IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

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

CRIMINAL APPEAL NO I3I OF 2005

1. ZUBERI ABDALLAH]
2. SALIMU SEIF] ..... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Longway, J.)

dated the 8th day of July, 2005
in
Criminal Sessions Case No. 5 of 2000

JUDGMENT OF THE COURT

27 June & 10 July 2007

KILEO, J.A.:

The appellants, Zuberi Abdallah and Salimu Seif were convicted by the High Court, sitting at Tanga in Criminal Sessions Case No. 5 of 2000 (Longway, J), of the charge of murder contrary to section 196 of the Penal Code. They were found to have murdered one Daudi Thomas Shenkala and were sentenced to suffer death by hanging. They were dissatisfied

with the decision of the High Court and they preferred this appeal. Mr. Sangawe and Mr. Akaro, learned advocates represented the appellants at the hearing of the appeal. Joint memoranda of appeal were filed, the first one by the appellants themselves and the second one by the two learned counsel. Mr. Oswald Herman, learned State Attorney, represented the respondent Republic.

There are two main grounds of appeal:

> **One,** That the learned trial judge erred in fact in holding that the head of the deceased was found in possession of the appellants and,
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> **Two,** that the learned trial judge erred in law and fact in convicting the appellants as there was not sufficient evidence for arriving at a conviction.

This is a bizarre as well as a very tragic case. According to the evidence of one William Lukindo who testified as PW1 at the trial, on 06/09/1998 the two appellants who were looking for someone to purchase human skin from them approached him. Though he was surprised, PW1 decided to show interest and arrangements were made to conclude the deal. A date

was set. In the meantime, PW1 reported the conversation to the police. The appellants did not appear on the first date that was set. They appeared on 12/12/1999 but on this day they said they needed fare and a box. PW1 gave them 5,200/= to cover the cost for the fare and the box. They were to return later on the same day at 11 p.m. PW1 immediately informed the police of the arrangement. A trap was laid but the appellants did not appear on this day, instead they appeared in the small hours of 21/12/1999. The two came with a box that was wrapped up. They said they wanted 6,000,000/= for the merchandize. PW1 told them that the buyer had come on the previous planned day but had to leave after they failed to turn up. PW1 convinced the two to accompany him to Korogwe to meet the 'buyer'. At Korogwe PW1 left the appellants in a hotel called **Kadadaa** telling them he was going to fetch the **'buyer'** whom he had christened **'Shehe'** but who was actually the OCD, one SSP Henry Salewi. The OCD testified as PW2 at the trial.

On being contacted PW2 effected the arrest of the appellants and proceeded with them to the house of PW1. The appellants upon being questioned by PW2 said that the parcel they had brought contained a human head. The box was opened and indeed a human head, still dripping with blood was seen. Both PW1 and PW2 were shocked for obvious reasons, and probably more so because they had been expecting if anything, to see human skin. At first the appellants did not say whose head it was, but later they said it was Daudi's head. When asked where the rest of the body was they said that it was in a shed in Swaha Majengo village. The appellants thereafter led the police entourage, which included Assistant Inspector of Police Emmanuel Kalinga (PW3) to a farm belonging to one Mwalimu Elias. There was a shed in the farm where a headless body was found. The head that was in the box, which was brought to PW1's house, fit the headless body. PW5, Jumanne Ramadhani identified the body as that of his cousin, Daudi Thomas. PW3 took the cautioned statement of the 1st appellant, Zuberi Abdallah who confessed to the

commission of the crime. The defence did not object to the production of the statement when it was tendered in evidence.

It was against the above set of circumstances that both appellants were found to have murdered Daudi Thomas Shenkala. The appellants denied involvement in the murder and the 1st appellant denied to have made any cautioned statement to the police.

Mr. Sangawe, learned counsel for the 1st appellant argued in respect of the first ground that the trial judge erred in finding that the head of the deceased was found in possession of the appellants. He pointed out that the head was found in the house of PW1 while the appellants were arrested at **Kadadaa** Hotel, which is at the Bus Stop.

Conviction was also challenged for being based on insufficient evidence. The learned counsel submitted that the evidence on record, which was circumstancial, did not lead irresistibly to the guilt of the appellants. He also argued that the chain of circumstances was broken in several areas; **firstly,**

there was no evidence of possession by the appellants, of the deceased's head, **secondly,** the appellants were not found at the house of PW1, **thirdly,** the deceased's cousin, Jumanne did not give evidence that it was the appellants who led the entourage to the headless body of Daudi Thomas, and **fourthly,** that what was found in the box was a human head and not human skin, which was the merchandize that PW1 had said was being sold by the appellants.

