IN THE COURT OF APPELA OF TANZANIA
AT ARUSHA
(CORAM: KAJI, J.A., KILEO, J.A. AND KIMARO, J.A.)
(Appeal from the Conviction of the High Court of Tanzania at Babati)
(Sheikh, J)
Dated 23rd day of June, 2005
In
HC Criminal Sessions Case No. 33 of 2001

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JUDGMENT OF THE COURT

14th 23rd April 2008
KAJI, J.A.

Athumani Jambi Tupa and Mwanaidi Rashid Mtula, hereinafter to be referred to as the first and second appellants respectively, were jointly charged with and convicted of murder contrary to section 196 of the penal code Cap 16. They were each sentenced to suffer death by hanging.

The facts which gave rise to this case may briefly be stated as follows:
One Rashid Monko was the husband of the 2nd appellant. At the material time their matrimonial life was not a happy one. It was alleged they used to quarrel from time to time. Haji Rashid (PW1) was their son.

Around 1.4.1998 Rashid Monko disappeared from his home. PW1 claimed that the 2nd appellant told him he had gone on safari. A month later Radhid Monko was still missing. PW1 asked the 2nd appellant why he had not yet returned home after so long. PW1 alleged that the 2nd appellant told him that he had been killed and that she was the author of the death together with the 1st appellant and others whose names she mentioned. The appellants and others who were alleged to have been mentioned by the 2nd appellant were arrested. Investigation led to the discovery of a skull, a jaw, some bones and some clothes which were alleged to be of Rashid Monko. The appellants were taken before a Justice of the Peace Hassan Gwandi (PW4) who recorded their statements which, according to the prosecution and the learned trial judge, were confessions. Acting on these statements and on the evidence of PW1 the learned trial judge convicted the appellants and sentenced them as above. The appellants were aggrieved by the decision and protested their innocence in this Court., they referred 3 grounds of appeal through Maruma and Company Advocates which read as follows:

1. The trial judge erred to convict the appellants despite the failure by the prosecution to prove that one Rashid Monko is in fact dead.

2. The trial judge erred to convict the appellants without warning herself of the danger of acting on the unreliable evidence of PW1 and/or uncorroborated evidence of the extra judicial statements.

3. The trial judge erred for acting on the extra judicial statements which were obtained illegally.

The 1st and 2nd grounds were ably argued by Mr. C J Maruma, learned counsel, and the 3rd ground by Ms C., Kimale who jointly represented the appellants at the hearing of the appeal. The respondent republic was represented by Mr. Prosper Rwegerera, learned State Attorney. Mr. Maruma made a very elaborate submission. Arguing ground No. 1 on whether Rashid Monko is dead, the learned counsel contended that there was no credible evidence that Rashid Monko was dead. The learned advocate pointed out that the skull, jaw, bones and clothes alleged to be of Rashid Monko were not tendered in Court at exhibit and that there was no chemist report showing that they were human remains and that they were of Rashid Monko. Mr. Maruma asserted that failure to produce them as exhibit should have made the Court draw an adverse inference on the prosecution. The learned advocate observed that in the absence of a chemist report it was dangerous for the trial judge to hold that Rashid Monko was dead.

Arguing ground No. 2 on whether it was safe to convict the appellants on the evidence of PW1 and/or uncorroborated evidence of the extra-judicial statements, Mr. Msaruma asserted that the said extra-0judicial statements were not confessions in that in the said statements the 1st appellant denied to have been involved in the offence charged, and the 2nd appellant exculpated herself and incriminated other suspects and further that, they were retracted/repudiated and were not corroborated by competent evidence as required by law. The learned advocate contended further that PW1 was not a reliable witness due to the fact that he had some grudge against the 2nd appellant allegedly for fabricating a case of bhang against his father, the alleged deceased. The learned counsel further observed that even Dafi Monko (PW2), the elder brother of the alleged deceased, was also not a reliable witness because he hated the 2nd appellant, his sister-in-law, for allegedly being a bad woman, a prostitute.

In elaboration of ground No. 3 that the trial judge erred for acting on the extra-judicial statements which were obtained illegally, Ms Kimale, learned advocate, contended that the extra-judicial statements exhibit P4 and P3 were recorded outside the permitted period of 4 hours and an extra 8 hours as prescribed by sections 50 and 51 of the Criminal procedure Act Cap. 20. The learned counsel asserted that, since they were illegally recorded, they had no evidential value in terms of section 169 of the above Act and should not have been acted upon.

