IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 465 OF 2022

MAJALIWA ERNEST.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Mlacha, J.)

dated the 5th day of July, 2022

in

Criminal Sessions Case No. 12 of 2022

.....

JUDGMENT OF THE COURT

23rd April & 7th May, 2024

GALEBA, J.A.:

In this appeal, Majaliwa Ernest, the appellant, is the father of the late Sara Majaliwa, the deceased. It was alleged before the High Court of Tanzania sitting at Kibondo, in Criminal Sessions Case No. 12 of 2022, that the appellant killed the deceased in the night of 28th August, 2021, at Kakonko Village within Kakonko District in Kigoma Region. The appellant was charged, found guilty and having been convicted of the murder, he was sentenced to suffer death by hanging. Being aggrieved, he lodged this appeal to contest the decision of the High Court.

The facts material to the above case are that; the appellant was married to Elizabeth John (PW1) in 2008. Their marriage was blessed with four issues, Geofrey Majaliwa, Julius Majaliwa, Jackson Majaliwa and the deceased. Unfortunately, right from infancy, the deceased displayed all signs of abnormality. At the age of 8, the child could not sit, talk or move. Being even unable to eat food on her own, the deceased had to be fed by someone, on all occasions. In addition, the deceased had to be fed with a diet containing special supplements, because of her health complications.

According to the prosecution, the appellant mistreated the deceased and would not assist PW1, her mother, in nursing their child. It was only PW1 who was taking care of the disabled child, by using resources from her relatives. This state of affairs led to a serious misunderstanding between PW1 and the appellant, such that, on 8th August, 2021, PW1 left her matrimonial home and relocated to Faustina Said's (PW2's) house, her mother, to escape mistreatment of the deceased from the appellant. The distance from PW1's matrimonial home to her mother's house was about 15 paces. She had moved to PW2 with the deceased and Jackson.

Early in the morning on 28th August, 2021, PW1 went to Mtendele Hospital to look for food items that were necessary for preparing the deceased's special meals. PW1 did not manage to be back till late at night on that day. When she got back, she found the door to PW2's house loosely closed without being bolted or firmly locked from inside, such that she just opened and entered in the room where her children were sleeping. She did not see the deceased, but thought that she had slept with her grandmother, PW2. With that unconfirmed assumption, she just slept. Nonetheless, PW1 learned the next morning that the deceased had not slept with PW2, and was nowhere to be seen. She called the appellant to find out, if he could have known the whereabouts of the deceased, but he denied to know anything about the missing child. On 29th August, 2021, she reported the incident at Kakonko Police Station, and that remained the status until 1st September, 2021.

On the latter date, Mtonda Andrea Bagae (PW3), when grazing his goats in Kamgote valley, noticed a swarm of flies covering the grasses and hovering over a particular spot in the bush. On getting closer, he saw a dead body of a girl and reported the matter at Kakonko Police Station. Then, No. E. 9284 D/SSGT Stanley (PW4), in company of PW5, Dr. Prosper Paul Manega (PW6) and a few civilians, proceeded to the

scene of crime and recovered the body of the deceased. PW6 examined the dead body and composed a Report on Postmortem Examination (Exhibit P3), in which he confirmed the cause of death to be a condition called *asphyxia* in medicine, which is deprivation of oxygen leading to unconsciousness or death. To this point, it was clear that the missing girl had fallen prey of a merciless murderer, who had taken away her life. Following this confirmation, PW5 interrogated the appellant who was already in police custody since 29th August, 2021, and recorded his cautioned statement (exhibit P2). According to PW5, the appellant admitted to have killed the deceased.

