

**IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA**

(CORAM: MUGASHA, J.A., SEHEL, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 431 OF 2021

NURU S/O VENEVAS.....1ST APPELLANT
SETH S/O SIMON.....2ND APPELLANT
EZEKIEL S/O KAROBEZI.....3RD APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania, at Kigoma
(Matuma, J.)**

dated the 15th day of June, 2021

in

Criminal Session Case No. 36 of 2020

.....

JUDGMENT OF THE COURT

29th May, & 2nd June, 2023

MUGASHA, J.A.:

In this appeal, Nuru s/o Venevas, Seth s/o Simon and Ezekiel s/o Karobezi, the 1st, 2nd and 3rd appellants respectively, were charged for the offence of murder contrary to sections 195 and 197 of the Penal Code [Cap 16 R.E. 2019]. In the charge laid against them, it was alleged by the prosecution that, on 2/10/2016 during night hours, the appellants did murder one Richard s/o Chua who was assaulted on several parts of the body resulting into severe bleeding and she died instantly. The prosecution lined

up eight prosecution witnesses and tendered a number of documentary exhibits. The appellants were the only witnesses for the defence.

A factual account underlying this appeal is briefly as follows: The deceased as a watchman and the 1st appellant as an operator of the excavator machine happened to be employed by the Chinese Company which was constructing the road from Kasulu to Kidahwe. On the fateful day, the deceased was on duty when the bandits invaded the site of the company where motor vehicles and other construction equipment were parked. While other security guards managed to escape, the deceased fought back the bandits so as to prevent them from stealing. However, he was overpowered and assaulted by the bandits, cut on different parts of the body and died on the spot and the bandits managed to steal the control box of the excavator. The matter was reported to Kasulu police station and investigation of the fateful incident commenced. The body of the deceased was examined by Paschal Bahezwa (PW3) who conducted autopsy and established the cause of death to be severe bleeding due to cut wounds on the head, shoulder and leg.

A number of police officers including E.7627 Cpl Magambo PW7, led by PW2 went to the scene of crime and found drivers and operators of the motor vehicles and the excavator in question. At the scene of crime, PW2

asked each driver to start the engine of his respective excavator including the 1st appellant who initially hesitated, but later he tried in vain to start the excavator and that is when he intimated to H. 3564 DC Ibrahim (PW2) that the control box was not in the excavator. Upon being further interrogated, it is alleged that the 1st appellant disclosed that, he had conspired with the 2nd and 3rd appellants only to steal the control box and they had not intended to kill the deceased and that he realized that the deceased was dead on the following day when he went to the scene of crime.

According to the testimony of PW2, besides the revelation by the 1st appellant, he as well assisted the police in the arrest of the 2nd and 3rd appellants. He said that, the 3rd appellant was arrested on 5/10/2016 at 23.00 hours and after being interviewed, he mentioned the 2nd appellant to have taken the control box to Ngara Benaco. However, the 3rd appellant led the police to Ushirombo and the 2nd appellant was not found. Instead, his wife told the police that he had travelled to Geita where his brother resided. According to Inspector Amran Msangi PW1, the OCS at Rwamgasa Police Post, upon the direction of the RCO Geita, he accompanied the police officers from Kasulu including PW2 to the house of Malaki in Mwalutole area where the 2nd appellant was suspected to be. Upon conducting a search, it is alleged that the 2nd appellant showed them the control box of the excavator

in the room of one Malaki. The control box and its accessories were seized and later entrusted to the exhibit keeper EX E. 3420 Cpl Charles (PW5), the control box and its accessories together with the black bag were entrusted to him on 12/10/2016 by PW2 and he marked them as KAS/EXH/REG/126/2016 in the Exhibit Register. H.8662 D/Sgt Eliah PW8 recounted that Jack Yang one of the staff in the Chinese company in question recorded a statement and mentioned the serial numbers of the control box and since he did not enter appearance, the statement was tendered at the trial as exhibit P12. The cautioned statements of the appellants as recorded by E. 7627 D/Cpl Magambo (PW7) were tendered at the trial as exhibits P7, P8 and P9 and it is alleged that they had confessed to have stolen the control box in the course of which the deceased was hacked to death.

