

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT M!ANZA (COFAM:KISJ1 7GA. J . ?~ ., BUVAJOAO, AdLUGKINAJ..A..) CRIMINAL APPEAL NOs..11 And 32 of 1996

- "- BETEEN I.. HkDIJk SALLJM 2.. DOTO ISII'tBA

1. APFLLANTS AND THE PJPTJBLC.. ., RESPONDENT (Appeal from the conviction of the High Court of Tanzania at Tabora) (MackanjaJ..) dated the 20th day of November, 1995 in Criminal Sessions Case No0 90 of 199 JU DGEMENT LUBtWAJ..A: The first appellant, Hadija Salum and the second appellait Doto Isimba together with one other person were charged with the murder of the deceased, Jidai Mtunga contrary to section 196 of the Penal Code.. The High Court (Mackanja, J.) sitting at Tabora convicted both the first and second appellants as charged and sentenced them to death.. They have appealed to this Court against both conviction and sentence.. It was common ground that the first appellant was the wife of the deceased living 'at Mwamala Village, Igunga District. At the trial it was the prosecution case that on the fateful night of 20th February, 1990, the deceased -- .. '-"" !-.- -2- was killed by the first appellant together with the second appellant and the other person who at the trial was the third accused. The prosecution case was solely based on the extra-judicial statements of the first and second - appellants. In her defence at the trial the first appellant retracted her confession in the extra-judicial statement (P4). She denied taking part in either the killing of the deceased or biring the second appellant and- tb ttldr accused. She claimed that on the fateful night 9 robbers broke into their house and got in through the window. As the deceased was in deep sleep, she saw the second appellant, Doto Isimba striking the deceased with an axe. The deceased died and the robbers including the second appellant ran away. Likewise, the second appellant in his defence at the trial denied any involvement in the killing of the deceased. He also denied knowing the first appellant. The second appellant also denied iaving said anything recorded by the Justice of the Peace - .n the extra-judicial stteent (xh. P5). Consideration After careful - and analysis of the idence, the learned trialjtfdge was satisfied that the tra-judicial statements of the first and second appellants re voluntary and truthful. He rejected the appellants' fence as an afterthought. The appellants were conviatd the offence of murder, The third accused at the trial acquitted. The appeal concerns the first and second ellants who, at the trial were referred to as the first second accused respectively. ..0/3

- 3- In this appeal, the first appellant was represented by Mr. Kweka learned counsel. Initially, he had filed four grounds of appeal but at the hearing of the appeal he opted to argue only ground one. That is that the learned trial judge erred in law in relying on the statement of the first accused, the first appellant which was not corroborated. He strongly criticized the learned judge in basing the conviction of the first appellant on the extra-judicial statement (Exh P4). The reason he said was that as the statement was retracted, independent evidence was required to corroborate the confessional statement. In this case, he insisted, there was no such corroboration and therefore it was not proper to found the conviction on such evidence. In conceding that at the trial the admission of the confessional statement Exh. P4 was not objected to by the defence, the learned trial judge should have been cautious in acting on the statement, Mr. Kweka stressed. We agree with Ir. Mwampoma, learned Senior State Attorney for the respondent Republic that the first appellant was properly convicted on her extra-judicial statement. It is common ground that the statement ExhP4 was admitted in evidence at the trial without objection by the learned counsel for the first appellant. In this statement, the first appellant, plainly admitted killing the deceased. In addition, the statement contains an account of the historical background leading to the death of the deceased in such a detailed manner that we think ..
- It could only be narrated by a person involved, in the murder incident.. For instance, in parts, the statement reads: Kutokana na maudhi ya kindr) a vile vile tendo la marehemu kutaka kunidhulumu mali yangu itokanayo na urithi wangu wa marehemu baba yangu imenifanya nifikie uamuzi wa kutaka rnbinu za kumuua mume wangu iii iliondokane na mateso ya kiroho na kimwili ambayo marehemu amekuwa akinifanyia ... ndipo nikapata wazo la kutafuta majambazi 111 -: niyakodi yanifanyie kazi ya kumuua mume wangu0 In another portion of the statement the first appellant
- said: Tarehe 20/2/1990 usiku mnamo majira ya saa 700 majambazi haya yaliwasili Mimi na mume wangu tulikuwa tumelala katika chumba kimoja kila mtu katika kitanda chake Wakatiwa kupanga mipango yetu mimi na haya majambazi niliishayapa ramani yote ya chumba chetu killvyo, na mipangilio ya vitanda changu na cha marehemu mtu allishaingia ndani na tochi yenye mwanga mkali illinulika, campiga mume EI shoka la usoni, na la pili mkononi kisha marehemu alianguka chini 0 Yule wa ndani nilimtambua ni Dotto Kayancla .15 4 S - -5- From the--statement (Exh. .P1 it is clear to us that the learned trial judge addressed the details of the statement and was satisfied that the statement was voluntary and truthful. In respect, we find no merit in Mr 0 Kweka's contention that as the first appellant had retracted the confession at the trial, conviction could not be sustained •1 without independent evidence to corroborate the confession. As correctly observed: by the learned trial judge the rule regarding, a retracted confessional statement was restated by this Court in the case of Hatihu Gandhi and Others v. Public (1996)L12, In this case we stated that as a matter of practice or prudence a trial court should accept with caution a confession which has been retracted or re-pudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case the confession is true. This principle had earlier been underscored by the Court of Appeal for Eastern Africa in the case of TUWNOI v.

