

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



(CORAM: MSOFFE, J. A., KILEO, J. A. AND KALEGEYA, J. A.)

CRIMINAL APPEAL NO 23 OF 2006

ALLY RASHIDI @ MNDOLWA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Tanga)**

(Mkwawa, J)

**Dated the 6th Day of December 2005
in
Criminal Sessions Case no 27 of 2003**

JUDGMENT OF THE COURT

2 & 10 July 2007

KILEO, J. A.:

The High Court of Tanzania, sitting at Tanga, found the appellant guilty of the murder of one Athumani s/o Saidi contrary to section 196 of the penal Code and sentenced him to death by hanging. He was aggrieved and has come to this Court on appeal.

At the hearing of the appeal he was represented by Mr. Alfred Akaro, learned advocate. Mr. Oswald Herman, learned State Attorney, represented the respondent Republic.

There is one ground in the memorandum of appeal:

That the learned trial judge erred in fact in convicting the appellant as there was no sufficient evidence to establish the guilt of the appellant beyond all reasonable doubt.

The case for the prosecution revolved around the appellant's confession to the crime, and the appellant's conduct subsequent to the commission of the crime.

There was evidence from Juma Amiri (PW3), an operator of a *pombe* shop at Mziasa Baga village in Lushoto District, that on 31st May 2002, the appellant and the deceased were drinking some local brew known as "*boha*" at his *pombe* shop. They left together at around 8.pm. The following day, the lifeless body of the deceased was found sprawled somewhere near a Primary school with cut wounds on the head. Post mortem report showed that the deceased met his death as a result of excessive bleeding. The manhunt mounted by the police led to the arrest of the appellant. Upon interrogation the appellant admitted to have killed the deceased. He said that he was hired to kill him by one Ali Hamza Mdoe. It is also on record that the appellant led the police to a spot where he had hidden a blood stained *panga* and an overcoat, which was also blood stained. On 2nd June 2002 the appellant made a cautioned statement to PW2, Detective Sergeant Kedmond, confessing to the killing. On the same day he appeared before a justice of the peace, Jones Joseph

Mahendo (PW1) and also confessed to the killing. Both the cautioned statement made to the police and the extra judicial statement made to the justice of the peace were received in evidence without objection. It was at the time when the appellant advanced his defence that he claimed that the confession made to the police and the justice of the peace were not freely given but were secured as a result of torture. The learned trial judge warned himself before he acted on the retracted confession.

Mr. Akaro argued that the case for the prosecution had loopholes in a number of areas, which should have been resolved in favour of his client. In the first place, no weapon was seen in possession of the appellant when he left the *pombe* shop. Mr. Akaro argued that this raised some questions as to where the *panga* alleged to have been used in the killing came from. In the second place, Mr Akaro contended that though the appellant is said to have been hired by Ali Hamza Mdoe to kill the deceased because allegedly the deceased had killed his child, there was no evidence that Ali Hamza Mdoe's child was actually dead. This state of affairs, according to Mr. Akaro, further weakened the prosecution case. Mr. Akaro pointed out a third area, which he thought raised some doubt on the guilt of the appellant. He submitted that the fact that the blood stained *panga* and overcoat were not taken to the chemist to determine whether the blood found there matched that of the deceased raised some doubts as to whether it was the appellant who killed the deceased. As for the cautioned statement recorded by the police, Mr. Akaro submitted that it should not have been taken as having amounted to

a confession as it was in a question and answer format instead of a narrative form.

Mr. Oswald Herman supported the conviction. He submitted that there was sufficient evidence on record establishing the guilt of the appellant. According to the learned State Attorney, the appellant's confession and the fact that he led the police to the place where he had hidden the murder weapon and his blood stained over coat sufficiently established his guilt.

