

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

**(CORAM: LUBUVA, J.A., MBAROUK, J.A., And OTHMAN, J.A.)**

**CRIMINAL APPEAL NO. 209 OF 2007**

**SHIDA MWINUKA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**(Appeal from the decision of the High Court  
of Tanzania at Iringa)**

**(Werema, J.)**

**dated the 4<sup>th</sup> day of April, 2007**

**in**

**Criminal Sessions No. 33 of 2006**

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**JUDGMENT OF THE COURT**

**10 & 14 July 2008**

**LUBUVA, J.A.:**

The High Court (Werema, J.) sitting at Njombe convicted the appellant Shida s/o Mwinuka of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. He was sentenced to death.

The facts as established at the trial were that the deceased, Dumuka Mwinuka, was the father of the appellant, Shida Mwinuka. They lived respectively at Igosi and Ivigo villages within the District

of Njombe. The deceased had two wives, Regina Tulo and Argentina Msigwa whose houses were close to each other at Igosi village. On Sunday, 8<sup>th</sup> October, 2000, Baineli Mwinuka, daughter of the deceased together with her mother, Argentina Msigwa (PW1) had gone to a nearby pombe shop for a local brew popularly known as "ulanzi". The deceased also went to the pombe shop but did not sit together with PW1 and her mother. There were many other people also partaking the local brew.

At about 7.00 p.m., PW1 and her mother left the pombe shop for home. Upon seeing PW1 and his wife, the mother of PW1, leaving the deceased also followed behind. They walked together for sometime until at some point on the way the deceased parted company with PW1 and her mother. PW1 and her mother went to their home thinking that perhaps the deceased had gone to the house of Regina Tulo, the other wife of the deceased.

On the same day, Sunday, 8<sup>th</sup> October, 2000 at about 8.00 p.m., the appellant went to the house where PW2 was staying with the deceased and handed over to PW2 a machete (panga) directing him to keep it. PW2 hid it at the roof of the house. The machete was later retrieved by the police investigating officers (PW3, PW4). It was tendered at the trial as Exh. P2.

The following morning, PW2 informed PW1 and her mother that the deceased was found dead at a pathway near the house of Regina Tulo, the second wife of the deceased. Word reached the Village Authorities and the police.

In the course of investigation, the appellant made a cautioned statement (Exh.P3) to D/Sgt. Philipo (PW4). In the statement the appellant admitted killing the deceased with a machete several times, removing the deceased's genitalia. He cleaned the machete and handed it over to PW2 with instruction to hide it. The appellant also made an extra judicial statement (Exh. P4) before M.A. Abdalla, now



deceased. In the extra judicial statement, he admitted killing the deceased because the deceased had bewitched his child and sister.

At the trial in the High Court, the case against the appellant was based on the evidence of PW1, PW2, PW3, PW4, and the cautioned statement, Exh. P3 and the extra judicial statement Exh. P4. In tendering the cautioned statement, objection was raised on the ground that it was not voluntary. That is that the appellant had retracted it. Consequently, a trial within a trial was held. Following the trial within a trial, the learned trial judge was satisfied that the statement was voluntary. The trial proceeded with the aid of the assessors. In his defence at the trial, the appellant gave a lengthy outline of witchcraft practices surrounding the deceased and the appellant prior to the death of the deceased. That, because of the rumours going the round about the deceased, the appellant got provoked on the fateful night when the appellant met the deceased. He killed the deceased.

The learned trial judge in what seems to us a well reasoned judgment, believed the cautioned statement (Exh. P3) and the extra judicial statement as truthful. He also believed PW1, PW2, PW3 and PW4 as witnesses of truth. Rejecting the defence of provocation, on the basis of this evidence, the appellant was convicted of murder and sentenced to death. Against the decision, this appeal has been preferred.

In this appeal, the appellant had the services of Mr. Kingwe, learned counsel, who also had represented the appellant at the trial. Likewise, the respondent Republic, was represented by Mr. Ntwina, learned Senior State Attorney, who had also appeared at the trial.

