

A For the reasons which I have attempted to give, this appeal is dismissed in that the conviction was well founded and the sentence imposed is the minimum under the law.

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KASHINDYE MELI v. REPUBLIC

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COURT OF APPEAL OF TANZANIA AT MWANZA

(Kisanga, Lubuva and Lugakingira, JJ.A.)

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CRIMINAL APPEAL No. 12 OF 1996

(From the decision of the High Court of Tanzania at Tabora, Mackanja, J., dated 20 November 1995, in Criminal Sessions Case No. 64 of 1990)

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Evidence – Extra-judicial statement – Statement made to a Justice of the Peace in the presence of a court messenger and police – Whether statement was true and freely made.

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Evidence – Extra-judicial statement – Uncorroborated extra-judicial statement – Appellant retracts the confession in the extra-judicial statement – Whether court may act on the retracted confession.

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The High Court convicted the appellant of murder contrary to section 196 of the Penal Code, and sentenced him to death. He appealed against conviction and sentence. In the appeal he argued, firstly, that the trial judge erred in convicting him for murder on insufficient evidence and, secondly, that proper procedure was not followed in recording the extra-judicial statement made to the Justice of the Peace. At the trial the appellant had retracted the confession made in the statement given to the Justice of the Peace.

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Held: (i) By the nature of the statement, the extra-judicial statement was true and freely made by the appellant, and it is now settled law that although it is dangerous to act upon a repudiated or retracted confession unless such confession is corroborated,

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the court may still act upon such confession if it is satisfied that the confession could not but be true;

(iii) As the appellant clearly admitted killing the deceased in the extra-judicial statement which was accepted by the Trial Court as truthful, that was sufficient evidence for founding the conviction against the appellant.

Appeal dismissed

Cases referred to:

- 1) *Herman Nyigo v. Republic* [1995] T.L.R. 187
- 2) *Tuwamoi v. Uganda* [1967] EA 84

Statutory provisions referred to:

1. Penal Code Act, section 196

Mr Rutaisire, for the Appellant

Mr Mwampoma, for the Republic

JUDGMENT

(Dated 1 December 2000)

Lubuva, J.A.: The High Court (Mackanja, J.) sitting at Tabora convicted the appellant of the offence of murder contrary to section 196 of the Penal Code. He was sentenced to death. He is appealing to this Court against conviction and sentence.

Briefly stated, it was the prosecution case that the deceased, John Meli, the husband of Nduhile Gatulwa (PW1) who lived at Lamadi, Magu District left for Nzega on 28 October 1988 together with his brother, the appellant, Kashindye Meli. Sometime in November 1988, the appellant returned to Lamadi alone. When asked by PW1 about the deceased, the appellant said that the deceased had remained behind in Nzega and had sent for money for settling some problem. The appellant sold the deceased's six head of cattle for TZS. 65 000 and shortly left for a destination he did not disclose to PW1. Since then

A the appellant did not return to his home at Lamadi in Magu District and the deceased was nowhere to be seen.

B The appellant's conduct raised suspicion that led to his arrest at Bunda in April 1989. He admitted before Ntobi Meli (PW2), his brother, and PW1 to have killed the deceased at Ijanija village in Nzega. Consequently, he was charged with the murder of the deceased. He was convicted and sentenced to death.

C The appellant has appealed to this Court. He is represented by Mr Rutaisire, learned Counsel. On the other hand Mr Mwampoma, learned State Attorney, appeared for the respondent Republic. In the memorandum of appeal three grounds were raised. However, at the commencement of the hearing of the appeal Mr Rutaisire argued
D only two grounds after abandoning the first ground. First, Mr Rutaisire contended that the learned trial judge erred in sustaining the conviction against the appellant for murder on insufficient evidence. Elaborating further he submitted that the case against the appellant is based on
E circumstantial evidence because no one saw the appellant killing the deceased. The only evidence that tends to link the appellant, he said, was the evidence of PW1 and PW2. According to these witnesses, he maintained, the appellant is alleged to have confessed killing the
F deceased.

