



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
CORAM: CHESONI, C.J., GICHERU & BOSIRE, JJ.A.
CRIMINAL APPEAL NO. 76 OF 1997
BETWEEN

DAVID KIMANI NJOROGE APPELLANT
AND
REPUBLIC RESPONDENT

(Appeal from a conviction & sentence of the High Court of
Kenya at Nakuru (Rimita, J.) dated 25th September, 1997
in
H.C.CR.C. NO. 46 OF 1993)

JUDGMENT OF THE COURT

The appellant, DAVID KIMANI NJOROGE , was convicted by the High Court (Rimita, J.) of the murder of his girl friend, MONICAH WANJIKU NGUGI , (deceased) between 1st and 6th June, 1992, at Susumua Dam in Nyandarua District of Central Province. He was sentenced to death, and has appealed against the conviction and sentence on five grounds in which he says the learned trial Judge erred in law and fact because:-

- (1)he did not consider all the circumstances under which the cautionary statement was obtained e.g. the duration of time the appellant was in police custody before his statement was recorded;***
- (2)he relied on a retracted statement to convict the appellant in the absence of corroboration;***
- (3)he concluded that the murder was premeditated when the evidence relating to malice aforethought was inconcrete;***
- (4)he did not consider the appellant's defence and rejected the same which occasioned a miscarriage of justice;***
- (5)The fifth ground alleges that the learned trial Judge erred in law and or misdirected himself in concluding that the charge had been proved when the evidence pointing to the appellants' guilt was inadequate.***

Mr. Odhiambo, for the appellant, adopted and argued the five grounds of appeal together.

The prosecution relied on two sets of evidence to establish the appellant's guilt. These were a confession (charge and caution statement) attributed to the appellant and circumstantial evidence.

The appellant was arrested on 8th June, 1992 and the charge and caution statement was recorded by Inspector of Police Abraham Macharia on 18th June, 1992. The appellant objected to the production of that statement at his trial prompting the learned Judge to hold a trial within a trial. During the trial within a trial Inspector Macharia told the court that he talked to the appellant before recording the statement and

that he (appellant) was fluent in the English language. This witness said that he was alone with the appellant in the office at the time of recording the statement. The witness added that he did not intimidate, threaten or promise the appellant anything to make him give the statement. The witness also told the court that after recording the statement he read it back to the appellant, who signed and Inspector Macharia counter-signed it. The witness (Inspector Macharia) was cross-examined by Mr. Njuguna for the appellant. The witness testified that the appellant neither complained to him nor appeared to have been beaten up.

The appellant gave sworn evidence during the trial within a trial and said that he did not know anything about the said statement. Thus he refused to accept (repudiated) it. However, he (appellant) in cross-examination said:-

"I agree the names appearing in the statement are mine. I signed them. I wrote the name myself. The statement was prepared before I signed it. I cannot tell how many statements I made to the police. I did not go to Inspector Macharia. I did not talk to Inspector Macharia at all."

If he (appellant) did not go or talk to Inspector Macharia then his claim that Inspector Macharia beat him on 17th June, 1992 cannot be true. When re-examined by his counsel the appellant had this to say:-

"I gave a statement about the night I was with the deceased but I do not know whether it was recorded."

The appellant alleged that he was tortured by the police because they wanted him to agree that he had killed the deceased. He did not complain to anybody, not even to the court, because he was afraid of the police. During the trial within a trial he never said that he was tortured by the police so that he could sign the cautionary statement. His allegations of being beaten up, his testicles being tied with a string and his toe being injured became relevant to the voluntariness of the charge and caution statement, only when in his sworn testimony in the main trial the appellant said:-

"I was beaten up and I signed the statement. I did not make the confession. The police Inspector exaggerated the story."

He therefore retracted the alleged confession. However, in cross-examination he (appellant) said:- "I do not agree that I killed but agree with other parts of the statement. ...

We had no problem but the parents of the deceased were reluctant. The parents of the deceased said that I was a poor man. I did not like this reference to me as a poor man."

The learned Judge made a detailed but correct summing up to the assessors whose unanimous opinion was that the appellant was guilty of the murder of Monica as charged. The learned trial Judge correctly directed himself that the prosecution's case depended on circumstantial evidence and the appellant's confession. He correctly held that the retracted and repudiated statement was voluntarily made by the appellant. In relation to this the learned Judge properly directed the assessors as to the danger of relying upon a retracted confession to support a conviction unless it is either supported by other independent evidence in material particulars or unless they (assessors) were, after full consideration, satisfied that the confession must be true. The Judge relied on the cases of KAMAU V. REPUBLIC (1965) E.A. at page 505 and TUWAMOI V. UGANDA (1967) E.A. at page 84. The appellant has attacked his conviction as being an error in both law and fact because it was based on a retracted statement. In BAKARI OMARI AND JOHN MARTHA KOMORA V. REPUBLIC [1983] I KAR 349 this Court citing TUWAMOI'S case with approval reiterated:-

"There is no rule of law or practice requiring corroboration of a retracted statement or confession before it can be acted upon, but it is dangerous to act upon it in the absence of corroboration in material particulars, or unless the court, after full consideration of the circumstances, is satisfied of its truth."

Again in **JOSEPH NJARAMBA KARURA V. REPUBLIC [1987] I KAR 1165** this Court re-emphasized that a retracted and repudiated confession of an accused person requires independent corroboration. There was such corroboration in the case before the learned Judge in the evidence of Samuel Kinuthia Kariuki (the appellant's cousin) that he left the appellant and the deceased drinking together at Maendeleo Bar at 7 p.m. The appellant said the same in his retracted and repudiated confession in which he says:-

"I left the said bar immediately and went to Njabini matatu stage. There I met my former wife the deceased Monicah Wanjiku Ngugi. We had earlier arranged to meet. On meeting I took her to Maendeleo Bar where I bought her Tusker beer. We stayed there till 9.00 p.m. ..."

When Dr. Daniel Oire Kiagie performed a post-mortem examination on the body of Monicah he established there were twelve stab wounds on the chest. In the cautionary statement the appellant is recorded to have said:- "I stabbed her six times on her chest as she was lying down."

Finally when the appellant was cross-examined on his own evidence he said:-

"The parents of the deceased said that I was a poor man. I did not like this reference to me as a poor man." In the repudiated and retracted confession he said:- "After sex I asked her why she was leaving me? She told me that she could not be able to stay with me because I am poor man. I became annoyed ..."

Where an accused person has retracted an alleged confession and he gives sworn evidence in the main trial that evidence, in so far as it is relevant, may provide corroboration to the retracted confession.

We have read through the retracted and repudiated confession and we are satisfied and find, after full and careful consideration, that even a most imaginative policeman or anyone else, could not narrate the incidents and movements of the appellant with the deceased in such details as are contained in the said statement, unless he was with them or with either the deceased or the appellant.

The learned Judge correctly excluded any defence of temporary insanity arising from consumption of a large quantity of alcohol, and, also the defence of provocation. He was entitled, taking into account the circumstantial evidence that the appellant had been drinking with the deceased during the day and part of the night till 11 p.m. when he (appellant) was the last person seen with the deceased while alive, and having fully considered the circumstances, and, being satisfied of the truth of the appellant's retracted and repudiated confession, to convict the appellant (David) of the murder of the deceased (Monicah). Mr. Onyango for the Respondent, is right in supporting the conviction. In the result we dismiss this appeal.

Dated and delivered at Nakuru this 26th day of February,

1998.

Z. R. CHESONI

CHIEF JUSTICE

J. E. GICHERU

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR