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| **CRIMINAL APPEAL NO. 112 OF 2005- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.** | **1. PASCHAL PETRO SAMBULA @ KISHUU, 2. ELIAKIMU LOMITU @ LENDOBILI, 3. LEKEN LOMBEJO @ KIPARA Vs. REPUBLIC (Appeal from the Conviction of the High Court of Tanzania at Arusha)- Criminal Session Case No. 13 of 2001- Shangwa, J.** | **Proper identification- Whether circumstances at the material time favourable for a correct identification-**<br><br>**Confession obtained through torture-** should not be admitted in evidence regardless of its truth.<br><br>Where torture is alleged, this Court has taken a more serious view and has implicitly presumed an associated confession to be vitiated and incapable of admission under section 29 (of the Evidence Act, 1967). This position is well stated in, *inter alia*, **Maona & Another v Republic**, Criminal Appeal No. 215 of 1992, and **Marus Kisukuli v R**, Criminal Appeal No. 146 of 1993.<br><br>**Corroboration** |

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| | | **where confession is retracted or repudiated-** After repudiating/retracting a confession, it competent corroboration is required to enable confession to be acted upon: **See for instance the cases of Mkubwa Said Omar v SMZ (1992) TLR 365, and Mbushuu @ Dominic Mnyaroje & Another v R (1995) TLR 97 at page 103.** |

**IN THE COURT OF APPEAL OF TANZANIA**
**AT ARUSHA**

**(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)**

**CRIMINAL APPEAL NO. 112 OF 2005**

**1. PASCHAL PETRO SAMBULA @ KISHUU**
**2. ELIAKIMU LOMITU @ LENDOBILI** }**.....APPELLANTS**
**3. LEKEN LOMBEJO @ KIPARA**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Conviction of the High Court of Tanzania at Arusha)**

**(Shangwa, J.)**

**dated the 28th day of August, 2004**
**in**
**Criminal Session Case No. 13 of 2001**

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**JUDGMENT OF THE COURT**

**2 & 15 October, 2007**

**KAJI, J.A.:**

On 30th November, 1993, at about 6 pm, at Korongo Tatu, Losunyai village, within Simanjiro District, by then in Arusha Region (now in Manyara Region), a Land Rover driven by the deceased Amon Elisa Mollel with about ten passengers, was invaded by a group of about eight bandits. One of the passengers was Ernest Elisa (PW1), a brother of the deceased. One of the bandits was armed with a firearm resembling an S.M.G. Some were armed with "pangas" and some with "sime". PW1 claimed to have identified the one with a firearm to be Pascal Petro Sambula @ Kishuu, the 1st appellant. He also claimed to have identified Eliakimu Lomitu @ Lendobili, the 2nd appellant.

Suddenly the 1st appellant fired at the LandRover thereby fatally injuring the deceased. The deceased was taken to Mount Meru Government Hospital where he died fourteen days later. Dr. Michael Kisetu Pallangyo (PW4) examined the body of the deceased and observed the deceased had wounds on the right arm and right buttock. The right buttock had been pierced and the wound extended to the stomach. The large intestines had been perforated. He was of the view that the immediate cause of death was Peritonitis (Exh. P1).

Efforts were made to arrest the suspects. The first to be arrested was the 2nd appellant who was arrested on 5.1.1994 at his home at Oljoro. When interrogated by No. C3574 D/Cpl Revocatus (PW5) he was alleged to have admitted his participation in murdering the deceased. He mentioned the 1st, 3rd appellants Leken Lombejo @ Kipara and Eliakim Saigurani Ndei (4th accused at the trial who was later acquitted) to be among the participants-in-crime. The 1st appellant was arrested on 17.9.1996 by No. C 7541 D/Cpl Haruna

(PW3). On interrogation the 1st appellant was alleged to have admitted participation in the crime. He mentioned Kipara, 3rd appellant, and Masai (5th accused at the trial who was later acquitted) to be among the participants-in-crime. The 3rd appellant Leken Lombejo @ Kipara was arrested on 5.9.1997 at Orkesmet village. On being interrogated by PW5 he was alleged to have admitted participation. The appellants and the two suspects were charged with the offence of murder, contrary to section 196 of the Penal Code, Cap 16. At the end of the day the appellants were found guilty and convicted as charged. They were each sentenced to death by hanging. The two suspects were acquitted. The appellants were aggrieved with the decision of the trial judge (Shangwa, J.). Hence this appeal. Before us the 1st appellant was represented by M. K. Kimomogoro, learned counsel, who had preferred three grounds of appeal, namely: -

1. That the Hon. trial judge erred in failing to hold that the circumstances were not favourable for a positive identification of the 1st appellant by PW1.

2. That the Hon. trial judge erred in law in holding that the cautioned statements given by the 2nd and 4th accused could corroborate the evidence of PW1.

3. That the Hon. trial judge erred in law in failing to consider the omission by PW1 to give a description of the 1st appellant at the first available opportunity.

The learned counsel elaborated on these grounds extensively. In essence the learned counsel contended that, the event occurred suddenly in a terrifying manner and the 1st appellant was alleged to have masked his face. Under the circumstances it was the learned counsel's submission that the circumstances were not favourable for a positive identification of the 1st appellant by PW1, and that PW1's evidence on identification required corroboration. The learned counsel further pointed out that the 2nd and 3rd appellants had repudiated or retracted their cautioned statements Exh. P3 and Exh. P4, and therefore those statements required corroboration and could

not have corroborated the evidence of PW1. The learned counsel remarked that in the absence of strong corroborating evidence it was dangerous to rely on the evidence of PW1 which was weak. The learned counsel doubted further on whether PW1 properly identified the 1st appellant for failure to give any description of the 1st appellant when reporting the event (murder) to the police.

The 2nd and 3rd appellants were represented by Mr. D'Souza, learned counsel who had preferred eight grounds of appeal. Essentially the learned counsel faulted the learned trial judge for differing with the unanimous opinion of the assessors in favour of acquittal without giving reasons for doing so. The learned counsel further maintained that the learned trial judge erred in relying on the uncorroborated retracted cautioned statements of the 2nd and 3rd appellants in convicting them. The learned counsel pointed out that the said cautioned statements which were involuntarily given and recorded out of the prescribed period could not have been the basis for convicting the 2nd and 3rd appellants. The learned counsel further pointed out that the learned trial judge erred in law and fact in

convicting the 2nd and 3rd appellants without actual proof of the alias names given by the prosecution which the 2nd and 3rd appellants had denied to be their names. The learned counsel faulted the learned trial judge for convicting the 2nd appellant in view of a strong defence of alibi which was not shaken by the prosecution. Mr. D'souza further contended that the only evidence against the 3rd appellant was a statement by the 1st appellant which was not tendered in court. It was the learned counsel's submission that that statement should not have been the basis for convicting the 3rd appellant. The learned counsel also faulted the trial judge for convicting the 2nd and 3rd appellants without assessment and evaluation of the total evidence on record in view of the discrepancies in the prosecution case.

On his part, Mr. Boniface, learned Senior State Attorney, who represented the respondent-Republic, did not oppose the appeal mainly on the grounds raised and elaborated by the learned counsel for the appellants.

The crucial issues in this case, in our view, are two, that is, whether the 1st and 2nd appellants were properly identified by PW1 at the scene of crime, and the admissibility of the cautioned statements of the 2nd and 3rd appellants (Exh. P3 and Exh. P4). There is no doubt that the key prosecution witness who claimed to have identified the 1st and 2nd appellants at the scene of crime is PW1. In fact he was the only prosecution witness who claimed to have identified the 1st and 2nd appellants at the scene of crime. At this juncture we may pause and ask:

Were the circumstances at the material time favourable for a correct identification? We think the answer is in the negative. We say so for the following reasons: -

First, there is evidence by PW1 and Mepukozi Ole Mabengo (DW8) that the bandits had covered their faces with masks apparently to conceal their identity. That being the position, was it possible for PW1 to identify the 1st and 2nd appellants properly and free from any possibility of a mistaken identity? We think the answer is in the negative. PW1 testified at one time that the deceased removed the mask from the 1st appellant's face and that is when he identified the

1st appellant. But later when he was answering a question by the 3rd assessor Hatibu Mohamed he said:

> *"After sometime, I saw that the bandit had no mask on his face".*

He did not elaborate at which stage he saw that the bandit (referring to the 1st appellant) had no mask on his face, and how the said mask disappeared from his face. We have also carefully considered the position in which PW1 was. He said he saw all this while hiding himself in a trench under the Landrover. We ask ourselves:
Was it possible under the circumstances for PW1 to properly identify the 1st appellant? We doubt very much.