In the memorandum of appeal, Mr. Kingwe raised four grounds of complaint. However, at the commencement of hearing the appeal, he opted to withdraw ground four. Therefore, there remained the following three grounds:

1. The learned trial Judge erred in law and fact by holding that the deceased was way laid on the pathway when at the scene there was no blood to that effect.
2. The learned trial Judge erred in law and fact when he admitted the "panga" which was not the one produced to the police.
3. The learned trial Judge erred in law and fact when he based his decision on the cautioned statement and extra-judicial statement without any due regard to the evidence adduced by the prosecution witnesses.

At the hearing of the appeal, Mr. Kingwe also opted to argue these grounds together because according to him, the grounds overlap. First, he dealt with the confessional statements Exh. P3 and Exh. P4. He said while the statements were properly admitted in evidence there was no independent evidence to corroborate the statements. This is because they were retracted, counsel further



submitted. According to Mr. Kingwe, the Post Mortem Examination Report (Exh. P1) which in itself needed corroboration could not be taken to corroborate the caution statement Exh. P3 and the extra judicial statement Exh. P4 as the learned trial judge did. For instance, he said, if, as shown in the Post Mortem Examination Report (Exh. P1) the cause of death was excessive bleeding and yet there was no blood found at the scene of crime, the possibility that the deceased was killed by other people elsewhere could not be ruled out, he said. All the more so, Mr. Kingwe further submitted, as the deceased was widely suspected to be a witch, he had many enemies. In this light, Mr. Kingwe went on in his submission, the appellant may well have admitted killing the deceased when in fact he did not. The appellant may not have known what exactly he had stated in the statements. Prompted by the Court however, Mr. Kingwe finally conceded that the Post Mortem Examination Report (Exh. P1) corroborated the confessional statements.

Mr. Kingwe also raised issues with regard to the machete (panga) Exh. P2. He submitted that the trial judge erred in relying on the evidence based on the machete because the panga produced in court at the trial was not the one which the appellant handed over to PW2. This is so, Mr. Kingwe went on in his submission, because when PW2 was shown Exh. P2 at the trial, he said it was not the one which the appellant gave to him on the night of the incident.

Next, Mr. Kingwe, addressed the Court on the question of malice aforethought. He submitted that from the record, there is evidence that the deceased was generally suspected of witchcraft. In that situation, counsel urged that had the learned trial judge considered this aspect, he would have come to a different conclusion that death was caused without malice aforethought.

Mr. Ntwina, learned Senior State Attorney, strongly resisted the appeal. First, he said although he and Mr. Kingwe, learned Senior State Attorney, and counsel respectively, appeared at the trial, it is



unfortunate that the picture presented in this Court in the submission by Mr. Kingwe is different from that at the trial.

Elaborating, he submitted that at the trial both the cautioned statement Exh.P3 and the extra-judicial statement Exh. P4, were admitted without objection. He urged that what was stated in the cautioned statement was corroborated by the Post Mortem Examination Report, item 20 in the schedule of observations by the doctor who performed the Post Mortem Examination. This aspect, Mr. Ntwina stressed, was lucidly addressed by the learned trial judge.

With regard to the machete (panga) Exh. P2, Mr. Ntwina took the view that the evidence on record clearly shows the sequence of events all the way until it was handed over at the police station. From the caution statement, the appellant had given an account of the weapon he used in killing the deceased by use of a machete. Furthermore, PW2, a brother of the appellant, not only admitted that the appellant gave the machete to him but also led the police (PW3) to the roof of the house from where it was retrieved, Mr. Ntwina

stated. The same machete was handed over to the police for safe custody where it was given police identifying mark. With such chain of events uninterrupted, Mr. Ntwina observed, there is no basis for the claim that Exh. P2 was not the one which was given to PW2.

In any case, Mr. Ntwina maintained, when the appellant was shown Exh. P2 he agreed that it was the same machete which he handed over to PW2. On the other hand, Mr. Ntwina submitted that even if it is accepted that Exh. P2 was not the machete which was handed over to PW2, still the position would not change. On the evidence including the cautioned statement (Exh. P3) the injuries on the deceased were caused by a machete. The medical evidence Exh. P1 shows that the deceased sustained severe cut wounds, the Senior State Attorney emphasized. So, whether Exh. P2 was not the one which was handed over to PW2, the appellant would still be linked with the death of the deceased.

