

Citation	Parties	Legal Principles Discussed
<p>CRIMINAL APPEAL No.159 of 2007 – COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM. Coram: MSOFFE J.A, KIMARO J.A AND MBAROUK J.A</p>	<p>BAKARI HUSSEIN VS THE REPUBLIC (Appeal from the decision of the High ‘Court of Tanzania at Dar es Salaam)- Criminal Sessions case No.21 of 1999. (Rugazia)</p>	<p>As regards to corroboration the law is settled that a court can act on a retracted or repudiated confession if after considering all the circumstance it is satisfied that the confession can not be true. See Tuwamoi Vs Uganda (1967) EA 84 pg.91.</p>

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MSOFFE, J.A. KIMARO, J.A. And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 159 OF 2007

**BAKARI HUSSEIN..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Rugazia J.)

**Dated the 23rd day of February, 2007
in
Criminal Sessions Case No. 21 of 1999**

JUDGMENT OF THE COURT

4th & 25th February, 2009

MSOFFE, J. A.:

The appellant was sentenced to death consequent upon his conviction of the murder of Leonard Temba on 30/1/1997 at Goba Kunguru within the District of Kinondoni in Dar es Salaam Region. He is dissatisfied, hence this appeal.

Briefly, the case for the prosecution was that on the fateful day the appellant and two others hired a motor vehicle Registration No. TZJ 9555 driven by the deceased. The deceased was with PW3 Godfrey Charles Kiondo. The appellant and the two others had earlier intimated to the

deceased that they had some "mitumba" which they wanted to collect at Goba. On arrival at Goba they told the deceased to stop and walk down to the place where the "mitumba" were stored because the place was not reachable by a motor vehicle. They invited the deceased to walk down with them to the valley where the "mitumba" were stored. The deceased obliged. PW3 was left behind. On the way, the appellant and the two others tied the deceased by the neck and strangled him to death. After doing so, they returned to the place where the vehicle was parked whereupon PW3 became suspicious on seeing them coming back without the deceased. As PW3 retreated from the vehicle the appellant and the two others entered into the vehicle and drove away at high speed. The vehicle hit a heap of bricks and stopped after which the appellant and the two others came out of it and ran away. PW3 reported the matter to the police. The autopsy revealed that death was due to asphyxia.

The prosecution mainly relied on the cautioned statement made by the appellant to PW4 Assistant Inspector Nicholas Kimela and the evidence of PW3.

At the trial the appellant retracted the confession essentially saying that the statement was not his and he was illiterate.

After evaluating the evidence the learned trial judge acquitted the two others and found the appellant guilty of murder and convicted and sentenced him accordingly. In his view, the retracted confession was amply corroborated by the evidence of PW3.

At the hearing of the appeal the appellant was represented by Mr. Richard Rweyongeza, learned advocate, and the respondent Republic was represented by Ms. Evelyne Makalla, learned State Attorney. Mr. Rweyongeza filed two grounds of appeal which read as under:-

1. **THAT**, the learned judge grossly misdirected himself in law in holding that the confession alleged to have been made by the appellant was admissible.
2. **THAT**, having regard to the evidence on record and the circumstances that led to the arrest of the appellant and his co-accused the learned judge grossly misdirected himself in fact and in law in finding PW3 a reliable witness and in finding collaborative (sic) evidence in the evidence of PW3 against the appellant.

In elaborating on the first ground of complaint, Mr. Rweyongeza submitted that the cautioned statement was inadmissible in evidence for

contravening the provisions of Section 50(1)(a) of the Criminal Procedure Act (Cap 20 R.E 2002), hereinafter the CPA, prescribing the period of four hours for interviewing a person under restraint. In the absence of extension of time for the interview under Section 51 of the CPA, Mr. Rweyongeza went on to say, the statement was inadmissible in evidence and the judge erred in acting on it in convicting the appellant.

In answer to the above complaint, Ms. Makalla was of the general view that the point was being raised for the first time on appeal. It did not surface in the High Court. At the trial, admission of the statement was objected to because the appellant said he was illiterate. The question of time taken for the interview did not feature at all, she emphasized.

