REPUBLIC OF KENYA
AT NAIROBI
(CORAM: CHESONI C.J, KWACH & SHAH,JJ.A.)
CRIMINAL APPEAL NO. 89 OF 1996
BETWEEN

SAMUEL WAWERU GACHAU alias KIHARA..... 1ST APPELLANT

JOHN MWANGI GITHUKU ..... 2ND APPELLANT

ANTHONY NDEGWA NJERU ..... 3RD APPELLANT

AND

THE REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mr. Justices Patel & Oguk) dated 25th September, 1996 in H.C.CR.A. NOS. 1342 - 1344 OF 1994)
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The convictions of Samuel Gachau (the first appellant) and John Githuku (the second appellant) were also based on the statements they made to the police under caution in which they confessed their involvement in the robbery. These statements were retracted or repudiated but after holding trials within a trial the trial magistrate held that they had been made voluntarily and they were admitted in evidence. In relation to these statements the magistrate had this to say in her judgmentwww.

> "The third accused gave a detailed statement under inquiry which was admitted in court on how they had come all the way from Nairobi under directions of the first accused to come and rob Gaitho (deceased) money. The 3rd accused mentioned the other accused in the statement. Similarly 5th accused in charge and cautionary statement confessed that they had come to rob Gaitho. He named 1st and 3rd accused those who were involved. These statements were admitted in evidence after trials within a trial were held."

The confessions in question were detailed and that was one of the reasons why the magistrate accepted them as true and had them admitted in evidence. In dismissing the appeals brought by these appellants the superior court also alluded to these statements and said-

> "We also take into account as against the first and second appellants, their repudiated statements which amount to a confession of their participation in the said crime."

The second appellant had repudiated his statement claiming that he had not made it. He said he was presented with a prepared statement by the police and ordered to sign it. When he refused to do so he was severely beaten. He then signed. The first appellant denied making the statement the police claimed he had made and said he had been beaten by the police.

In his own defense to the charges the first appellant told the magistrate inter alia-

> "On 25th December, 1991 after the parade I was brought to Nyeri Police Station. I told them to take me to the hospital because of the beating I had, they refused. When I went to court prosecutor applied that I be kept at the police station, the application was refused. I was then taken to hospital by prison authorities. ***I have the treatment cards to show I was be aten while at the police station. Medical documents are defense Exh.1."*** (Emphasis added) .

It is clear from this passage that the first appellant had been taken for treatment and he produced documentary evidence to prove it which the magistrate admitted in evidence and marked as "Defense Ex 1." These medical documents have disappeared and we could not trace them in the original court file. But whatever the position may be their production at the trial by the first appellant lends credence to his claim that he had been beaten by the police in order to extract a confession from him.

Section 26 of the Evidence Act (Cap 80) provides that-

> "26. A confession or any admission of fact tending to the proof of guilt made by an accused person is not admissible in criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

And section 27 of the Evidence Act provides that-

> "27. If such a confession as referred to in section 26 of this Act is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is admissible."

There was evidence before the trial magistrate that the first appellant had sustained personal injury while in the custody of the police and his evidence was that these injuries had been inflicted upon him by the police in the process of extracting a confession from him. If that allegation WS true, and on the evidence it cannot but be true, then the statement was inadmissible and should have been rejected by the magistrate. This findings should also have thrown into question the confession alleged to have been made by the second appellant.

In the case of ***Njuguna s/o Kimani and Others v Reginam*** 21 EACA 316 the Court of Appeal for Eastern Africa dealing with section 24 of the Indian Evidence Act which is the equivalent of section 26 of the Eviden ce Act (Cap 80) held inter alia that the onus is upon the prosecution to prove affirmatively that t confession been voluntarily made an not obtained by improper or unlawful questioning or other improper methods and that any inducement to make the same had ceased to operate on the mind of the maker at the time of making. We agree with Mrs Marsham therefore that the confessions had been improperly obtained and should have been rejected. We shall accordingly place no reliance on these confessions in this judgment.

Dated at Nairobi this ... day of ....., 1999.

Z. R. CHESONI

CHIEF JUSTICE

R. O. KWACH

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL