



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 148 of 1997

ALLAN KHAEMBA KWABI.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein was charged in the lower court with the offence of robbery with violence C/S 296 (2) of the Penal Code in court 1 and in count 2 with the offence of giving false information to a person employed in the public service contrary to section 129 (b) of the penal code. He was tried found guilty convicted and sentenced to suffer death in the manner prescribed by law in count 1 but pronounced no sentence on count 2. Being aggrieved with that order the appellant has appealed to this court citing 8 grounds of appeal namely that the learned trial magistrate erred both in law and facts when he ruled the repudiated confession statement of the accused to be admissible in evidence before investigating the accused's claim of torture while in police custody erred in law and facts when he ruled the accused's statement under inquiry to be admissible in evidence without bearing in mind the same had been recorded by Inspector Ndegwa PW6 who was the arresting officer and also involved in the initial investigation of this case. This was in contravention of the procedures set in the Judges rules as regards recording of statement from an accused person, erred in law and facts when he succumb his jurisprudence to be mesmerized by the circumstantial evidence of blood in his cloth wear as inculpatory evidence against accused without bearing in mind that the facts prevailing at the fateful scene of attack involved the accused as a victim in this case, misdirected himself on points of law and facts when he arrived on the finding that the money found in accused's house was exclusively that one robbed from the deceased whereas the prosecution side couldn't prove it absolutely, erred on both points of law and facts when he failed to deliver his considered findings on the contradictions encountered between prosecution evidence investigations and post mortem report on the cause of deceased's death, that the prosecution side did not discharge their burden of proof beyond reasonable doubt, that since he did not follow all that transpired in court he humbly requests for the proceedings to enable him prepare his appeal and on the basis of the foregoing he asks for the appeal to be allowed and he be set at liberty.

In his oral submissions in court counsel for the appellant stressed the following points:

1. That offence of robbery which is stealing was not proved as there is no evidence showing that the deceased had 56,500/= which was capable of being stolen and which in fact was stolen as the evidence of PW2 was based on his own estimate and no record was produced to show that the deceased used to bring home between 50-70,000 daily and there is no evidence to show how that figure was arrived at.
2. No Doctor was called to produce the post mortem report and it is not known how that report got into the evidence as it was not produced.

3. The confessional statement should not have been relied upon as what they state is contrary to the evidence. The talk of strangulation when the post mortem talks of fracture of the base of the skull caused by trauma caused by a blunt object and there are other injuries on the body of the deceased which are not consistent with strangulation.
4. The prosecution cannot rely on the circumstantial evidence as it does not point out irresistibly to the accused person's guilt as there is no evidence that the deceased left Eldoret with money, took money in the course of the journey from sales; there is no proof as to whether he died of strangulation or of trauma.
5. The learned trial Magistrate should not have relied on the confessional statement as it was retracted; the contents are not corroborated of any other material evidence; and there were allegations of torture and no evidence was adduced to show that the injuries were sustained by the appellant before he went into police custody. Neither was it stated that he sustained these injuries after he had been taken to court. All these factors go to show that the alleged confession was not voluntary.
6. No reasons were stated as to why the learned trial magistrate rejected the evidence of allegations of torture and so the admission of that statement amounts to a misdirection of law and facts.
7. It is their stand that no investigations were carried out because had they done so the real culprits would have been arrested and brought to book.
8. Although the appellant stated that the vehicle has stalled before the attack he said that he fixed it and that is why it started moving and appellant used it to go to police station to report.
9. That as regards the blood stains on the clothes of the appellant it has not been stated that care was taken to ensure that no drops from the blood sample could have dropped on the appellants clothes as they were being taken to the government chemist. It is their stand that the foregoing facts created doubts in the prosecution's case which were not resolved by the learned trial Magistrate.

The state on the other hand submitted that they do not support the conviction and sentence and they associate themselves with the submissions of the defence counsel. They are also of the view that the case was not properly investigated as the prosecution relied heavily on the evidence of the confessional statement which was not corroborated.