UGAJTPk 596V E.A. E4. From these decisions the position of the law is that depending on the circumstances of the case, a conviction can be founded on a confessional statement after the court has properly directed itself on the evidence and satisfied as to its truthfulness. We are therefore satisfied that Mr. Kweka's generalized submission that no conviction can be founded on uncorroborated confession is not correct. In this case the first appellant retracted her confessional statement at trial. Her denial was rejected by the trial judge as an afterthought. In our view, the learned trial—judge cannot be faulted in rejecting the first appellant's . . /6 4

- 6 - ce because as she was ably represented at the trial counsel, ordinarily she would have told the counsel the earliest opportunity that she had not stated what is affirmed in the "statement in Exh. 4. This —would have enabled, counsel to raise the matter at the commencement of the trial. The court would then put to test the voluntariness and truthfulness of the statement by holding a trial within a trial. As it happened, in this case, we think the blunt denial by the first appellant at the trial in this manner is indicative of the credibility to be attached to her testimony. Like the learned trial judge we are satisfied that the first appellant's defence at the trial was nothing but an afterthought, it was properly rejected. We agree with Mr. Mwampoma, learned Senior State Attorney that there is no merit in her appeal. will next deal with the second appellant. In this appeal he was represented by Mr. Rugaimukamu, learned counsel. Essentially, Mr. Rugaimukamu raised three points of complaint. First, that the learned judge erred in law in basing the conviction on the confessional statement of the first appellant (Exh. PLI). Secondly that the extra-judicial statement of the second appellant (Exh. P5) was wrongly admitted in evidence. Thirdly, that there was no sufficient circumstantial evidence to support the second appellant's conviction, .17 S regard to the first ground, he strongly contended that the first appellant's confessional statement was not to be relied upon because she was not truthful. In elaboration he said in her statement to the police and the extra-judicial statement, (Exh, P4) the first appellant was not consistent. At times, he said she referred to robbers (majambazi) who had attacked her husband, the deceased without specifically mentioning the second appellant. Yet in court, in her defence the first appellant stated that she knew the second appellant who used to frequent her house looking for maize. Such a person who keeps on changing in her evidence is not truthful, her statement in Exh. P4 should not have been relied on in convicting the second appellant, Mr. Rugaimukamu insisted. With the confessional statement (Exh. P4). discounted., there was therefore no evidence on which to convict the second appellant he submitted, Furthermore, Mr. Rugaimukamu said because the second appellant had. I denied making any confession to Jumanie Said Katonga, (PW6) the judge should have been cautious in admitting such confession. In support of this submission he referred to the case of Hemed Abdallah v. Republic (1995) T.L.R. 172, We need not be delayed in this submission. As submitted by Mr. Mwampoma, learned Senior State Attorney, the discrepancies in the defence of the first appellant and the extra-judicial statement Exh. P4 are not material, they do not affect the central story that the first appellant was involved in the hiring of the second appellant to kill the deceased.. As already observed while dealing with the first appellant, the

confessional statement ixh. P4 was, as correctly found by the learned trial judge, nothing but true. Having accepted it as truthful and having regard to the fact that this was a confession which also affected the first appellant as well as the second appellant, a co-accused, it was

