

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA ATMWANZA {CdRAM: MSOFFE, I.A., BWANA, J.A And MJASIRI I.A.) CRIMINAL APPEAL NO. 25 OF 2011 RICHARD BU KORI APPELLANT VERSUS THE REPUBLIC ~ESPONDENT {Appeal from the Decision of the High Court of Tanzania at Mwanza) {Rwakibarila, J.) C' ..,;,, --z.o...: : .., C:\? P- . - N<IT ! st ~,)~ dated the 1 day of November, 2010 ..s;i..t---'v\..~ "v-./c:S>~ in :3 -7-4? (.3) Criminal Appeal No. 27 of 2010 ~ ::'.Jt)J:::i'"<3' s- ~ , μ \ . . - t?cvJ:0~ 6 ~ ~~~ JUDGEMENT OF THE COURT ~~~-tOG-'IJlv (_JVUV' \,~2-, 14 & 17 February, 2012 BWANA, J.A.: b--~ <!'V ~ \?~.r~ The appellant, Richard Bukori, was originally tried and convicted in -1:::..V:S"fr> \::zJ•. cS~ <\-c eight counts and sentenced to concurrent sentences of seven years c..(2-Pss- . ~-,,,, ,•4 imprisonment. Before the Musoma District Court, the appellant was AA,/;.,>~ ~So::;.-\!, /4-'!t)OG••>l- Charged with and convicted of five counts of forgery contrary to sections ~. 333 and 337 of the Penal Code, Cap 16 (Vol. 1 R.E. 2002). He was also charged with and convicted of two counts of uttering false documents contrary to section 342 of the said Penal Code, and one count of obtaining money by false pretences contrary to section 302 of the Penal Code. · His 1 \ first appeal before the High Court was unsuccessful, hence this second appeal. Before us, the appellant was represented by Mr. Bernard Kabonde, I learned advocate while the respondent Republic was represented by Mr. Castu~e Ndamugoba, learned State Attorney. The facts of the case are briefly as follows. The appellant was a treasurer of TASAF, a non governmental organization (the NGO). The appellant was its treasurer at Iringo "A" Street in Musoma town. As treasurer, he kept TASAF's books of accounts and other bank statements. TASAF had an Account No. 162570400 with CRDB BANK, Musoma Branch. The appellant was as well one of the signatories of the account, together with the chairman and secretary, respectively. Sometime in 2007 allegations emerged that the appellant had embezzled the NGO's funds. In the course of investigation, various books of account for the NGO and specimen signatures of the key actors, such as the appellant, the chairman and secretary, were taken and forwarded to the Forensic Bureau (the FB) in Dar es Salaam for expert analysis. An expert report from the FB revealed, inter alia, that there was resemblance of writings between the appellant's specimen handwriting and the 2 " . handwriting on cheques, letters and other relevant documents used to withdraw money from account number 162570400. The appellant was arrested and charged with the offences as above stated. The appellant denied committing the offences. In his memorandum of appeal, he raised four grounds of appeal. We are however, of the view that this appeal may be determined by considering the

first ground only, namely- That the first appellate judge erred in law for upholding the admission of Exh. P4 ... albeit the same being objected and to wit:

- a) That the author of Exh. P.4 (FB report) was not called to adduce evidence of his finding.
- b) That Exh. P.4 was not accompanied by the necessary annexure and specimen signatures inclusive. The gist of the appellant's averment on this point is that although he had opposed Exh. P4 being tendered in evidence, the same was admitted 3 thus prejudicing his case. He was not given an opportunity to cross examine the maker of Exh. P4. It was Mr. Ndamugoba's submission that the appellant was given an opportunity to see the document, Exh. P4 and did not oppose to its admission in evidence. He submitted further that such handwriting expert report could be tendered in court pursuant to section 205 (3) of the Criminal Procedure Act (the CPA). There was no legal requirement, on the part of the trial court, to inform an accused person of his rights as it is, in cases of medical evidence (section 240 (3) of the CPA). An important point for our determination is whether there was no need on the part of the court to invoke the provisions of section 205 (3) of the CPA and in the interest of justice to inform the accused person of his rights as is the case under section 240 (3) of the CPA. The said section 205 (3) of the CPA provides:- "When any report under this section is received in evidence in any trial or proceeding under this Act other than an inquiry, the Court shall, if the 4 accused or his advocate so requests and may if it thinks fit, summon and cross examine the person whq made the report or make it available for cross examination." (emphasis provided). The requirements for summoning the maker of the document under dispute/ consideration, is remarkably different from that under section 240
- (3) of the CPC which provide thus When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection. The first appellate judge considered the two provisions (supra) and came to the conclusion that in the instant case, the court was not bound to inform an accused person of his rights to have a handwriting expert 5 . , summoned for cross examination. He concluded that Exh. P4 was therefore, properly admitted. Technically, there is nothing unlawful about the stance taken by the first appellate Judge. However, the requirements of substantive justice and prudence has troubled our minds. It is not in dispute that the conviction of the appellant was based mainly on the findings of the handwriting expert as reported in Exh. P4. It was prudent, therefore that the appellant be given an opportunity to understand and cross-examine the maker of Exh. P4. The appellant was unrepresented during the trial stage. He had, we do note, attempted to challenge the admissibility of Exh. P4, using lay man's language. He was unsuccessful. We think he was unjustifiably denied of that basic right. Having shown that he did not agree with the contents of Exh. P4, !he cou!!_ was under obligation to give___ him an opportunity to cross-examine the maker of such a document.

The trial court should have given a wider interpretation of the contents of section 205 (3) supra, as highlighted. We are convinced that failure to do so was a fatal irregularity which denied the appellant his fundamental right, to cross examine the maker of Exh. P4. 6 While still on this point, we suggest that Parliament should reconcile the provisions of sections 205 (3) and 240 (3) of the CPA so that the former encompass the provisions of the latter. In other words, accused persons (or through their advocates) should be given opportunity to call for cross examination of makers of expert reports and that the trial court be under legal obligation to inform the accused person of that right, as is the case under section 240 (3) of the CPA. The above considered, we allow this appeal. We quash the conviction and set aside the sentences. We make an order that unless the appellant is otherwise held, he be set free forthwith. DATED at MWANZA this 15th day of February, 2012. J. H MSOFFE JUSTICE OF APPEAL S. J. BWANA JUSTICE OF APPEAL S. MJASIRI JUSTICE OF APPEAL is a true copy of the original. J. S. MGETTA DEPUTY REGISTRAR 7 8 Mr. Rugaimukamu also complained that there was no investigation officer in respect of this case. There was no eye witness as well. . Regarding ground No. 3 Mr. Rugaimukamu submitted that in view of the inconsistencies and contradictions of the evidence of PW1 and PW2 as elaborated when arguing ground No. 1, their evidence should not be relied upon. Mr. Rugaimukamu concluded his submission on the last ground of appeal relating to the confessions made by the appellants by stating that the trial Judge erred in law in accepting the same. He submitted that the case of Mukami w / o Wankyo v R

(1990) TLR 46 was wrongly relied upon by the trial Judge, as the circumstances in Mukami's case are different from this case. Mr. Hilla on his part, did not support the conviction. 9 He submitted that the legal position is settled on retracted confessions. The evidence needs corroboration as a matter of practice. He further stated that where there is an allegation of torture the trial Judge is supposed to exercise caution. The trial Judge did not address himself on this. The element of torture was not opposed by the prosecution. In relation to the evidence of PW1 and PW2, Mr. Hilla conceded that there were grave contradictions and inconsistencies in their testimonies and their evidence was totally unreliable, and could not therefore be used to corroborate the confessions of the appellants. He stated that according to the evidence on record the deceased and the 2nd appellant are no longer married, they were divorced in 1994 and no longer lived together. He also argued that PW2 could not have seen the deceased in November 1998 if he had died the same year in September. Mr Hilla also submitted that as PW1 was not present in the office when Yohana spoke to PW2, his evidence was hearsay as Yohana was never called as a witness., 10 Mr. Hilla wound up his submissions by stating that in view of the nature of the evidence, the appellants should be given the benefit of doubt. After carefully going through the record and the submissions made by both learned counsel, we on our part are compelled to agree with them. The main issue for consideration is whether or not the deceased is dead and whether or not it was the appellants who intentionally caused his death. In looking at the evidence on record, neither the post-mortem report nor any DNA report has been tendered in court to prove that the bones found in the pit latrine were first of all

human bones and second whether they were the deceased's bones. There was no evidence to link the bones found in the pit latrine with the deceased. , 11 . The trial Judge based the conviction of the appellants on their confessions and the testimony of PW1 and PW2. He was satisfied that their evidence corroborated the confessions. Given the status of the evidence of PW1 and PW2 and the grave inconsistencies and contradictions in their evidence, that evidence cannot be relied upon to corroborate the confessions made by the appellants. The said evidence left a lot of questions unanswered. We are of the view that the contradictions went to the root of the matter. See the case of Mohamed Matula v R (1995) TLR 3 and John Gilikola v Republic, CAT Criminal Appeal No. 31 of 1999 (unreported). However in our view, the problem does not lie only on the evidence of PW1 and PW2. Looking at the serious allegations of torture by both appellants, the trial Judge was wrong in finding both appellants guilty of the offence of murder without exercising any caution. Once torture is alleged, the Courts should be very cautious in relying on the statements. See Paulo Maduka and Four Others v Republic, Criminal Appeal No. 110 of 2007 (unreported). The Court in Maduka's case made reference to the case of Brasius ,.... 12 0 Maona and Gaitan Mgao v R, Criminal Appeal No. 215 of 1992 (unreported) where it was stated thus:- "Once torture has been established, courts should be very cautious in admitting such statements in evidence even under the provisions of section 29 of the Evidence Act 1967 which in our considered opinion was not meant to be invoked in situations where the inducement involved torture. " See also Dotto Ngassa v R, Criminal Appeal No. 6 of 2002 and Maselo Mwita @ Maseke and Another v R, Criminal Appeal No. 63 of 2005 (both unreported). Given the clear legal position and practice in respect of evidence obtained under torture, we have no doubts in our minds that such evidence should be treated with caution. Even though the trial Judge acknowledged the fact that the appellants retracted their confessions, he did not address himself on the claims made by the appellants that, they were tortured in order to obtain confessions 13 ... from them nor did he address himself on the need to exercise caution before admitting such statements. We are fully aware that an appellate Court can only interfere with a finding of fact by the trial court where there has been a misapprehension of the evidence, a miscarriage of justice or a violation of principle of law or practice. See Amratlal D.M. t/a Zanzibar Silk Stores v A.H. Jariwara t/a Zanzibar Hotel (1980) TLR 31, DPP v Jaffari Mfaume Kawawa (1981) TLR 143; Mussa Mwaikunda v R, Criminal Appeal No. 174 of 2006 (unreported). After a careful review and analysis of the entire evidence on record and judgment of the trial court, we have found a compelling need to interfere with the findings of the trial court. We are satisfied in our minds that the trial Judge did not exercise caution in dealing with the evidence where there were allegations of torture. We strongly believe that the circumstances surrounding this case justify our interference. \ r •, , ; ' .Y 14 ~- In the event, we allow the appeal, quash the convictions and set aside the sentences. The appellants are to be released from prison forthwith unless they are lawfully held therein. DATED at MWANZA this 22 nd day of February. 2012. J.H. MSOFFE JUSTICE OF APPEAL SJ. BWANA JUSTICE OF APPEAL

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5. MJASIRI JUSTICE OF APPEAL this is a true copy of the original. ~ ~ 1> I ._,, . ;"! ' (J.S. MGETTA) DEPUTY REGISTRAR
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