In his defence, the appellant stated that in the evening of 28th August, 2021, he went to PW2's house, in an attempt to mend relations with his wife. His brother-in-law, Mr. Ibrahim and his mother-in-law, PW2 told him to come with his parents. On the same day, he notified his parents on the need to attend the reconciliation meeting, and at 20:30 hours he went to bed. The next morning on 29th August, 2021, he went to PW2's house in company of his father Mr. Samwel, with an intention of holding a reconciliation meeting. In attendance, he testified, were also Mr. John, Mr. Ibrahim, Mr. Silali Galus, Ms. Fabiana Danstan and PW1. However, PW1 refused to speak without knowing where exactly

was the deceased. The appellant testified further that; it was later resolved that they all go to report the incident of the missing child to the police. He stated that, at the police, when PW1 was inside being questioned, he remained outside but after a while, a certain policeman appeared, arrested him and locked him up in custody. As for the cautioned statement, he did not only deny it, but also, he stated that he saw PW5 who recorded the statement, for the first time in court. In summary, the appellant denied involvement in the murder of the deceased. Nonetheless, upon a full trial, as indicated above, the High Court convicted the appellant and sentenced him as shown earlier.

The appellant was aggrieved by that decision, hence the present appeal. The appeal was initially based on 5 grounds, but at the hearing, the fourth ground was abandoned, thereby leaving it predicated on four grounds, namely; **one,** that the prosecution case was not proved beyond reasonable doubt; **two**, that the circumstantial evidence relied upon to convict the appellant was not watertight as required by law. **Three,** that in receiving the evidence of PW1, the trial court did not comply with the provisions of section 130 (1) and (3) of the Evidence Act, and; **four**, that the cautioned statement contained material falsehood. In addition to the above grounds, at the hearing, we required

both counsel to address us on the legality or otherwise of the cautioned statement, which was recorded on 1st September, 2021, while the appellant had been detained at the police from 29th August, 2021.

At the hearing of this appeal, the appellant had the services of Mr. Sadiki Aliki, learned advocate, whereas the respondent Republic was represented by Mr. Shabani Juma Masanja, learned Senior State Attorney, assisted by Mses. Edna Jackson Makala and Naomi Joseph Mollel, both learned State Attorneys.

Mr. Aliki started with the 2nd ground of appeal, complaining that circumstantial evidence was not watertight. He challenged the prosecution that because PW1 stated that Geofrey Majaliwa saw the appellant taking away the deceased, then such a witness was material and was supposed to be called. He contended that as there are no reasons why he was not called, the High Court was duty bound to draw an adverse inference against the case of the prosecution. He thus prayed that the 2nd ground of appeal be allowed.

In reply, Mr. Masanja was in agreement with Mr. Aliki, that the circumstantial evidence was not watertight, which means that, the trial court was wrong to have convicted the appellant based on such

evidence. However, he submitted that, the appellant was not only convicted based on such evidence, but also his own admission of guilt in the cautioned statement, exhibit P2. He contended that what is contained in exhibit P2, was corroborated by the evidence of PW3 and PW6, the medical doctor who testified that the deceased died of suffocation. According to Mr. Masanja, even without credible circumstantial evidence, as was the case, the cautioned statement was enough to found a conviction.

The law on the subject of circumstantial evidence was summarized in the case of **Bahati Makeja v. R,** Criminal Appeal No. 118 of 2006 (unreported), where this Court stated that; **first**, the facts upon which guilty is to be affirmed, must be firmly established beyond reasonable doubt; **two**, the evidence should unerringly be pointing towards the guilt of the accused; **three**, all the pieces of evidence, should form a chain leading to only one conclusion that the crime was committed by the accused and no one else, and; **four**, the evidence must be incapable of any explanation other than that of the guilt of the accused.

Thus, the issue for our consideration, is whether we are satisfied that the evidence tendered by the prosecution did not pass the above tests as submitted jointly by both learned counsel.

In this case, PW1 during cross-examination testified that her son, one Geofrey Majaliwa informed her that the appellant is the person who took away the deceased, but the former told him not to disclose such information to any third party. The said PW1's son, was not called as a witness although at pages 13 and 22 of the record of appeal, the said Geofrey Majaliwa was listed as a prospective witness during committal proceedings and preliminary hearing, respectively. Nonetheless, the witness was not called for no apparent reason. In our view, had Geofrey Majaliwa been called as a witness, we would have known for certain if the person who took away the deceased girl was the appellant or not. At page 83 of the record of appeal, the trial court observed that the children, including Geofrey did not come to testify because, the accused person was their father. With respect, that position is not supported by law, at least none was cited in the judgment of the High Court. As far as we are aware, there is no law in place which states that a child cannot give evidence to incriminate his parent. Thus, we are satisfied that the failure to call the said Geofrey Majaliwa, left open for a speculation as to who might have taken the deceased from the house of PW2. In our view, the trial court was duty bound, in terms of this Court's decision in **Wambura Marwa Wambura v. R**, Criminal Appeal No. 115 of 2019

(unreported), to draw an adverse inference against the prosecution on this aspect, for Geofrey Majaliwa was a material witness.

