



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 23 OF 2000**

**REPUBLIC**

**VERSUS**

**JOHN WANJALA WAFULA**

**J U D G M E N T**

JOHN WANJALA WAFULA, the accused, is charged with two counts of murders contrary to section 203 read with section 204 of the Penal Code. Particulars of count 1 are that, on the 5th July, 1992 at Karura Forest within Nairobi Area, jointly with others not before the court, the accused murdered RUTH WANJIKU KIORE (hereinafter referred to as “the first deceased). Particulars of count 2 are that, on the same 5th July, 1992 at Karura Forest jointly with others not before the court the accused murdered MARGARET MUTHONI KIORE (hereinafter referred to as “the second deceased”)

The accused pleaded not guilty. His trial proceeded to conclusion. The prosecution has called eight witnesses. The accused has elected to give unworn statement and not to call any witness. The state is represented by Mr. Karuri while the accused is represented by Mr. Nyamodi.

The first deceased got married to HENRY KIORE WAWERU (P.W.2) in 1975. They sired six children out of that union, one of whom is the second deceased. This marriage did not, however, last long because the first deceased and P.W.2 separated. So that, on 5th July, 1992 when this offence was committed both the first deceased and P.W.2 were not living together.

HANNAH WANJIKU KIORE (P.W.1) is the daughter of the 1st deceased and P.W.2, is the sister of the 2nd deceased. P.W.1 lived with the 1st deceased and the 2nd deceased in Karura Kanyangu Village at Karura Forest Area. It is the evidence of P.W.1 that the 1st deceased was a vegetable and Second Hand Clothes hawker in Nairobi.

Evidence placed on record by the Prosecution has established that on the 5th July, 1992 P.W.1 escorted the 1st and 2nd deceased to Karura Bus Stage so as to catch a bus and proceed to Nairobi on their business. P.W.1 saw the 1st and 2nd deceased board a bus for Nairobi at 12 noon. P.W.1 said she did not see the 1st deceased talking to anybody before boarding that Bus.

It was also the last time that P.W.1 saw the 1st and 2nd deceased alive again. For both 1st and 2nd deceased did not return to their home in Karura Kanyangu Village from Nairobi. They virtually disappeared and a search for them within Karura Forest was launched by their relatives.

On the 7th July, 1992 IP FRANCIS KARIUKI MURANGE (P.W.8) OC crime at Muthaiga Police Station, received a telephone call from an anonymous caller who reported that a woman’s body was lying within Karura Forest. The caller, apart from saying where within the forest the body of that body was lying, did not leave his identify. It had so transpired that, a week or so earlier before that 7th July, 1992,

another woman's body had been recovered from the same Karura Forest in circumstances which suggested that she had been sexually abused, and the police had removed that body to the City Mortuary. On the 7th July, 1992 that telephone caller informed P.W.8 that the second woman's body was lying near the same place where the earlier body of a woman had been removed from Karura Forest.

Acting on the information received from that telephone caller, P.W.8 took three armed policemen and proceeded into Karura Forest. Indeed they found a body of a woman lying naked, facing downward. There was a thin cord tied round her neck in circumstances that suggested she had been strangled. The rest of her body appeared intact though her clothes were torn and scattered around the scene. There was no evidence of any apparent sexual assault on her.

P.W.8 summoned scene of crime to the scene and several photographs of the body were taken at the scene by an officer who was not called to testify. Thereafter the body was removed from the scene to the City Mortuary. Its Identity had not then been established.

When P.W.2 heard that the 1st deceased had gone missing and that a body of an unidentified female had been removed from Karura Forest by the Police, he gave out the 1st deceased's National Identity Card which bore here photograph. Using that photograph the identity of the body which was removed from Karura Forest on 7th July, 1992 by the Police and kept at the City Mortuary was established to be of the 1st deceased. But there is a problem of identification of that body which has arisen in this case. The 1st deceased's National Identity Card used for purposes of identifying that body was not tendered into evidence. The scenes of crime personnel who photographed that body at the scene were not called as witnesses. Though the booklet containing photographs were marked for identification, that booklet of photographs was eventually not produced as an exhibit. The Pathologist who performed a postmortem examination was not called to give evidence. I will revert to this aspect of the case later on in this Judgment.