As for the cautioned statement, Mr. Sangawe submitted that it was not enough for the trial judge to say that the retracted confession was belated as long as the appellant denied having made it.

Mr. Akaro, learned counsel for the second appellant argued that the failure by the prosecution to call Anania whom PW1 said he had asked to escort him to Magunga and also failure to call PW1's wife weakened the case for the prosecution. He referred to the case between **R and Uberle (1938) 5 E.A.C.A. 58** in support of his argument.

On the cautioned statement of the 1st appellant, he argued that since it had been retracted, it ought to have been treated with a lot of caution. He drew support on this argument from the case between **Shihobe Seni & Another and R (1992) TLR 330.** In that case it was held that where confessions are repudiated, then there is a need for ascertaining their reliability and/or seek corroboration.

The learned counsel also argued that since there were several civilian witnesses at the house of PW1, the non-calling of any of those witnesses rendered the case for the prosecution very weak. Mr. Akaro submitted further that there was no unshakable evidence showing that the appellants led the police to the headless body of the deceased.

Mr. Oswald, learned State Attorney for the respondent Republic, supported conviction.

On the issue of possession, by the appellants, of the deceased's head he submitted that circumstances of the case established that there was constructive possession. He pointed out that it

was only the appellants who knew the contents of the box, and the only ones who knew the identity of the deceased. The learned State Attorney cited the case between **Moses Charles Deo and R (1987) TLR 134** to elaborate his contention.

Mr. Oswald responding to the ground on sufficiency of evidence argued that the circumstancial evidence on record pointed irresistibly to the guilt of the appellants.

It is true that the case against the appellants is centred on circumstancial evidence. No one witnessed them kill the deceased Daudi Thomas Shenkala. The question is, did the circumstancial evidence on record lead, irresistibly to the guilt of the appellants? Coupled with this is also the question whether the witnesses for the prosecution were properly found to be credible.

We have given serious consideration to the matter before us. Both assessors who sat with the trial judge believed the prosecution witnesses. The trial judge who had opportunity to observe the witnesses at the witness box found the witnesses

worthy to be believed. We must also say that there is nothing on record to make us think that they could not have been credible.

Now, did their evidence lead irresistibly to the guilt of the appellants?

PW1 explained how the appellants who told him that they were looking for someone to buy human skin from them approached him. He narrated the events from the first day he was first approached to the day the appellants came to his house with a box that later turned out to contain a human head. The appellants constructively, were the ones who possessed the human head. The case between **Moses Charles Deo & R,** which was cited by Mr. Oswald, defines what amounts to possession. In that case it was held:-

> **"For a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of their presence and that he exercised control over them, or that the**

goods came, albeit in his absence, at his invitation and arrangement"

The circumstances of this case squarely fall within the above definition. The appellants were aware of the presence of the human head in the box that they brought to the house of PW1. They exercised control over that head. In actual fact they were trading on it.

There is also overwhelming evidence to show that the appellants led the police to the headless body of the deceased at Mswaha Majengo village. PW1 was not part of the entourage.

In the light of the above circumstances we are satisfied that the chain of events was nowhere broken. The fact of a human head being found in the box brought by appellants instead of human skin, which was the subject of negotiation, does not constitute a break in the link.

On the cautioned statement we are satisfied that the learned trial judge properly found that it was a true explanation of the

issues in it. She addressed the matter very well and we wish to reproduce what she stated;

> **"The accuseds deny involvement in their defence. The 1st accused particularly, claiming that the Exhibit P2 was not voluntarily made. As earlier noted, this document was processed by PW.III systematically and had no resistance when it was sought to be produced. This cautioned statement as I have had the opportunity to re-read it and further to what I have found earlier, this statement can only have been made by the 1st accused because he expresses the matters there with such close detail, that an impositer would not. The explanation of the project they went to see PW1 for and how it was executed is on paper. I agree in this instance that the retraction/reputation is belated and otherwise on the reliance of PW.III, I hold that Exhibit P2 is a true explanation of the issues in it. I make this holding on application of the decision of Shihobe Seni**

and Another v. Republic (1992) TLR 330 – further referring to Tuwamoi v. Uganda (1967) E.A. 84."

We are also satisfied that even if the cautioned statement of the 1st appellant were to be disregarded, the other independent evidence available is so overwhelming that there is no way this Court can fault the decision of the trial judge.

In the circumstances we find no merit in this appeal and we accordingly dismiss it.

DATED at TANGA this 3rd 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.

THE COURT OF APPEAL OF TANZANIA

(I. P. KITUSI)
DEPUTY REGISTRAR