We shall first deal with the complaint that there was no independent evidence to corroborate the confessional statements Exh. P3 and Exh. P4. The reason given by counsel was that the confession was retracted. In dealing with this aspect, sight should not be lost of the fact that at the trial where Mr. Kingwe appeared for the accused, now the appellant, both the caution and the extra judicial statements (Exh. P3 and Exh. P4) were admitted without objection. Even here during the hearing of the appeal, Mr. Kingwe conceded that the statements were properly admitted.

On the basis of the uncontroverted evidence in the cautioned statement (Exh. P3) it is our view that Mr. Ntwina, learned Senior State Attorney is correct in his submission that the statement was corroborated by the Post Mortem Examination Report (Exh. P2). From the record at page 88, part of the cautioned statement reads:

Na kwa hasira niliweza kukata mboo ya  
marehemu na kutupa.



This aspect is reflected in the summary of the Post Mortem Examination Report where it is shown **No private parts**. Similarly, in the schedule of observation, under item 20, it is indicated: **genital organs removed**. This, the learned trial judge addressed in clear terms when he stated:

Further, it is not disputed that the body of the deceased was found with cut wounds of what is referred to as a sharp object. That evidence corroborates the statements in Exh. P3 that the accused slashed the deceased several times on the head and that he, the accused severed the genitals of the deceased. Accordingly, I do hold that the Report of the Post Mortem Examination **(Exh. P1)** corroborates **Exh. P3**.

In this light, we are satisfied that the learned trial judge properly directed himself that the confessional statements Exh. P3 and Exh. P4 were corroborated by the post mortem examination report Exh. P1. We dismiss Mr. Kingwe's complaint in this ground.

The complaint that the machete (panga) Exh. P2 was not the one given to PW2 need not delay us. The witness, PW2, a brother of the appellant, having been found as a witness of truth by the learned trial judge, there is no ground for holding that his (PW2) version regarding the machete was not true. In his evidence he clearly related how the appellant came to the house with the machete with instruction to hide it. PW2 hid it on the roof of the house from where it was retrieved by the police (PW3). It was handed over to the police and was given a police identification number. This is the machete which was tendered in court at the trial as Exh. P2. It is also to be observed at this juncture that it all started with the appellant's statement to the police that he had killed the deceased with a machete (panga) which he had given to PW2. Consequently, in the course of investigation the machete was retrieved with the aid of PW2.

In the circumstances, we are unable to accept Mr. Kingwe's contention that Exh. P2 was not the one the appellant gave to PW2. We can find no reason why the police should have exchanged Exh.

P2 for the machete given to PW2 by the appellant. After all, it is in evidence on the record that at the police station when the appellant was shown Exh. P2 he agreed that it was the one he gave to PW2.

On the other hand, for inexplicable reason, if it is accepted that Exh. P2 was not the one that was handed over to PW2, still we do not think that it would change the position as found by the trial judge. In his confessional statements, unequivocally, the appellant admits killing the deceased with a machete. So, again as stated before, we find no merit in this ground as well.

All in all therefore, taking into account all the circumstances of the case; the details in the confessional statements given by the appellant of the killing, the weapon used and the injuries sustained, the post mortem examination report (Exh. P1) we have no flicker of doubt in our minds that the appellant killed the deceased with the requisite malice aforethought. We agree with Mr. Ntwina, learned Senior State Attorney, that the learned trial judge correctly convicted the appellant.



In the event, the appeal is dismissed in its entirety.

DATED at MBEYA this 14<sup>th</sup> day of July, 2008.

D.Z. LUBUVA  
**JUSTICE OF APPEAL**

M.S. MBAROUK  
**JUSTICE OF APPEAL**

M.C. OTHMAN  
**JUSTICE OF APPEAL**

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

A handwritten signature in blue ink, consisting of several overlapping loops and a long vertical stroke, positioned above the title 'DEPUTY REGISTRAR'.

**DEPUTY REGISTRAR**