In their respective defences, the appellants denied the accusations by the prosecution. Besides denying to have been at the scene of crime on the fateful day, they denied to have made cautioned statements and alleged that they were false. On the part of the 1st appellant whose statement was recorded on 6/10/2016, he claimed to have been arrested on 3/10/2016 at the place of work together with Said and Shuashua fellow operators on accusations of having stolen diesel from the excavators. The 2nd appellant whose statement was recorded on 13/10/2016 was arrested on 11/10/2016

at Geita, testified that he was at Ushirombo with his wife and children and claimed to be unaware of the utility of the control box of an excavator. He added that, during the search the police entered the house of Malaki with the black bag and that he was not involved in the search as he had remained in the vehicle and as such, he did not sign any certificate of search and seizure. The search and seizure certificate was tendered as exhibit P1. That apart, he said to have been locked at the Ushirombo police station for one day and on 7/10/2016 he was taken to Kasulu police station and joined by the 3rd appellant. The 3rd appellant whose statement was recorded on 5/10/2016 at 00.00 hours. testified that he was arrested on 5/10/2016 at 23.00 hours in Muzye village Kasulu at the house of his friend one Stanslaus.

After a full trial the learned trial Judge summed up the evidence to assessors who returned a verdict of guilty. Subsequently the appellants were convicted and sentenced to suffer death by hanging. Discontented, the appellants have lodged an appeal seeking to demonstrate their innocence. In the Memorandum of Appeal filed on 29/10/21 the appellants have fronted two grounds of complaint as follows:

- 1. That, the trial court erred in law and fact in convicting the appellants on a standard of proof which is below reasonable doubt.*
- 2. That, there were serious irregularities in the trial proceedings that went to the root of the matter.*

Later through their advocate, on 22/5/2023 a joint supplementary memorandum of appeal was filed raising 7 grounds of appeal as follows:

- 1. That, the Hon trial Judge erred in law and facts by convicting and sentencing the Appellants on the charge of murder basing on flimsy circumstantial evidence, doctrine of recent possession, accomplice evidence and retracted cautioned statements by the appellants (Exhibits P7, P8 and P9 respectively) contrary to the dictates of the law.*
- 2. That, the Hon trial Judge erred in law and facts by convicting and sentencing the Appellants basing on the doctrine of recent possession without considering that the chain of custody of the alleged control box (Exhibit P2) was broken and that the Jack Yang in exhibit P12 did not credibly identify the alleged control box.*
- 3. That, the Hon trial Judge erred in law and facts by misdirecting himself in interpreting case laws he referred on the principles of law involved in the case thereby arrived at erroneous decision of convicting and sentencing the appellants.*
- 4. That, the Hon trial Judge erred in law and facts by failing to have considered material discrepancies and contradictions in the evidence by the prosecution side.*
- 5. That, the Hon trial Judge erred in law and facts by admitting as exhibits P7, P8 and P9 respectively the cautioned statements of the appellants' despite of the objection on their admissibility.*

6. *That, the Hon trial Judge erred in law and facts by convicting and sentencing the Appellants while the prosecution side failed to call material witnesses who were Godfrey Juma who led police officers in drawing sketch map (Exhibit P6), the deceased's co watchman who was said to have escaped the attack and two operators of other two excavators found at the scene of crime.*
7. *That, the Hon trial Judge erred in law and facts for his inadequate, non and misdirection in summing up to lay assessors for not summing up on the position and directives of the law on accomplice evidence explaining how the accomplice evidence can be based to convict accused person.*

The 1st and 2nd appellants were represented by Mr. Sadiki Aliko, learned counsel whereas the 3rd appellant had the services of Mr. Daniel Rwemenyela, learned counsel. Mr. Shaban Juma Masanja, learned Senior State Attorney represented the respondent Republic. Mr. Aliko abandoned the initial memorandum of appeal and the 7th ground of the supplementary memorandum of appeal which shall conveniently be treated as sole memorandum of appeal. Then he argued together the remaining six grounds of appeal.

It was the learned counsel submission that, the High Court wrongly acted on circumstantial evidence to convict the appellants because the stealing of the control box of the excavator was not proved so as to warrant

invoking the doctrine of recent possession in order to link the appellants with the killing incident. On this, it was pointed out that, since Jack Juan the manager of the Chinese Company disclosed the serial numbers of the control box of the excavator more than a year after the search was conducted, in the absence of the prior description of the serial numbers of the control box of the excavator, it was argued that; **one** it is doubtful as to how the police officers managed to locate it during search in the house of Malaki where it was alleged to have been taken thereto by the 2nd appellant. Yet, Malaki being a material witness did not adduce evidence at the trial. **Two**, the search certificate containing the serial numbers of the control box pursuant to search conducted on 10/10/2016, it is doubtful; **four**, the control box was not positively identified by the owner whereas PW2, PW7 and PW8, who were not employees of the complainant were not capacitated to positively identify the control box. With this submission it was argued that, stealing was not proved at the required standard and as such, it was not proper for the learned trial Judge to invoke the doctrine of recent possession to link the appellants with the killing incident.