The other point in respect of which we agree with both learned counsel was the fact that the appellant went to the house of PW2, three times in the evening of 28th August, 2021, and that he hated the deceased, are not sufficient circumstances, upon which the trial court would have convicted him based on circumstantial evidence.

Lastly, at pages 30 and 31 of the record of appeal, PW2 stated that the appellant had gone to her place to seek reconciliation with his wife (PW1), and that after he left, she closed the doors and slept. This piece of evidence is not consistent with the appellant's guilt. **Firstly**, his motive seems to have been to seek reconciliation with his wife. **Secondly**, if the doors were closed by PW2 at the time that the appellant left, there ought to have been evidence that the doors to the house were broken to permit intrusion and taking away the deceased. There was no such evidence to this effect. Therefore, we are also satisfied that, it was wrong for the trial court to have convicted the appellant based on circumstantial evidence. Thus, the 2nd ground of appeal is allowed.

Next, Mr. Aliki argued the 3rd ground, in which he initially complained that, as PW1 was the appellant's wife, then, the trial court erred for not informing her that she was only competent but not compellable to give evidence, under section 130 (1) and (3) of the Evidence Act. In reply, Mr. Masanja submitted that because the evidence was seeking to protect the interest of PW1's child, the case at hand fell within the exceptions listed under section 130 (2) (b) of the same Act. In his rejoinder, Mr. Aliki readily conceded to the learned Senior State Attorney's contention, and concluded that his complaint in the 3rd ground of appeal had no substance. Thus, based on Mr. Aliki's acknowledgement of the misconception in raising the said ground of appeal, which we are in agreement with, the 3rd ground of appeal has no merit. We, therefore, dismiss it.

Before getting to the other grounds of appeal, we propose to discuss the ground we raised; the issue of recording the cautioned statement out of time. In this respect, Mr. Masanja was brief, while citing our recent decision in the case of **Tabu Sita v. R**, Criminal Appeal No. 279 of 2019 (unreported), he contended that, as long as the appellant did not object to the admission of the cautioned statement before the trial court, the statement cannot be challenged on appeal. He

submitted further that, on 29th August, 2021, the appellant was apprehended but it was on 1st September, 2021, when it was confirmed that the missing child had been murdered. According to him, detention of the appellant in respect of the offence of murder, became effective at the point when it came to the knowledge of the police, that the missing child was killed.

As for Mr. Aliki, the cautioned statement was unlawful because it was taken out of time in clear violation of section 50 (1) of the Criminal Procedure Act (the CPA). He moved the Court to expunge the exhibit.

With the above arguments, the question before us is this; is it lawful for the appellate court to entertain an issue on whether the cautioned statement was recorded in time, while the same was tendered without objection at the trial. In this case, when the trial Judge asked the defence side on their views following a request by PW5 to tender the cautioned statement at page 42 of the record of appeal, Mr. Fortunatus Felix Daud, the learned advocate who was appearing for the appellant, stated that the defence side had no objection to the admission of the confession. Then the statement was admitted as exhibit P2.

On the other hand, at pages 59 and 62 of the record of appeal, it is indicated that, the interview of the appellant started from 18:00 hours and ended at 19:30 hours on 1st September, 2021. Since there was no evidence of extension of the set time in terms of section 51 (1) of the same Act, it means that the appellant had been under police restraint for over three days from 29th August, 2021 contrary to section 50 (1) of the CPA, which provides to the following effect:

> *"50. -(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say,* ***the period of four hours commencing at the time when he was taken under restraint in respect of the offence;***
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended"*
>
> [Emphasis added]

Before us, both counsel were in agreement, that the statement was taken out of the 4 hours, and there was no evidence that such period was extended as required by the above law. However, Mr.