The confession to PW1 and PW2, Mr Rutaisire went on in his submission, still would not advance the prosecution case any further. In the first place, he said at the time when the alleged confession
G was made to PW1 and PW2, the appellant was in police custody. In that case, he said the confession required independent corroborative evidence which was not available. In the circumstances, the fact that the appellant is alleged to have led the way to the scene of crime or
H that he sold cattle to raise TZS. 65 000 would be of no avail. Such evidence would not serve as independent corroborative evidence, Mr Rutaisire urged. Finally, Mr Rutaisire strongly discredited the extra-judicial statement of the appellant to PW4 the Justice of the
I Peace. The reason he contended was that proper procedure was not followed in recording the confessional statement.

We wish to deal first with the confession by the appellant to the witnesses PW1, PW2 and Detective Corporal (PW3). The learned trial judge found these as witnesses of truth. Being the Trial Court and having had the advantage of seeing the witnesses, we have no basis for doubting the credibility of these witnesses at the appellate stage. Even then it is trite principle that independent corroborative evidence is required to support the evidence of PW1, PW2 and PW3. Mr Mwampoma, learned State Attorney strongly urged that the appellant's conduct in raising TZS.65 000 by selling cattle and leading PW2 and PW3 to the scene of crime provided corroboration. With respect, we think the learned State Attorney is not correct.

It is common ground that at the time the appellant made the confession to PW1, PW2 and PW3, he was in custody. He had not admitted commission of the offence prior to his arrest and being placed under custody. It is to be observed that at the very outset when the cautioned statement was taken the appellant did not admit killing the deceased. At any rate, the cautioned statement was not tendered at the trial. Ordinarily, one would expect that if the appellant had actually admitted killing the deceased voluntarily, he would make some indication of the confession from the very start. For this reason, it is highly doubtful that the appellant after having been in police custody, his purported showing of the scene of crime and raising of the money was independently free. The possibility that he did so in order to avoid torture cannot be discounted. In the circumstances, we agree with Mr Rutaisire that the appellant's confession to PW1 and PW2 was not supported by independent corroborative evidence.

Another important aspect of the evidence against the appellant pertains to the extra-judicial statement exhibit page 1. Mr Rutaisire strongly criticized the procedure followed in taking the *extra-judicial* statement. According to him, Hilda Shija (PW4) the Primary Court Magistrate, as a Justice of the Peace did not comply with the formal procedure required in taking the statement. For instance, he said, the appellant made the confessional statement, Exhibit P1 in the presence of the court messenger and someone else. For this reason,

A he insisted, the extra-judicial statement should therefore not be relied upon in convicting the appellant. It was not free and voluntary, he concluded. Countering this submission, Mr Mwampoma, learned State Attorney submitted that the extra-judicial statement was taken in
B due compliance with the procedure required. It was therefore free and voluntary, he emphasized.

Whether the Primary Court Magistrate (PW4) Hilda Shija followed the proper procedure required in taking the extra-judicial statement
C we need not labour much. From the record, page 25 of the typed script, the procedure followed is clearly shown. The questions asked to the appellant and his replies thereto indicate that the appellant was a free agent. What is more, the appellant was ably represented
D at the trial by counsel Mr Mahuna. There is no indication in the record of any objection against the admission of the statement exhibit page 1 on grounds of any irregularity. Again the complaint by Mr Rutaisire, learned counsel that the statement to PW4 was made in
E the presence of the court messenger and another person is not supported by the record. Worst still, at the conclusion of the evidence in chief by Hilda Shida (PW4), Justice of the Peace there was no cross examination by counsel for the appellant on any unsatisfactory aspect of the extra-judicial statement or the procedure followed in taking the statement.
F At this stage on appeal, Mr Rutaisire cannot therefore be heard to challenge the voluntary nature of the statement. As no doubt Mr Rutaisire is aware, at the stage when PW4 was giving evidence, if objection was raised against the admissibility of exhibit page 1, a trial within
G a trial could be held in order to determine if it was freely made. That was not done. In the circumstance, we are satisfied that the extra-judicial statement exhibit page 1 was freely and voluntarily made by the appellant.

H At the trial, the appellant denied having traveled to Ijanija village in Nzega District with the deceased. He also retracted the confessional statement he had made to Hilda Shija (PW4) the Justice of Peace.
I He maintained that because of torture by the police he admitted in the statement that he had killed the deceased. He further said that as

a policeman had remained with the Justice of Peace together with the court messenger, he feared telling PW4 of the torture. The learned judge rejected the defence and accepted the confessional statement exhibit page 1 as voluntary and true.