- properly admitted as evidence. Section 33 (1) of the Evidence -Act-1967, provided to this effect. It provides:
- that: 33 (1) 'There two or more persons are being tried jointly for the same offence or for
- different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some
- other of those persons is • •
- proved, the court may take that confession into consideration against that other person. Under this provision, the first appellant's confession was - properly considered against the second appellant. Therefore, we find no error on the part of the learned trial judge in taking into account the first appellant's extra-judicial statement 2xh. P4 against the second appellant. We reject ground one of the second. appellant, S I —9- Mr. ..Rugaimukasu's second complaint was that the Dnd appellants confession in xh. P4 was improperly fitted on account of the fact that there was no tificate of Jumanne Saidi Katanga (PW6) the Justice the Peace. Je vehemently contended thatas the Justice of the Peace did not read out the statement to the second appellant, the statement was rendered inadmissible0 He did not cite any authority in support of this proposition. Cal We agree with Mr. Mwampoma that the irregularity was not fatal. From the record it is clear that there was no such a certificate0 PW6, the Justice o the Peace also admits this fact in his -ev-idence when he stated:- I i did not record on 2nd accused statement that I read out the statement to the 2nd accused before he signed it." In our view, PW6's evidence on 'this point is unambiguous. He'emphatically said he did not record that he had read out the statement to the second appellant before the 2nd appellant signed it He •does not say be 5id not read out (emphasis supplied) the statement. If the statement was read, out to the second appellant as the learned trial judge found, but through an oversight on the part of the Justice of the Peace that fact was not recorded, the situation woirdThedifferent. In that case as stated by Mr. Mwampoma, such an irregularity did not render the statement inadmissible as urged by Mr.ugaimukamu. In HATIBU GANDHI 'I,
- 10 .nother v. Republic (1996) T.L.R. 12 we expressed the view that breach of the Chief Justice's Instructions does not render the confession in the extra-judicial statement inadmissible. In this use there i yet another aspect. The record quite clearly shows that the statement bears the thumb print of the second apoellant. The irregularity therefore was of no consequence. In holding this view we are far from encouraging non-compliance with the Chief Justice's Instructions by magistrates when recording extra-judicial statements. As far as possible, magistrates exercising function of Justice of the Peace should strive to comply with the instructions. In the event that through inadver;ence as happened in this case, such an irregular±t occurs the admissibility and voluntariness of the statement should be looked into

in the light of other circumstances that would render the statement inadmissible. In the circumstances, we are satisfied that the learned judge as justified in his conclusion that the irregularity did not render the statement inadmissible. This ground also fails. We now turn to the second appellant's last complaint that there was not sufficient circumstantial evidence to support the conviction. Mr. Rugaimukamu urged that the murder weapon, the blood stained axe (Exh. P1) was not submitted to the Government Chemist to ascertain if the blood on it was that of the deceased. With respect, the question of blood was not in issue at the trial. There is therefore no basis for raising it at this stage. It was also his submission that it was the trial judge's duty to find that the second appellant's admission to PW1 led to the discovery of the axe Exh. P1. According to the evidence on record, he insisted, it was not the second appellant who led the way to the place where the axe, clothes and radio were discovered. As such, he said there was no evidence to corroborate the second appellant's confession. We do not accept Mr. Rugaimukamu's submission on this point. The record quite clearly shows that Musa Salum (PW2), 9 All Amri (PW3), and Sgt, Leonard (P45) testified that the second appellant led to his (2nd appellant) paddy farm where the deceased's clothes (Exh. P2) and radio were found. The clothes were identified by Salum Jidai (PW4) the son of the deceased, and first appellant. Earlier on, according to these witnesses (PW2, PW3, PW5) the second appellant had also led to the place where the axe Exh. P1 was found. This evidence does not support Mr. Rugaimukamu's submission in this respect. The learned judge having found the witnesses PW1, PW2, PW3, PW4 and PW5 credible and truthful, we are respectfully in agreement with Mr. Mwapoma that their testimony corroborated the confession of the second appellant. It is evident from the testimony of D/Cpl. Nathaniel (PW1) that the second appellant clearly admitted killing the deceased using an axe which he hid in a bush. He also admitted stealing the deceased's clothes and radio which he showed hidden in a paddy farm. As a result of such confession to PW1 the murder weapon, and the deceased's clothes and radio were discovered. This evidence, we are satisfied was, '1' 1 -1

- q — 12 — as found by the learned trial judge sufficient to corroborate the second appellant's confessional statement Exh. P5. Mr. Rugaimukamu's third ground is without substance, it is dismissed. In the event and for the foregoing reasons, we are satisfied that the conviction in respect of both the first and second appellants was properly found. 4 We
- find no merit in the appeals which are dismissed in their entirety. DATED at WANZA this 19th day of November 2001. DZLJJyA
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- I certify that this is a true copy of the original. 1' • • • (F.L.K. WABALI . D1;PUTy RGITRR
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