There is no doubt that the appellant was the last person to be seen with the deceased before the deceased met his death. There is evidence, which the trial court found to be credible, that the appellant led the police to a blood stained *panga* and overcoat. PW3 was one of the witnesses who were present when the appellant led the police to the spot, in the bush, where the murder weapon was concealed. The appellant also showed his overcoat, which was bloodstained. According to PW3 the appellant was wearing the overcoat at the *pombe* shop the night prior to the discovery of the deceased body.

As mentioned earlier, Mr. Akaro argued that the fact that the appellant was not seen with a *panga* as he left the *pombe* shop should be found to have cast doubt on the case for the prosecution. We doubt however, whether someone who was intent on committing a crime would have displayed his weapon in the circumstances of the case. We are satisfied, as was the trial judge that there was unshaken evidence that the appellant led the police to the place

where he had hidden the murder weapon and his blood stained overcoat.

It was also Mr. Akaro's contention that the failure by the police to cause an analysis of the blood stained *panga* and overcoat to be carried on in order to ascertain whether the blood there matched the deceased's blood weakened the case for the prosecution. It should be noted however, that the appellant confessed to the killing. This being the case, we do not think that the non- examination, by a government analyst of the bloodstained *panga* and overcoat weakened the case for the prosecution in the circumstances.

Mr. Akaro challenged the trial court's reliance on the cautioned statement on account of the fact that it was in a question and answer format. It is true that the cautioned statement, which was tendered in court, as exhibit P5 appears to have been in a question and answer form. It was in a form of an interview and appears to have been taken under the provisions of section 57 of the Criminal Procedure Act, 1985.

This Court, recently, in the case between **Ramadhani Salum and the Republic – Criminal Appeal No. 5 of 2004** (unreported) discussed the import of statements made under section 57 and those made under section 58 of the CPA. It noted that cautioned statements could be taken under section 58 as well as under section 57 (2) of the CPA, which provides as follows:

"(2) where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes during the interview, either orally or in writing, a confession relating to an offence, the police officer shall make or cause to be made, while the interview is being held or as soon as practicable after the interview is completed, a record in writing setting out-

.....

(d) whether a caution was given to the person before he made the confession and, if so, the terms on which the caution was given, the time when it was given and any other response made by the person to the caution..."

Having measured the above provisions of the law the Court went on to state:

"Caution statements, therefore are not made exclusively under section 58 and exhibit P5 in this case is not any less a caution statement merely because it was taken under section 57 and not section 58. The circumstances in which the two kinds of caution statements are taken are different. The one taken under section 57 may be as a result either of answers to questions asked by the police investigating officer or partly as answers to questions asked and partly volunteered

statements. The statement under section 58 is a result of a wholly volunteered and unsolicited statement by the suspect”.

The cautioned statement that the appellant made to PW2 was partly answers to questions asked and partly volunteered statement. We find the argument that it did not amount to a confession because it was in a question and answer format to lack merit. There is also the appellant's extra judicial statement, exhibit P2. This statement was also retracted. The trial judge in his well-reasoned analysis of the circumstances of the case found that the appellant was a free agent when he made the statements. We have no reason to find otherwise. The complaint that the appellant was tortured before he made the statements was raised for the first time when the appellant was giving his defence. We think that this was an afterthought. Because involuntariness of the statements was not raised as an issue when PW1 and PW2 testified, the question of conducting a trial within a trial did not arise. All the same, we are satisfied that the trial judge correctly found that the retracted confession was sufficiently corroborated by the evidence of conduct of the appellant which showed that he led the police to the spot where he had hidden the murder weapon and the blood stained overcoat. It was rightly observed by the trial judge that these items could only be shown by a person who was involved in hiding or had knowledge of the place they were hidden.

We are satisfied that the appellant's confession, coupled with the fact that he led the police investigators to the spot where he had hidden the incriminating items sufficiently established the case against the appellant. In the event we find his appeal to be devoid of any merit and we hereby dismiss it.

DATED at TANGA this 4th day of July, 2007.

J.H.MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

L.B.KALEGEYA
JUSTICE OF APPEAL

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




(I. P. KITUSI)
DEPUTY REGISTRAR