Like the learned trial judge, we are firmly of the view that the appellant's extra-judicial statement (Exhibit page 1) was truthful. First, we can see no reason at all why the appellant could not tell PW4 of any torture by the police if he had been tortured. Secondly, and more importantly in the statement the details pertaining to the sequence of events leading to the death of the deceased are such that no one else other than a participant to the murder could do so. In minute details the statement outlined what happened from the time the appellant set out on the journey to Ijanija Nzega with the deceased, the sale of cattle to realize the money TZS. 65 000, the bargain with the hired killers of the deceased, how the deceased was killed; wrapping up the body in a sack and throwing it in a bush near a river. Such details we think can only be forthcoming from no other person than the one who witnessed or participated in the killing of the deceased. Here, the appellant admits hiring the killers of the deceased and being present at the killing. It is inconceivable that the appellant made the confession to the Justice of Peace because of torture and presence of a policeman when he made the statement. If that was so, how did he get all the details leading to the deceased's death. By the nature of the statement, we are satisfied that the extra-judicial statement was true and freely made by the appellant. The trial judge had, and we think correctly so found PW4, the Justice of Peace, a truthful witness.

As just observed in this case, contrary to the finding of the learned trial judge, there was no independent corroborative evidence to the confession of the appellant, the pertinent question is whether the conviction could be upheld solely on the uncorroborated extra-judicial statement. At the trial, the appellant retracted the confession. It is now settled law that although it is dangerous to act upon repudiated or retracted confession unless such confession is corroborated, the

- A court may act upon such confession if it is satisfied that the confession could not but be true. In the case of *Herman Nyigo v. Republic* (1), the appellant was convicted of murder on the basis of a retracted confession, the court in dismissing the appeal, reiterated this principle.
- B Much earlier, the Court of Appeal for East Africa had held similar view in the case of *Tuwamoi v. Uganda* (2) when it said that:

... a Trial Court should accept any confession which has been retracted with caution and must before founding a conviction on such confession be fully satisfied in all the circumstances of the case that the confession is true.

- C Applying this principle to the present case, it is clear to us that the learned trial judge was aware of the danger of founding a conviction on uncorroborated evidence. He looked for corroboration in the evidence of PW1 and PW2, PW3 and the appellant's sale of cattle which as already stated was in our view not independent corroborative evidence. He was also satisfied that the confessional statement of the appellant to PW4, the Justice of the Peace could not but be true.
- E This, we think, the learned judge was correct. The appellant having clearly admitted in the extra-judicial statement killing the deceased which was accepted by the Trial Court as truthful, we are satisfied that, that was sufficient evidence for founding the conviction against the appellant. All in all, and for the foregoing reasons, the appeal is dismissed in its entirety.

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MWITA SIBORA v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT MWANZA

(Kisanga, Lubuva and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 49 OF 1996

(From the Judgment and Order of the High Court of Tanzania at Mwanza, Chipata, J., in Criminal Appeal No. 22 of 1996)

Criminal Law – Robbery with violence – Appellant found in possession of the robbed bicycle ten days after the date of the robbery – Whether appellant was properly convicted – Section 286 of the Penal Code.

Criminal Practice and Procedure – Sentencing – Minimum sentences for robbery and for armed robbery – Section 5(b) of the Minimum Sentences Act as amended by Acts Number 10 of 1989 and 6 of 1994.

The appellant was convicted of the offence of robbery with violence and sentenced to 30 years imprisonment with 12 strokes of corporal punishment. His appeal to the High Court was dismissed but the sentence of imprisonment was reduced to 20 years. The evidence was that the complainant was robbed of his "Rolly" sports bicycle. Under the seat of the bicycle were the letters "HM", being initials of the complainant's name, Hussein Mtongori. The complainant was beaten to unconsciousness in the course of the robbery. Ten days later, the appellant was found in possession of the bicycle and was charged and convicted accordingly.

Held: (i) There was nothing on the record of evidence or the grounds of appeal upon which to fault the concurrent findings of the courts below.

(ii) The aspect of sentencing, however, attracted comment. The reduction of the sentence was made *per incuriam*; until 1994 section 5(b) of the Minimum Sentences Act provided for 15 years imprisonment for robbery and 30 years for armed robbery, but in 1994 the Act was further amended to provide for a minimum sentence of 15 years imprisonment for simple robbery and a minimum of 30 years imprisonment for armed robbery.