2. They further stated that they will not ask for a retrial as the appellant has been in custody since 1994. We have re-evaluated the evidence on the record before the lower court and we find that as submitted by the defence and conceded by the state we find that there is no evidence to show how much money the deceased left with on this journey, how much he had realized from the sales and how much was on his body as at the time he was robbed. It therefore follows that it is not known how the figure of the amount allegedly robbed was arrived at as PW2 simply said that the deceased usually came home with between 50-70,000/= each day. The amount allegedly robbed was not proved.

2. We also find that the Doctor who performed the post mortem was not called to testify. The record shows that on 9/11/95 the prosecution applied to have the post mortem report and P3 to be produced. The defence had no objection and the prosecutor just handed them in and were marked as exhibit 5 and 6. We would like to associate ourselves with the findings in the ruling in Nairobi Miscellaneous Criminal Application No. 217/98 by our Sister Judge Justice S. Ondeyo where the P3 was produced by the prosecutor purportedly under section 77(1) of the Evidence Act as amended by Act No. 14/91. This section provided that "in Criminal Proceedings any document purportedly to be a report under the hand of a government analyst medical practitioner or any ballistic report, document examiner or Geologist upon any person or matter or thing submitted to him for examination or analysis may be used in evidence."

As observed by our Sister Judge therein that Section does not empower the prosecution to hand in such documents as he is not a witness. The document must be produced by a witness. We are of the view that in the circumstances of this case the P3 should have been produced by police officer who escorted appellant for medical examination and the post mortem by the police officer who attended the post

mortem. We therefore agree that these two documents being the post mortem and the P3 were improperly introduced in evidence.

We have also found that there was no eye witness and the prosecution case rests on the confessional statement and t circumstantial evidence. We find that the confessional statement was retracted and or repudiated. It was admitted in evidence after a trial within a trial. We have read the ruling pursuant to which the statement was admitted and we find that the appellant's main contention was that he had been tortured into making that statement. The learned trial Magistrate as he then was just stated that the statement was admissible of torture. The learned trial magistrate as he then was did not give reasons as to why the statement was admissible. He did not give reasons as to why he dismissed the allegations of torture. We agree with the contention of both lawyers that the statement was wrongly admitted and acted upon.

As regards the aspect of corroboration there is no independent evidence save the presence of blood group similar to that of the deceased being found on the clothes worn by the appellant. As contended by the defence it was necessary to produce evidence regarding the wrapping of the exhibits enroute to the government chemist to ensure that there was no leakage of the blood samples. It was also necessary to find out how old the blood was on the clothes.

Further reliance was derived from the recovery of the money in sack in the appellant's house. It was necessary to adduce evidence to the effect that appellant had an opportunity to rush home and hide the money. This could have easily been adduced from evidence from appellant's neighbours who may have seen him with the vehicle at his home that night before reporting to police. No reason was given by the prosecution as to why no inquiries were made regarding this aspect of evidence.

A further ingredient to be considered was that the court was to seek corroboration for the retracted statement as regards the cause of death of the deceased. The post mortem report stated that the cause of death was instantaneous due to fracture of the base of the skull leading to haemorrhage and brain damage, while the statement states that the deceased was strangled and died of strangulation. This was contrary to the medical findings and so the statement could not possibly be true and so it should not have been acted upon.

In view of what we have stated above we find it not necessary to pursue this matter further. Our conclusion is that the matter was not properly investigated, evidence not properly admitted and that the conclusions reached are not supported. We agree with the submissions of both counsels that the conviction cannot stand. We also agree that since appellant has been in since 1994 and on the evidence as it stands we find it not worth to order a retrial. We therefore allow this appeal in its entirety, set aside the conviction and sentence and order the appellant to be set at liberty forthwith unless otherwise lawfully held.

Dated of Eldoret this 5th day of January, 2000.

Read and delivered at Kitale this 19th day of January, 2000.

1. R. NAMBUYE

JUDGE

2. ALNASHIR VISRAM

LORD COMMISSIONER OF ASSIZE