Regarding the killing incident, it was the learned counsel's submission that the prosecution account did not prove the charge against the appellants because the alleged confessional statements of the 1st and 2nd appellant were

recorded beyond the prescribed four hours and were wrongly acted upon to convict the appellants. To be precise, it was pointed out that whereas the 1st appellant was arrested on 3/10/2016 his statement was recorded on 6/10/2016 whereas the 2nd appellant who was arrested in Ushiroombo on 10/10/2016 and taken to Kasulu where he arrived on 12/10/2016 at 19:00 hours, his statement was recorded on 13/10/2016 at 13:27 hours from restraint of a suspect. It was thus argued that, since the delay was not explained, the illegally procured cautioned statements were wrongly acted upon by the trial court to ground the convictions of the appellants. As for the cautioned statement of the 3rd appellant, advocate Aliko submitted that it was wrongly acted upon to ground the convictions considering that since it was repudiated, no evidence was paraded to corroborate it, it was also wrongly acted upon to convict the appellants.

The other appellant's counsel was Mr. Rwemenyela who besides, supporting Mr. Aliko's submission on the improper search and the irregular invocation of the doctrine of recent possession, he challenged the finding by the learned trial judge who concluded that the retracted cautioned statement is corroborated by the injuries sustained by the 3rd appellant at the scene of crime as per the evidence of PW2 DC Hassan because the 3rd appellant was injured in the course of being arrested and not at the scene of crime as

alleged. With this submission it was argued that, since the facts from which the inference of guilt is sought to be drawn were not proved beyond reasonable doubt, the High Court wrongly acted on circumstantial evidence to convict the appellants. To support the propositions, he cited to us was the case of **REPUBLIC VS KERSTIN CAMERON [2003] TLR 84 HC**. Ultimately, both learned counsel for the appellants urged the Court to allow the appeal, quash and set aside the conviction and the sentence.

On the other hand, the learned Senior State Attorney initially did not support the appeal. He was of the view that, since the appellants confessed to have stolen the control box of the excavator, the learned trial Judge was justified to rely on the retracted confessions and invoke the doctrine of recent possession to link them with the murder of the deceased. To support his propositions, he cited to us the case of **DICKSON ELIA NSAMBA SHAPWATA AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 92 of 2007 (unreported).

Upon being probed by the Court on the elements of the doctrine of recent possession, he conceded that in the absence of prior description of the control box and its positive identification by the owner, stealing was not proved and thus, the learned trial judge wrongly invoked the doctrine to convict the appellants for the charge of murder. On being further probed on

the time of recording the cautioned statements of the appellants, he conceded that the statements of the 1st and 2nd appellant were recorded beyond the prescribe period hence illegally procured. He thus urged us to expunge the statements from the record.

In respect of the cautioned statement of the 3rd appellant, he submitted that it was legally procured and that although it was retracted, it is corroborated by the evidence of PW2 and PW4 who testified that the 3rd appellant was hit by the deceased and sustained injuries. He thus argued that, the 2nd appellant is as well implicated by the 3rd appellant's cautioned statement. However, when asked on the existence of corroborative evidence as the 3rd appellant was a co accused, he decline and yet urged us to acquit the 1st appellant and sustain the conviction of the 2nd and 3rd appellants for the offence of murder.

After a careful consideration of the grounds of appeal, the contending submission of the learned counsel and the record before us, we need to appraise and evaluate the evidence in order to ascertain if the charge of murder was proved to the hilt against the appellants. We are fortified in that regard, being aware of the salutary principle of law that a first appeal is in the form of a rehearing as the second appellate court has the duty to re-evaluate the evidence on record, subject it to a critical scrutiny and if

warranted arrive at its own conclusions of fact. See: **D.R PANDYA VS REPUBLIC** [1957] EA 336 and **VUYO JACK VS REPUBLIC**, Criminal Appeal No. 334 of 2016 (unreported).

Moreover, since it is apparent that the trial court convicted the appellants having relied on what it considered to be a credible prosecution account, despite that being the domain of the trial court in as far as the demeanour is concerned, the Court can assess the credibility of the witnesses basing on the coherence and consistency of the testimony of such witnesses including that of an accused person. See: **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No, 28 of 2001 and **SIMON SHAURI AWAKI @ DAWI VS REPUBLIC**, Criminal Appeal No. 62 of 2020 (unreported).