In response Mr. prosper Rwegerera, learned state Attorney, did not support the conviction mainly for the reasons submitted by Mr.. Maruma and Ms. Kimale. The learned State Attorney conceded that there was no conclusive evidence that Rashid Monko was really dead and that the remains alleged to have been found were humans and that they were of Rashid Monko. The learned state Attorney also conceded that PW1 was not a reliable witness and that most of his testimony was based on what he said he was told by the 2nd appellant which was hearsay requiring corroboration which was lacking in the instant case. Mr. Prosper further conceded that the extra-judicial statements were illegally recorded outside the prescribed period and that the exceptions under section 169 were not applicable since there were no special circumstances.

We have carefully considered the oral submissions by the learned counsel and the lelarned State Attorney.

The appellants were charged with the murder of Rashid Monko. It was the duty of the prosecution to prove beyond all reasonable doubt that:-

(1) Rashid Monko was really dead and that he died an unnatural death.

(2) The appellants caused his death (*the death of Rashid Monko).

(3) The appellants acted unlawfully and with malice aforethought.

In the instant case there was no conclusive evidence that Rashid Monko was really dead and that it was the appellants who caused his death unlawfully with malice aforethought. The skull, jaw and bones alleged to have been found were not confirmed by any scientific method that they were human and that they were those of Rashidi Monko. According to the 2nd appellant, the alleged deceased, who was her husband had some teeth missing from his jaw unlike the jaw which was found which had all the teeth intact. Definitely she knew him better than any body else. She further stated that the skull was very small resembling that of a monkey. In the absence of a chemist report it cannot be said with certainty that those remains were human and that they were of Rashid Monko. A mere allegation by laymen was not enough. In the case of **Katabe Kachochoba v R** (1986) TLR 170, the appellant Katabe was convicted of murder on purely circumstantial evidence. The appellant was employed by one Ali Malela to gather honey in the forest. The appellant went with Ali Malela into the forest to collect honey. There after Ali Malela was not seen. A search which was mounted discovered burnt remains which were thought to be those of Ali Malela. No scientific test was carried out to establish that he remains were those of Ali Malela. The trial court convicted the appellant. On appeal this Court held as

follows:

> We are not prepared to accept a layman's view that the kidney and heard and part of the skull were human remains. The Republic had not proved that the remains found were human remains and that they were the remains of Ali Malela.

In the instant case we adopt a similar view and hold that the Republic had not proved that the remains found were human remains and that they were the remains of Rashid Monko.

With this piece of evidence expunged, which evidence then established the death of Rashid Monko? In our view there is none. PW1's evidence on this is hearsay as he alleged he was told so by his mother, the 2nd appellant. The 2nd appellant has denied strongly against this allegation. The evidence of PW1 required corroboration on this.

Was there any evidence to corroborate this? In our view there was none. The alleged extra-judicial statements which would have rendered corroboration were not confessions for the reasons stated. Therefore the hearsay evidence of PW1 remained uncorroborated and could not have been acted upon.

Apart from the fact that the statements were not confessions which could be acted upon, they were also illegally obtained. The 1st appellant was arrested on 5.5.1998 at 11 pm. He was remanded in a village lock up till on 10.5.1998 at 1.45 pm when his statement was recorded. The 2nd appellant was arrested on 5..5.1998 at 5.am. Her statement was recorded on 10.5.1998 at 6 pm. It is obvious that they were recorded outside the period of 4 hours and an extra 8 hours after arrest as provided for by section 50 and 51 of the criminal Procedure Act and could not be acted upon in terms of section169 since there is nothing suggesting that the exceptions prescribed thereat existed. See the cases of **Tumain Mollel @ John walker,** Criminal, Appeal No. 40 of 1999 (unreported) and **Janta Joseph Komba & 3 others v R,** Criminal Appeal No. 95 of 2005 (unreported).

For the foregoing reasons we are of the view that the prosecution did not prove the guilt of the appellants beyond all reasonable doubt as required by law and the appellants should not have been convicted.

As observed earlier on the learned state attorney for the Republic did not support the conviction, and in our view rightly so.

In the event, and for the reasons stated above, we allow the appeal, quash the

conviction and set aside the sentence of death by hanging. The appellants are to be released from prison forthwith unless lawfully held.

DATED at ARUSHA this 18th day of April, 2008.

WS.N. KAJI
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

F.L.K. WAMBALI
SENIOR DEPUTY REGISTRAR