Second, we doubt very much whether the deceased after being so fatally injured had the guts and strength to confront the bandit armed with a gun and remove his mask.

Third, PW1 did not mention the time when the event occurred. But according to DW8 who was among the ten or so passengers in the Landrover, it was at dusk. Or to quote the exact words he used:

> *"Darkness had started at the time we were attacked by robbers."*

This strengthens even further our doubt on whether, under the circumstances, PW1 could properly identify the 1st and 2nd appellants.

Fourth, PW1 did not give any description of the suspects when he reported to the police as testified by PW3 at page 19 of the record. This is unusual with a person who claimed to have identified the culprits.

Fifth, according to all that we have stated above, we doubt very much the credibility of PW1. He even denied to have identified the body of the deceased to Dr. Pallangyo (PW4) who performed the post mortem examination despite the abundant evidence by PW4 and the Post mortem Examination Report that he was one of those who identified the body of the deceased to PW4.

We think it was very dangerous to rely on his evidence in convicting the 1st and 2nd appellants without corroboration by other competent evidence. This brings us to the cautioned statements of the 2nd and 3rd appellants (Exh. P3 and Exh. P4) which the learned trial judge held to have corroborated the evidence of PW1.

There was ample evidence by the 2nd appellant that Exh. P3 which incriminated the 1st, 2nd and 3rd appellants was obtained through torture. This was supported by the PF3 Exh. D1. Since Exh. P3 was obtained through torture, it should not have been admitted in evidence regardless of its truth. In the case of **Richard Lubilo and Another v R**, Criminal Appeal No. 10 of 1995 (unreported), in considering the admissibility of a confession made by the accused under torture, this Court had this to say at page 9: -

> *Where torture is alleged, this Court has taken a more serious view and has implicitly presumed an associated confession to be vitiated and incapable of admission under section 29 (of the Evidence Act, 1967). This*

*position is well stated in, inter alia,* ***Maona & Another v Republic****, Criminal Appeal No. 215 of 1992, and* ***Marus Kisukuli v R****, Criminal Appeal No. 146 of 1993 (both unreported).*

That being the position, we therefore expunge the evidence pertaining to Exh. P3. We are left with the evidence pertaining to Exh. P4. According to the evidence in the trial within a trial, it is evident that it was made by the 3rd appellant involuntarily, if it was ever made. We say if it was ever made because the 3rd appellant repudiated/retracted it. After repudiating/retracting it, it required competent corroboration to be acted upon. See for instance the cases of **Mkubwa Said Omar v SMZ** (1992) TLR 365, and **Mbushuu @ Dominic Mnyaroje & Another v R** (1995) TLR 97 at page 103.

In the instant case there was no such corroboration. In this confession the 3rd appellant was recorded to have incriminated himself and the other two appellants. It was upon this confession

that the conviction of the 3rd appellant and the other two appellants was founded. Since the 3rd appellant had repudiated/retracted it and was not corroborated by material evidence, it could not form the basis for convicting the appellants.

Since the evidence of the sole prosecution eye witness (PW1) was weak for the reasons we have demonstrated above, and since the cautioned statement of the 2nd appellant (EXh. P3) was of no evidential value and that of the 3rd appellant (Exh. P4) was of little evidential value for the reasons we have stated above, there was no evidence to found the conviction of the appellants. As pointed out earlier on, the learned Senior State Attorney 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. The appellants are to be released forthwith unless lawfully held.

DATED at ARUSHA this 15th day of October, 2007.

**J. A. MROSO**
**JUSTICE OF APPEAL**

**S. N. KAJI**
**JUSTICE OF APPEAL**

**E. M. K. RUTAKANGWA**
**JUSTICE OF APPEAL**

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

**(I. P. KITUSI)**
**DEPUTY REGISTRAR**