



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAKURU  
(CORAM: TUNOI, LAKHA & OWUOR, J.J.A)  
CRIMINAL APPEAL NO. 23 OF 1999  
BETWEEN**

**FRANCIS NDUNG'U NJOGU .....APPELLANT  
AND  
REPUBLIC .....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at  
Eldoret (Hon. Justice Nambuye) dated 4th December, 1998  
in  
H.C.Cr. Case No. 61 of 1995)**

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**JUDGMENT OF THE COURT**

The appellant, Francis Ndung'u Njogu, was convicted in the High Court at Eldoret (Nambuye, J.) on an information charging him jointly with six others with the offence of murder contrary to **section 203 as read with 204 of the Penal Code**. The particulars of the offence were that the appellant with others namely Charles Githenji, Peter Kagima (Moni), Eliud Nguki, Daniel Maina (Lovi), Joseph Karanja and Samson Njoroge (Sigalame), 2nd to 7th accused respectively, had on the night of 2F1asrtm , daByu ronft Jfuonree,s t1 9i9n4 Uaats iKna mGuiysuh u District of the Rift Valley Province murdered P.C Maina.

After a trial in which the state adduced evidence from fifteen witnesses, the learned Judge was not satisfied that the case against the other six accused persons had been proved beyond reasonable doubt and therefore acquitted them.

P.C Maina, the deceased, was murdered at the time when there were what has become commonly known as 'Tribal Clashes' in several parts of the Rift Valley, Burnt Forest area included. Most families deserted their homes and moved to centres, Kamuyu trading centre being one of them. A Police Post was established at the centre to provide security for the people that had moved there. In -charge of the Police Post was Inspector Isaac Khisa (PW 12). The others were P.C Geoffrey Njenga (PW 3), Sgt. Muya, P.C Ofwandu (PW 2) and P.C Maina, the deceased.

On the night of 21st June, 1994 World Cup Football matches were being played. Charles Githenji, the 2nd accused in the superior court and a teacher at a Kamuyu Secondary School, set up a television for people to watch for a fee of 3/= per head. He engaged Daniel Kariuki Njehia alias Kamangae (PW 4) to manage this business. The deceased and P.C Njehia (PW 3) sought permission from I/P Khisa to go and watch the match on the T.V at thTeh ec ernutree .w a s that they deposit their guns where I/P Khisa was sleeping which they did. PW 3 testified that he and the deceased went to the centre and watched the first game. Halfway through, PW 3 was called out by PW 4 to speak with his girl friend, Njeri. While talking to her, he heard shouts from a nearby house. He went there to find out what was happening. He found a group of people drinking chang'aa. He did not drink nor did he arrest the people. It transpired that there

were all the six accused except for the 2nd accused. While there the appellant appeared at the door and remarked that all the beer was finished. PW 3 went back to the station. While warming himself the deceased came back and talked to I/P Khisa. According to I/P Khisa he informed him that he was going back to watch the last match, between Spain and another country. He went and PW 3 went to sleep till morning.

I/P Khisa confirmed this testimony. The Inspector assumed that the deceased was going to sleep. To the contrary, the evidence is that he went back to the centre. According to Njehia (PW 4), when the match was going on the appellant came to the door and requested him to call for him any 'askari'. He called one and as he went out was followed by the other 'askari'. The first match ended and the two 'askaris' went away. The police officer came back for the 2nd match. Once more the appellant asked him to call the 'askari' he had called. Njehia called the police officer. He was not armed. They talked and by then the 2nd accused, Githenji was now in the T.V room. Njehia did not hear the conversation between the 'askari' and the appellant. The two of them went away and did not come back.

The following morning, both PW 12 and PW 3 did not see the deceased. None of them knew exactly what had transpired the night before. PW 12 began getting anxious. This same morning, the 22nd of June, 1994 Grace Njambi (PW 5) went off to the appellant's shop in the centre to buy cooking oil. She had a strange conversation with the appellant in which he requested her to go back and tell him what she saw at the farm where she was going to. She assumed that he was talking about potatoes that were being stolen. She left for the shamba with her sister Margaret Nyambura (PW 6). At the gate of the shamba they found some blood. They also met the 6th accused, Karanja and one Samuel Ndegwa Njenga who advised them not to go further because they had seen a body of a person in the water dam in the farm. According to Ndegwa (PW 10), he was taking his cattle to graze when Karanja called him and showed him blood in his shamba.

They called Mburu (PW 8) with whom they followed the blood-trail to a water dam where they saw a hand of a body in a jungle suit protruding. The body was covered in nappier grass and leaves.

They decided to go to the Police Post and report. That is when they met the two women.

The report was made to I/P Khisa who after confirming that the body was that of P.C Maina, made reports to Burnt Forest Police Station and thereafter to Eldoret. C.I.D officers, G.S.U and other police officers were mobilized and investigations commenced. Amongst the officers that went to the scene was Cpl. Ogeto (PW 11), I/P Khisa, P.C Katiba (PW 13) and I/P Bitok from Eldoret.