It occurs to us that it is true that Sections 50(1) and 51(1) of the CPA provide for a time frame within which a person under restraint should be interviewed. They provide as follows:-

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.*

51-(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may:-

- (a) *extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or*
- (b) *Either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period.*

A look at the record of proceedings shows that on 11/12/2006 when PW4 sought to introduce the statement in evidence Mr. Rweyongeza objected "because the accused says that is not his statement and he is illiterate". Henceforth, a trial within a trial was conducted wherein the question of non-compliance with Sections 50 (1) and 51(1) of the CPA did not feature at all. As such, the judge did not say anything on it in his Ruling on the trial within a trial. In fact, the appellant did not also canvass the point in his defence at the trial. So, on the face of it, the complaint put forth by Mr. Rweyongeza is attractive, but we are not persuaded by it. Section 169 of the CPA provides in part as follows:-

169-(1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public

interest without unduly prejudicing the rights and freedoms of any person.

(2).....

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(Emphasis supplied)

From the record, it is plainly obvious that when PW4 tendered in evidence the statement Mr. Rweyongeza did not raise any objection to its admission in evidence on account of failure to comply with Sections 50(1) and 51(1) of the CPA. Since there was no objection from the appellant's advocate the prosecution side was not called upon to invoke Section 169(3) of the CPA. So, it is too late in the day to allow Mr. Rweyongeza to raise an objection at this point in time, on appeal. Objection should have been raised during the trial of the case.

As regards corroboration, the law is settled that a court can act on a retracted or repudiated confession if after considering all the circumstances

it is satisfied that the confession cannot but be true. The case of **Tuwamoi v Uganda** (1967) EA 84 is an authority on the point. At page 91 the then Court of Appeal for Eastern Africa stated as follows:-

“We would summarize the position thus - a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true”.

As observed by this Court in **Dickson Elia Nsamba Shapwata and Another v Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 12, it is always desirable to look for corroboration in support of a confession which has been retracted or repudiated before acting on it to the detriment of an appellant. As already stated, in the present case, the trial court found enough corroborative evidence in support of the appellant's cautioned statement. The question we have to consider and decide is whether or not the evidence of PW3 had the requisite probative value to provide enough corroboration to the cautioned statement. This brings us to the second ground of appeal.

The complaint in the second ground is basically that PW3 was not all that of a reliable witness as to provide enough corroboration to the cautioned statement. With respect, we are satisfied that there is merit in this ground of appeal. We say so for a number of reasons. **One**, in answer to a question by one of the assessors PW3 admitted that he was also arrested as a suspect in the offence. If so, we think, it was not all that safe to rely on his evidence wholesale. **Two**, this witness did not witness the alleged murder. At best, his evidence was circumstantial. **Three**, following his arrest this witness did not mention the appellant at the police station. If he really knew the appellant's role in the murder one

would have expected him, at the very least, to mention him, at the very early possible opportunity, at the police station to be exact.

There were other features in the case which we think we should mention here. The appellant was not contradicted in his assertion that following his arrest an identification parade was conducted. If the appellant was a known person as alleged by PW3, we wonder if it was necessary to conduct the parade! Also, looking at the evidence in its totality, it is not clear as to why the appellant was arrested. Was he arrested because he was with the deceased on the material day? Or was the arrest effected because he was the killer? Or was he arrested because the prosecution wanted to "fix" him? Surely, these questions and others could have only been answered if the investigator of the case had been called upon to testify on the circumstances leading to the arrest. Apparently, no such evidence from the investigator was forthcoming in the case.

In the end, we are satisfied that the evidence taken as a whole, and particularly in view of the position we have taken on the evidence of PW3, the case against the appellant was not proved beyond reasonable doubt.

We accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

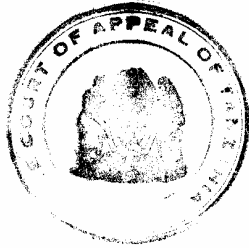
DATED at DAR ES SALAAM this 13th day of February, 2009.

J. H. MSOFFE,
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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




P. B. KHADAY
DEPUTY REGISTRAR