The 2nd deceased or her body had not been seen by the 13th July, 1992. The search for her intensified, this time by the combined forces of her relatives and the police. On that 13th July, 1992, GEOFFREY NJOROGI (P.W.7) and members of his family, for P.W.7 was a brother to the 1st deceased and an uncle to the 2nd deceased, went to Muthaiga police Station and made a Report to P.W.8. They claimed that a man believed to be a Ugandan National who lived in Karura Kanyangu Village at Karura Forest was behaving in a suspicious manner since the disappearance of the 1st and 2nd deceased. Upon receiving that report P.W.8 decided that that man ought to be arrested for questioning. He gave out those instructions. P.W.8 instructed several Policemen to accompany P.W.7 into Karura Forest to search for the body of the 2nd deceased. This search was carried out for the whole of the 13th July, 1992 but without success and it was called off.

During the same night of 13th July, 1992 P.W.7 led AP Constable PATRICK MANGI (P.W.5) and other Administration Policemen from Wagige Chief's camp to the home of the accused at 10 p.m. They found the accused inside his house and arrested him on suspicion of having been involved in the killing of the 1st deceased. Upon his arrest the accused was taken to the home of Chief EVANS NDUNGU KIARIE (P.W.3) who instructed that he be locked up, and this was done.

P.W.5 testified that he and the other people took the accused to the Chief's Camp Wangige for interrogation. He said the accused then gave them certain information about the death of the deceased persons. That information given to a person in authority without a caution, and particularly to a Police Officer not of the rank of Assistant Inspector of Police, was inadmissible in evidence. It follows that any information given by the accused to his interrogators during the night of 13th July, 1992 is therefore inadmissible in evidence and is hereby expurged.

In the morning of the 14th July, 1992 the accused was taken to Muthaiga Police Station where he was received by the officer-in-charge Chief Inspector Duncan Thuku Nyaga (P.W.4) Also taken to Muthaiga Police Station was Emmanuel Mateka who had previously been charged with raping a woman in Karura Forest but had been acquitted because the complainant did not turn up in court to give evidence.

The accused and Emmanuel Mateka were then interrogated by P.W.4 and other officers within Muthaiga Police Station. It is the evidence of P.W.4 that, during their interrogation, the accused and Emmanuel Mateka both admitted to have raped and killed the 1st and 2nd deceased persons in Karura Forest upon their return from Nairobi in the evening of the 5th July, 1992 and that the accused and Emmanuel Mateka led them to Karura Forest and showed them the spot where they had raped and killed the 1st deceased. It was the spot where indeed the body of the 1st deceased had been removed from to the City Mortuary by the Police. It is also the evidence of P.W.4 and P.W.8 that the accused led them to the recovery of the 2nd deceased's body and explained to them how the 2nd deceased had been raped and killed.

The information, which was being given to P.W.4 at Muthaiga Police Station by both the accused and Emmanuel Mateka amounted to a confession to the murder of both the 1st and 2nd deceased within the meaning of Section 25 of the Evidence Act Cap 80 Laws of Kenya which reads:

***“S.25, A confession comprises words or conduct or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence”.***

It was a legal requirement that ones PW4 and PW8 realised that the accused and Emmanuel Mateka were giving them information which amounted to a confession to immediately administer a caution to them as required under the Judge's Rules.

It is true, as was held in ANYANGU AND OTHERS V R. (1968) E.A. 239 that the Judges' Rules are only rules of practice and it is always in the discretion of the trial judge to allow such statements made by accused persons although they are not obtained strictly in accordance with the Rules. The Court of Appeal for Eastern Africa in that case was dealing with a situation where the appellant had made statements to a police officer before being charged and at the trial the admissibility of those statements was objected to on the ground that they had been obtained in breach of the Judges' Rules. In the case before me, no such caution had been administered at all.

The administration of that caution to the accused, followed by the receipt of any information from the accused and Emmanuel Mateka by PW4 and PW8 could either have been oral or through what is often referred to as a statement under inquiry which PW4 and PW8 ought to have recorded from them on that 14th July, 1992 when it dawned on them that the accused and Emmanuel Mateka were confessing to the murder of the deceased persons. Instead no oral caution was administered by PW4 and PW8 and no statement under inquiry was also recorded from the accused.

Instead PW4 and PW8 allowed the accused to give to them that oral confession without a caution, allowed the accused and Emmanuel Mateka to lead them into Karura Forest so as to point out to them various spots where they had allegedly raped and killed the 1st and 2nd deceased. This aspect of investigation was materially prejudicial to the accused.