In grounds 1,2 and 5, the learned trial Judge is faulted to have relied on irregular search and seizure of the control box and the illegally procured cautioned statements of the appellants to ground their convictions. On this, the learned trial Judge relied on the confessional statements of the appellants, evidence of PW1, PW2, PW7, PW8 and the statement of Jack Yang (Exhibit P12) and concluded that, **one** the deceased was murdered in the course appellants stealing the control box of the excavator; **two**, the 1st appellant narrated a leading account which facilitated the arrest of 2nd and 3rd appellant whereby the latter was found in physical possession of the

control box at Mwatulole street in Geita, and **three**; the control box was positively identified by the complainant as per the statement of Jack Yang, the General Manager.

It is apparent that, none of those witnesses availed direct evidence on the killing incident. It is settled law that in order to ground a conviction on circumstantial evidence, the evidence must be incapable of more than one interpretation and secondly; the facts from which an inference of guilt is sought to be drawn, must be proved beyond reasonable doubt and must clearly be linked with the facts from which the inference is to be drawn or inferred. This was emphasized in the case of **SIMON MUSOKE V. REPUBLIC** (1958) EA 718 it was stated thus:

"In a case depending conclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt".

In the present matter it was alleged that the deceased was killed in the course of appellants stealing the control box of the excavator which the 1st appellant was its driver. A similar encounter was discussed in the case of

REPUBLIC V. LOUGHLIN 35 Criminal Appeal. R 69 the Lord Chief Justice of England had this to say at page 71:

"If it is proved that premises have been broken into and that certain property has been stolen therefrom and that very shortly afterward, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the one ..."

Yet, in the case of **REX VS BAKARI ABDULA** (1949) 16 EACA 84 the Court had the following to say on the doctrine of recent possession:

"That cases often arise in which possession by an accused person of the property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal".

In the wake of settled position of the law and circumstances surrounding the present case can it be safely vouched that the doctrine of recent possession was correctly invoked to ground the conviction of the appellant? We do not think so and we are fortified in that regard because

without the prior description of the serial numbers of the control box of the excavator, it is doubtful as to whether the control box allegedly found in the house of Malaki belonged to the complainant as he was not paraded as a prosecution witness. We say so because he was a material witness who could have clarified to the trial court if at all the alleged control box was actually found in his room and if it was taken thereto by the 2nd appellant. In this regard, the learned trial judge misdirected himself to rely on the statement of Jack Yang, the Manager who disclosed the serial numbers of the control box of the excavator more than a year after the search and yet the statement he made tendered as Exhibit P12 falls short of proof that the owner had positively identified the control box.

It is our considered view that in the absence of prior description, exhibit P12 is indeed inconsequential and added no value to the prosecution case as it rendered the search and seizure not credible. In the circumstances, in the absence of prior description of the control box and its positive identification by the complainant, the stealing was not proved beyond reasonable doubt and as such, the doctrine of recent possession was wrongly invoked to link the appellants with the killing incident. In the circumstances, the search and seizure certificate exhibit P1 is hereby expunged.

That said, is there any remaining proof on the killing incident. As earlier stated, the learned trial Judge is faulted to have relied on such statements which were recorded beyond the prescribed period as stipulated under the provisions of section 50 (1) and (2) of the Criminal Procedure Act [CAP 20 R.E.2022] as hereunder:

"50. -(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-

a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or

causing the person to do any act connected with the investigation of the offence-

(a) While the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

b) for the purpose of-

(i) enabling the person to arrange, or attempt to arrange, for the attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;
The Criminal Procedure Act [CAP. 20 R.E. 2019]

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an interview with the person under restraint or while

the person under restraint is doing an act in connection with the investigation;

(c) while awaiting the arrival of a person referred to in subparagraph (iv) of paragraph

(b); or

(d) while the person under restraint is consulting with a lawyer”.

As none of the circumstances arose to warrant the delayed recording of the cautioned statements of the 1st and 2nd appellant within prescribed period of four hours, since no extension was sought and obtained pursuant to section 51 of the CPA, we agree with both learned counsel, the cautioned statements of the 1st and 2nd appellants were illegally procured, it is inadmissible and deserves to be expunged. See: **JANTA JOSEPH KOMBA AND 3 OTHERS VS REPUBLIC**, Criminal Appeal No 95 of 2006, **JOSEPH MKUMBWA AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 97 of 2007, **DIRECTOR OF PUBLIC PROSECUTIONS VS FESTO EMMANUEL AND ANOTHER**, Criminal Appeal No. 62 of 2017 and **SHABANI HAMISI VS REPUBLIC**, Criminal Appeal No. 146 'A' of 2017 (all unreported). In the premises, the confessional statements of the 1st and 2nd appellants (exhibits P7 and P8) are expunged.

