d if }1e agreed to hc;vo been ros~onsi ble for 112.,pl1ael I s dedh 1 Dd~ers woti.ld end right there. rr.:lis very a,t~cr:::ctive induGrnen-t \I'(;";S :10ld up to the appelic:.nb 1JJ' the CJ.le,irrac..n of o, 1,owcrful villoeo io-.rcrnment Committee, uo do ;:wt sec !101:r such c:.11 inducement coulcl h:~we failed to \_operato 011 t).10 8;j)pell.:~1t. H wc..s quite c;~;pa,ble of mo.king him offer a fcJ.lse co;lfessio:1a L1 t~1csc circunwtc;\_1ccs w0 n,re unable to sey lil:~0 the leO,I'ned trii"~.1 judge tha,t the C.:~i:"Jolln.,."1t 's confession\_ w2.,::: volunbry, if it -,12,3 aot volunt 8.I"J, it i-.r;~s unlikely to be tru.~. 2,,1cl therefore unsnfo to ';)o,se a convidioa on it. 11.ccot'dingly we cllow the 2,Pl-:,00.1, qu.2.sh ~~1~c conyiction which 2,s inclic<1..ted was not su:~i:~iortec1 by t~1e Re:,n1Jlic, set asi-de\_ t ~;gEmtenoe. of dedh with E.'11 order f8r the o,ppollan:1; 1a. 1-41.t:~ied.i.c,te --- .....o..../4. ,. 4 release from ").ustody unless ho is otherwise lr:lrl'ul~ detained, - DN.P:::~:,) J{l YilleYA this 2nd. dL!;/ of June, 1909. F o L. r:rY:,lLftLI c~mE:F' JUSt:i:cr.:

- , tf ..... JJQ\$t19 1! , -, ~ JUST'IC}~ OF' J:..PPE/J, :- \. , 1~:..c , ~. . 1"~ JUSTICE OF APPLi:AL I  
cert if:: thd this is a true copy of t.iJ.e. original.,. J:o~;; ~-:;;,( ( ;J •. H.\_ M~OJ!1i'\_\_ ] ) . • • '-  
Li'''''' '''' ..... ~..... • --~1rroR S- n~\_:i!r'UTY -... ''Tir- !I..• .. .. )!J. ~ 1 •',,, - V- ..\_ /

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