I have given this matter serious consideration. I have taken into account the fact that the accused has claimed in his unsworn statement that, after his arrest on the 13th July, 1992, he was taken to Wangige Chief's Camp for interrogation and was thoroughly tortured by the administration police, who included PW5, and because of that torture he admitted to have killed the two deceased person jointly with Emmanuel Mateka. The accused also claimed that he was forced to take the Administration Police to Emmanuel Mateka's home from where he was arrested in the same night of 13th July, 1992, and that both of them were then escorted to Muthaiga police station.

It follows from the above that the confession to the killing of the 1st and 2nd deceased by the accused was obtained by PW4 and PW8 from the accused contrary to the Judges' Rules and in violation of the provisions of Section 26 of the Evidence Act which provides:

***“S.26: A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise.....”.***

The confession made to P.W.4 and P.W.8 by the accused was caused by threats and torture.

All the information which the accused gave to the police in his alleged confession during interrogation on 14th July, 1992 was inadmissible and is of no evidential value. I so hold despite the fact that, during the trial, no objection to its admissibility was raised by the accused.

I have already pointed out hereinabove that a statement under inquiry ought to have been recorded from the accused during his interrogation when it dawned on PW4 and PW8 that the accused had useful information to give relating to the death of the 1st and 2nd deceased. I have perused the committal bundle which the Attorney General forwarded to this court. It contained a statement of inquiry recorded from the accused on the 17.7.1992 at 2.40 p.m. by IP FRANCIS KARIUKI MURANGI (PW8). It is a complete confession into the killing of the 1st and 2nd deceased by the accused and Emmanuel Mateka. IP Francis Kariuki Muranga gave evidence as PW8 on the 25th January, 2002. Mr. Karuri, State Counsel was prosecuting. The court waited for that evidence of the statement under inquiry to be led but it was not. The prosecution therefore did not see it fit to present to court that statement in support of its case for reasons best known to itself. Very vital evidence to this case was thus left out by the prosecution.

A charge and cautionary statement had been recorded from this accused by IP Cosmas Wanjala (C.D. 13 in the committal bundle) based at Muthaiga police station. It was recorded on 27.7.1992 at 5.30 p.m. IP Cosmas Wanjala (CD13) was not called by the prosecution to produce that statement, marked in the committal bundle as EX2. It was a short statement in which the accused had said, in answer to the murder charge:

***“All that is not true Sir. I have just been framed. I have not killed anybody. On that day I was on duty at Karura Kanyungu and when I finished my work, I went home and I later came to my employer where I took the cows for grazing within the farm. I know nothing about the murder”.***

A prudent prosecutor, in search of justice to be done, is duty bound to adduce all evidence in his possession, whether it is in favour of the prosecution or is in favour of an accused person so that the court, seized of all evidence, can fairly and judiciously adjudicate the dispute or the issues presented to it. The charge and cautionary statement recorded by IP Cosmas Wanjala from the accused, marked Cx2 in the committal bundle, ought to have been produced as an exhibit. IP Wanjala was not called by the prosecution. That charge and cautionary statement was deliberately withheld by the prosecution from court. In this regard the prosecution failed in its noble duty to the court, to assist the court to come to a fair and just decision.

The prosecution further did not call the Pathologist who examined the bodies of the 1st and 2nd deceased as to the cause of their deaths. According to the committal bundle which the Attorney General forwarded to this court, that Pathologist was Dr. Samuel Odero Ywaya {CD 15} who had examined the body of the 1st deceased at the City Mortuary on the 20th July, 1992 and had filled a postmortem form marked Cx4, and who also had examined the body of the 2nd deceased on the same day at the City Mortuary and had equally filled the postmortem form marked Cx5 in the committal bundle. No attempt was made to call Dr. Ywaya to give evidence or to have these postmortem reports produced as exhibits either under Section 33(b) of the Evidence Act or Section 77 of the same Evidence Act. The direct consequence of this omission by the prosecution is that the identities and causes of death of the 1st and 2nd deceased persons have not been established beyond reasonable doubt. The defence of the accused, that he did not kill the 1st and 2nd deceased, is therefore probably true.

In my summing up to the assessors, all the above issues were presented to them. For the reasons which I have recorded in this Judgement I do not agree with the opinion of the 3rd assessor Benjamin Ototo that the accused is guilty of murder. I however agree and accept the opinion of Mr. Mwai (1st assessor) and of Mrs. Jennifer Okello (2nd assessor) that the accused is not guilty of murder.

This court finds John Wanjala Wafula, the accused, not guilty of murder and he is now accordingly acquitted. I order that he be released from prison custody forthwith unless he is lawfully held.

It is so ordered.

Dated and delivered at Nairobi this 16th day of May, 2002.

**A.G.A ETYANG**

**JUDGE**