Pertaining to the cautioned statement of the 3rd appellant, it was recorded within prescribed time but retracted at the trial. The question to be answered is if the retracted confession can be acted upon to ground the conviction. It is trite principle that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction and it is always desirable to look for corroboration in support of a confession which has been repudiated or retracted. This was emphasized in the case of **TUWAMOI VS UGANDA** (1967) EA 84 the Court held:

*"The present rule then as applied in East Africa, is regard to regard to 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 the 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 must be true". (See also: **Hemed Abdallah v. Republic** [1995] TLR.*

See also: **SHIHOBE SENI AND ANOTHER VS REPUBLIC** [1992] T.L.R 330 and **ALI SALEHE MSUTU VS REPUBLIC** [1980] T.L.R 1. In the latter case the Court held as follows:

"A repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted".

We shall be accordingly guided by the settled principle which requires a repudiated confession to be corroborated by independent evidence. Whereas the learned counsel urged us not to rely on the uncorroborated repudiated confession, the learned Senior State Attorney the prosecution account that the 3rd appellant sustained injuries after being attacked by the deceased at the scene of crime suffice as corroboration of the repudiated statement. This takes us to re-visiting the evidence adduced at the trial in order to ascertain the place where the 3rd appellant sustained the injuries.

It is on record that, the fateful murder incident was on 3/10/2016 and the prosecution account is to the effect that the 3rd appellant sustained injuries on that day. He was arrested on 5/10/2016 and attended by PW6 on 13/10/2016 who at page 81 of the record of appeal testified that, the appellant had a wound on the head. Upon examining the wound, he gathered that it was sustained more than a week between 8 to 9 days and caused by a sharp object. The 3rd appellant's account is compatible with that of the Doctor PW6. At pages 175-177 he testified among other things as follows:

*"I remember on 5/10/2016 At 23:00 hours in the night at Muzye Village in Kasulu District I was arrested. By that time, I was at the home of my friend namely Stanslaus being asleep. Suddenly I heard people knocking "Fungua". They then broke the door and we thought they were thieves as they did not introduce themselves. We thus tried to revenge against them thinking they were thieves. **In that Saga they injured me on the head.** They then arrested me and my friend Stanslaus. They handcuffed us and took us out where they then introduced themselves as police officers from Kasulu. By that time, I did not know the weapon which they used to assault me..."*

*"I stayed in the lock up to the 11/10/2016 when they took me back to Kasulu. In the vehicle there were other people whom I did not identify. **Up to this time I was yet taken to hospital for the wound I sustained in the course of arrest...**"*

Apparently, the 3rd appellant's account that he was injured by the police at the time of arrest and not by the deceased at the scene of crime was not controverted by the prosecution. Since they opted not to cross examine the 3rd appellant on such a crucial fact, which cast doubt on the prosecution and we have no option but to give the benefit of doubt to the

appellants. In that regard, it was not correct for the learned trial Judge to rely on the repudiated cautioned statement of the 3rd appellant to convict the appellants.

We decline the invitation by the learned Senior State Attorney who urged us to convict the 2nd appellant on the basis of the 3rd appellant's confession statement and the absence of any other corroborating evidence. We are fortified in that regard because in terms of section 33(2) of the Evidence Act [CAP 6 R.E. 2022], a conviction of an accused person shall not be solely based on a confession of a co accused.

Furthermore, besides Malaki in whose room the control box was found, the prosecution did not parade one Godfrey Juma another material witness who led the police in drawing the sketch map. These were indeed material witnesses able to testify on the material facts of the case as to the occurrence of the stealing incident in the course of which the deceased was killed and the retrieval of the control box. However, nothing was said by the prosecution if they were within reach but they were not called without sufficient reason and as such, this court draws an inference adverse to the prosecution. See: **AZIZI ABDALAH VS REPUBLIC** 1991 TLR 71.

In the circumstances, having revisited the entire evidence we are satisfied that there is no credible prosecution account to sustain the

convictions of the appellants because the charge of murder was not proved against the appellants at the required standard. That said, although the deceased was brutally murdered, there is no evidence to connect the appellants with the killing incident. Thus, we allow the appeal, quash the conviction and sentence and order the immediate release of the appellants unless held for other lawful cause.

DATED at **KIGOMA** this 1st day of June, 2023.


S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of May, 2023 in the presence of Mr. Sadiki Aiki for the 1st and 2nd Appellants also holding brief for Mr. Daniel Rwemenyela for the 3rd Appellant and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Edina Makala, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL