

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: Nyalali, C.J., Mwakasendo, J.A. and Kisanga, J.A.)

CRIMINAL APPEAL NO. 15 OF 1980

B E T W E E N

LUKIO ELIEZELI APPELLANT

A N D

THE REPUBLIC RESPONDENT

(Appeal from the conviction and sentence
of the High Court of Tanzania at Moshi)
(Maganga, J.) dated the 29th day of
February, 1980,

in

Criminal Sessions Case No. 55 of 1978

JUDGMENT OF THE COURT

MWAKASENDO, J.A.:

The appellant, LUKIO ELIEZELI, is the son of the deceased, ELIEZELI KILAVO. He was convicted by the High Court sitting at Moshi of the murder of his father and sentenced to death. His appeal before us has been ably argued by Messrs Kinabo and G. F. Mlawa, learned counsel for the appellant and the Republic, respectively.

The Republic called a number of witnesses to prove its case against the appellant, but suffice here to refer only briefly to the evidence of three witnesses for the prosecution. These witnesses are BERNARD GODWIN (P.W.3), DR. FADHILI YOHANA MNAYA (P.W.5) and MUSTAFA MLAWA (P.W.7). Bernard Godwin, a relative of the appellant, told the trial High Court that at 6.30 p.m. on 5th March, 1978, while passing outside the deceased's homestead he heard the appellant quarrelling with his father, the deceased. Bernard did not say what the quarrel was about. Later the same evening Bernard was walking towards the deceased's homestead when, as he says, he saw the deceased lying outside his homestead. At about the same time he heard the appellant shout "Give me a knife" and threaten to kill anyone who raised an alarm. Bernard then described the events that followed in these

"We moved aside and after sometime he came and told us to cover the blood on the ground with earth. He was still alone. There was a lot of blood and we covered it as instructed. I was with Fecha. We used a spade to cover the blood with sand. I did not know where the blood came from but I suspected it came from accused's father because I heard the accused talk of a knife and slaying. When we covered the blood the deceased's body was not there. I did not tell anybody of what I had seen as Lukio had threatened that he would kill us if we talked. I did not see the deceased again till when his body was discovered in the pond. I saw the body. The body was tied with a rope to a stone. The pond where the body was found is about ½ a mile from the deceased's house."

Dr. Fadhili Yohana Mnaya in his evidence told the trial court how one day in March 1978 he was called to Kisanjuni village and there witnessed a body of a male African adult being fished out of a pond. According to Dr. Mnaya the body was 'anchored by three stones with a nylon string around the waist and a sisal rope tied loosely around the neck and legs'. The body was identified to the doctor by the wife of the deceased, ELIAZINA KIBARUTI (P.W.1) as that of her husband, ELIEZELI KILAVO. The doctor then conducted a postmortem on the body. As a result of his postmortem examination Dr. Mnaya formed the opinion that the death of the deceased was due to haemorrhage arising from a complete severance of the carotid arteries and jugular veins. Be it noted that both the identification of the body and the postmortem examination were carried out in the presence of RAMIA KAHUGWANA (P.W.6), police investigating officer.

The other important witness called by the Republic was MUSTAFA MLAWA (P.W.7), a Justice of the Peace. Mustafa Mlawwa told court how one day in March 1978 the appellant was brought to chambers and how, upon examining him and being satisfied he was a free agent, he allowed him to make a statement to him. This statement was clearly a confession by the appellant to the murder of his father. At the trial, however, appellant while admitting that he made the statement he was asked to have made before the Justice of the Peace, contended that

his statement was not a voluntary one as it had been obtained from him by and under inducements and tortures administered by the police at Same. In view of this retraction of the extra-judicial statement the learned trial judge ordered a trial-within-a-trial to be held in order to determine the admissibility of this statement. This was done and at the end of the proceedings of the trial-within-a-trial, the learned trial judge ruled the statement voluntary and accordingly admitted it in evidence. Mr. Kinabo, learned counsel for the appellant, has strongly criticised this decision of the learned trial judge. He has submitted at some length as to why he thinks the extra-judicial statement should not have been held voluntary. He has pointed out that while the trial judge was entitled to hold the statement voluntary and therefore admissible in evidence, it was wrong for him to find the appellant guilty on the basis of this retracted statement without there being any other evidence to corroborate it. In counsel's view, there was no material evidence on record to corroborate appellant's retracted statement. Counsel cited the case of TUWAMOI versus UGANDA (1967) E.A. 84 in support of his arguments. While we appreciate the stand taken by the counsel for the appellant in this case, we are unable to agree that the learned trial judge erred in any way in his consideration of the retracted extra-judicial statement of the appellant. The rule of practice enunciated by the Court of Appeal in the case of TUWAMOI versus UGANDA seems to us to vindicate the learned trial judge's action in this case. At page 89 of the TUWAMOI versus UGANDA case, Duffus, Ag. V.P. speaking for the Court of Appeal said:-

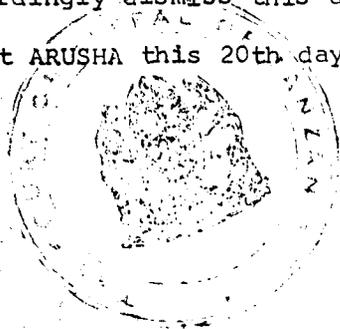
"The present rule then as applied in East Africa in regard to a retracted confession is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in absence of corroboration in some material particular but that the court might do so if it is fully satisfied in the circumstances of the case that the confession is true."

Looking at the judgment of the trial High Court we are satisfied that the learned trial judge was at all times fully conscious of the danger of acting upon an extra-judicial statement of the appellant which had been retracted and thus looked for corroboration before convicting. He found adequate evidence to corroborate the appellant's statement to the Justice of the Peace in the evidence of Bernard Godwin (P.W.3), Eliamini Salehe (P.W.4), Dr. Fadhili Yohana Mnaya (P.W.5) and Ramia Kahugwana (P.W.6). In any case, it appears from the judgment that the learned trial judge was quite prepared, after considering all the material points and surrounding circumstances of the case, to act on the appellant's confession to the Justice of the Peace and convict, because, as he says, he was fully satisfied that the appellant's confession could not be but true.

With respect, we cannot find anything in the learned judge's reasoning and conclusion in the case which could be condemned as erroneous.

We accordingly dismiss this appeal.

DATED at ARUSHA this 20th day of November, 1980.

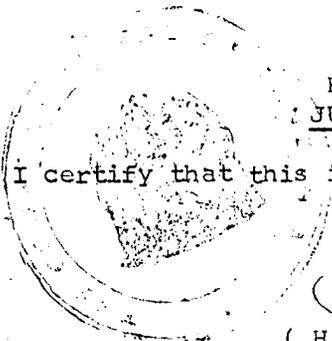


F. L. NYALALI
CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(H. A. MSUMI)
SENIOR DEPUTY REGISTRAR