Interrogation of the witnesses including PW 3 led to the arrest of all the accused. The six accused persons and the appellant were the people that were drinking chang'aa in the house at the centre and who PW 3 saw and identified. He also confirmed that the deceased in fact left the centre three times on that fateful night, once with Sgt. Muya, with him, and the last time by himself.

The murder of the police officer and the disappearance of the gun was a worrying thing. So a 'barasa' was called and members of the public and police officers were sent out to go and look for the gun. One of the group that went, in which Shadrack Kibe (PW 1) and P.C Ofwandu were, found the gun in the shamba.

During the investigations, PW 11, PW 12, PW 13 and PW 15 went and observed that there were boots' marks at the scene leading to the dam.

The appellant gave information that led to the arrest of all the other accused persons and the discovery of the murder weapon in a latrine pit into which he claimed to have thrown them. Soil from the scene was collected as well as pieces of bone and grass that had blood on them. These were examined and found to be stained with Group 'O' blood which happened to have been the deceased's blood group. The gumboots collected from the appellant's house and his jacket that was dipped in water by a third party had no blood stains on them.

The appellant after arrest gave two extra judicial statements. The inquiry statement and the charge and cautionary statement. Both these statements detailed how the appellant and the other accused planned and had the deceased killed and dumped in the water dam. The injuries found on the body during the post-mortem confirmed that the deceased had been killed by being inflicted with very serious injuries which confirmed the appellant's statement as to how he killed the deceased.

The inquiry statement was not objected to and was admitted into evidence as an exhibit. The charge and cautionary statement recorded from the appellant and in which he allegedly confessed to the murder was repudiated but admitted into evidence by the learned Judge after a trial within a trial.

It is not in dispute that those two statements were considered by the learned Judge in great details and formed the basis of the conviction of the appellant.

Mr. Kariuki, counsel for the appellant, argued the appeal on two main grounds, notwithstanding the fact that both the original petition filed by the appellant and the supplementary one filed by him constituted quite a number of grounds. However, we agreed with him that looked at together the two grounds argued by him formed the basis of the appeal.

The main thrust of his attack was against the admission into evidence of the two extra-judicial statements recorded from the appellant. The first being the statement under inquiry taken from the appellant by I/P Bitok on 26th February, 1994.

Although the admission of the statement was not objected to by counsel then representing the appellant, Mr. Kariuki still contended before us that the judge misdirected herself and erred in admitting the same into evidence and furthermore by grounding the conviction of the appellant on it. The whole statement was recorded in English there being no version of it in the Kiswahili language that the witness claimed in cross-examination that the appellant spoke. That statement goes into great details as to what happened on that night and how the appellant killed P.C Maina.

The second statement, the charge and cautionary statement, was taken from the appellant on 5th of July, 1994. That statement was also a confession. It was reproduced and admitted by the learned Judge after a trial within a trial. It was recorded in Kiswahili, a language that the appellant understood.

The certificate of I/P Bitok also stated that the statement was recorded in Kiswahili language.

The basis of Mr. Kariuki's objection that the two statements were recorded in English whilst the language the appellant spoke and understood was Kiswahili is only true of the statement of inquiry. Even if we find that admission of that statement offended **section 22 of the Police Act**, that would still leave the charge and cautionary statement intact.

The rule on which Mr. Kariuki's objection is based is to ensure that there is no miscarriage of justice as is the case if the statements are not recorded in the language of the appellant. In that event it can be alleged that what is recorded does not correspond with what was said. See **Njeru s/o Nkoro and Another vs Republic Criminal Appeal No. 47 of 1967 (unreported)**.

*"The reason for the first of these rules is obvious, a person who is required to use a language other than that of his choice may afterwards say that through his ignorance of the language, his use of the words has conveyed on meaning other than that which he intended.*

*The reason for the second rule is that it is desirable whatever possible to have the statement in the actual words of the person who made it. A great deal may turn on the words used but his translation of them into another language, it may be alleged that what is recorded does not correspond with what was said".*

In the present case, however, Mr. Kariuki does not allege the above. Nor, does he allege that there was any misunderstanding arising from a different language having been used. In our view, therefore, there is

no prejudice occasioned to the appellant and no miscarriage of justice. Accordingly, the objection to the two extra judicial statements is rejected.

As to the second ground it was contended that the trial Judge did not pass any sentence. We do not agree. After the conviction and sentence the record indicates the following:

**"Sentence:**

There is only one sentence provided by law for this offence, which is to suffer death in the manner provided for by law".

Having considered the observation made by the learned Judge, we are of the view that it amounts to her passing of sentence. We are satisfied that she intended to pass the only sentence which the law allows in the circumstances. There is no ambiguity as regards this. Moreover, in the supplementary petition signed by Mr. Kariuki himself he speaks of the appellant having been "sentenced to suffer death". This ground also fails.

Taking the evidence as a whole we are satisfied that the conviction of the appellant was fully justified.

In the result, the appeal against conviction and sentence is hereby dismissed.

**Dated and delivered at Nakuru this 24th day of September, 1999.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**