Masanja clarified that, time started to run when the police got information of the murder on 1st September, 2021. With respect to the learned Senior State Attorney, we are unable to agree with that contention. We take that position because; **first**, allowing that to be the practice, we would be participating in cultivation of a potential ground for germination and growth of a possible uncontrollable culture of arresting civilians and detaining them in custody waiting indefinitely for discovery of major or serious offences, before any statements could be recorded. **Second**, that would also render compliance with the provisions of section 50 (1) of the CPA, optional. That, we cannot risk to do.

Thus, here is a cautioned statement, which was admitted without objection on one hand, but which was recorded 3 days out of time on the other. The issue within our focus, is whether this Court on appeal can question the illegality of such a cautioned statement. In that respect, there are two conflicting positions, developed by this Court, through case law.

The proponents of the first position take the view that, where, at the trial the admission of a cautioned statement is not objected to, and

determined at that time, the issue cannot be raised or entertained at any subsequent time, including on appeal.

The second position is that, any point of law may be raised any time including at an appeal stage. So, if on appeal the Court finds that the confession was not recorded according to law, the statement is invalid, even where the same was not objected to at the time of its admission.

We will revisit a few decisions taking the first view, before getting to the second. The first is the case of **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (unreported). In that case, the cautioned statement was admitted without objection. The appellant was convicted based on, among other pieces of evidence, the cautioned statement. The High Court took the view that as the appellant had not objected to the admission of the cautioned statement, he had foregone his chance such that he could not reopen the matter on first appeal. On appeal to this Court, the appellant raised the same point and the court upheld the position taken by the first appellate court. It stated:

> *"Objections to the admissibility of confessional statements may be taken on two grounds. First, under section 27 of the Evidence Act, that it was*

not made voluntarily or not made at all. Second, under section 169 of the Criminal Procedure Act: that it was taken in violation of the provisions of the CPA, such as sections 50, 51 etc... The decision of the trial court on such matters can only be faulted if it can be shown, that the admission or rejection of such evidence ***was objected to and that it did not properly exercise judicial discretion, or at all, in rejecting or admitting it.***"

[Emphasis added]

The other case in which this Court subscribed to the same position was in **Emmanuel Lohay and Udagene Yatosha v. R**, Criminal Appeal No. 278 of 2010 (unreported). In that case, we stated that:

"*...as earlier stated, the above statements were produced and admitted in evidence without objection by the defence. In essence, the appellants are now seeking to challenge the admissibility of the statements.* ***With respect, it is too late in the day for them to do so because their admissibility or otherwise was never raised at the trial.*** *As a matter of general principle, an appellate court cannot allow*

matters that were not raised and decided by the court(s) below."

In the same class are our own decisions in **Tabu Sita** (supra), and **Shihoze Seni and Another v. R** (1992) T.L.R. 330.

We will now proceed to the second view. The first relevant decision in that respect is **Juma Mohamed @ Mpakama v. R** [2019] T.L.R. 514. In this case, the cautioned statement had been admitted without objection. On a second appeal to this Court, we stated at page 515 of the report that:

> *"(iii) Courts in Tanzania have undeniable duty to ensure that cautioned statements which were taken beyond the times prescribed by the law are first cleared before they are exhibited as evidence. This is a legal question which cannot be shifted to the accused person,* ***even if he does not object to the admission of a belated cautioned statement."***
>
> [Emphasis added]

In the above case, the Court expunged the cautioned statement relying on its previous decision in **Abdallah Ally @ Kalukuni v. R,**

Criminal Appeal No. 131 of 2016 (unreported). In the latter case, this Court had observed:

> *"In our case the statement of the appellant was taken beyond the prescribed time of four hours from the time he was arrested. The statement is not admissible in evidence. Unfortunately,* ***both lower Courts did not address this legal anomaly notwithstanding that it was not objected to, when tendered."***

Another case taking this view is, **Idd Muhidin @ Kibatamo v. R**, Criminal Appeal No. 101 of 2008 (unreported).

To decide on which view we should depart from, we have to discuss briefly, one crucial doctrine called *stare decisis* in Latin, otherwise known as the doctrine of precedents. In terms of that doctrine, all decisions of the Court, be that of a single Justice, the full Court or the full Bench, rank equally, and whenever possible, the Court is bound to follow its previous decisions. In **Arcopar (O.M.) S.A. v. Harbert Marwa and Family Company Limited and Others** [2015] T.L.R. 76, although the Court did not hold that the list of such instances was exhaustive, it listed seven instances where the Court may depart

from its previous decisions, and the seventh scenario was when there are conflicting decisions.

Also, in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** (1988) T.L.R. 146, this Court stated that the Court should be free in both civil and criminal cases to depart from its previous decisions when it appears right to do so. On the degree of care needed, in the case of **Dodhia v. National & Grindlays Bank Ltd And Another** (1970) E.A. 195, it was observed that it is lawful for the Court to depart from its previous decision, but in doing so, it must be cautious.

In view of the above, it is evident that departing from a previous position of the Court, is not a simple matter to attend to in a casual rush; it is a sensitive area of justice administration, for if that is to happen each and every other day, certainty of the law, its predictability and public confidence in it, could be put to jeopardy and at the risk of a slow meltdown. That is why, we think, in **Dodhia** (supra), we are warned to exercise caution.

As far as we are aware, there are two principles to guide us in deciding which one of the two positions we have to depart from. We are however, not at all saying that these are the only relevant principles for

that purpose; for there could be others. The commonest is *the most recent decision* principle. This principle states that, where a Court is faced with two decisions pronouncing contradictory positions, the decision to be adopted as good law, is the one which was decided most recently. See for instance, **Tanzania Game Trackers Limited v. Bryan Priestley,** Civil Application No. 17/02 of 2019 and; **Geita Gold Mining Limited v. Jumanne Mtafuni,** Civil Appeal No. 30 of 2019 (both unreported). See also **Arcopar (O.M.) S.A.** (supra).

The second principle, which is not very common in applicability, is *the best interest of the accused* principle. This principle states that, in criminal law, where there are two equivalent propositions of fact, one favouring the accused and another adverse to his interests, the court should adopt a position that is favourable to the accused. Some of the cases in which the principle has been applied are **Abdullah Jeje @ Malima Mabula v. R,** Criminal Appeal No. 195 of 2007, and; **Mohamed Seleman Kidari @ Ndwata v. R** Criminal Appeal No. 82 of 2022 (both unreported). Another case is **Olfam Mathias @ Mnola v. R** [2012] T.L.R. 304. This principle, when closely examined, one notices that it shares a rationale with two other sister concepts in criminal law;

the requirement of proof beyond reasonable doubt, and the constitutional principle of the presumption of innocence.

Thus, in this case we adopt the position taken in the case of **Mohamed Juma @ Mpakama** (supra) and other cases in that category. Therefore, in this case our decision is that, although the cautioned statement was not objected to at the trial, having been recorded about three days from when the appellant was restrained in police custody, the confession was offensive of the provisions of section 50 (1) of the CPA. For that reason, we discard exhibit P2 and render it evidentially valueless. Having made this finding, we do not find any useful point in engaging into any discussion seeking to determine the 4th ground of appeal.

Notably, we have already held above that there was no circumstantial evidence against the appellant. Now that the cautioned statement has also gone, there is nothing left on the record upon which the trial court could have convicted the appellant. Thus, we allow the 1st ground of appeal and affirm that the case against the appellant was not proved beyond reasonable doubt.

Finally, we allow the appeal, and quash the appellant's conviction. We set aside his sentence of death, and order his immediate release from prison unless he is held there for any other lawful cause.

DATED at **KIGOMA** this 6th day of May, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2024 in the presence of Mr. Sadiki Aliki, learned counsel for the appellant and Mr. Shabani Juma Masanja, learned Senior State Attorney assisted by Ms. Naomi Joseph Mollel, learned State Attorney for the Republic/Respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL