REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI
(CORAM: GICHERU, OMOLO & SHAH, JJ.A)
CRIMINAL APPEAL NO. 6 OF 1992
BETWEEN

JOSEPH JUMA MBORI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High court of Kenya at Nairobi (Mr. Justice Mango) dated 22nd January, 1992

in

CRIMINAL CASE NO. 17 OF 1991

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JUDGMENT OF THE COURT

The appellant was found guilty and convicted by the High Court at Nairobi upon an information which charged him with murdering Titus Waithaka Karuga on 15th day of May, 1990 at Raini Trading Centre, Karuri Division of the Kiambu District of Central Province, contrary to section 203 as read with section 204 both of the Penal Code and was duly sentenced to death. The assessors supported the judge's finding.

The appellant was at the material time a free-lance carpenter residing at Raini Trading Centre. The evidence adduced by the prosecution shows that on that day, at about 7.30 a.m., PW1, Kimemia Njoroge went to the shop belonging to Titus Waithaka Karuga (hereinafter referred to as "the deceased") to collect money for the newspaper which he was to buy for the deceased to read. When he went to the shop he found the appellant alone inside the shop. The appellant was known to PW1. He asked of the appellant the whereabouts of the deceased and was told that "mzee" (meaning the deceased) was somewhere on the upper side. He used Kiswahili words "mzee yuko huku juu" which literally translated mean that the old man was up there. He found the accused in the part of the shop where the shop-keeper would normally be and not where a customer would be.

PW1 returned to the shop later to find it locked from outside. He went away only to return upon being called by the deceased's wife who informed him the deceased was no more.His body was found on the floor inside the shop where he had earlier seen the appellant standing. He later identified the appellant, at an identification parade, as the person he saw earlier in the shop. PW5, Wilson Mwaura, gave evidence to the effect that he had given out on rent a house, which house, situate at Raini Trading Centre, was occupied by the appellant until 15th May, 1990 whereafter he did not see him occupy the houseD.r .

Samuel Odero Ywaya, a pathologist carried out the post-mortem examination of the deceased and found that the cause of death was manual strangulation and fracture of the frontal perietal region with bleeding in the brain. Apart from the alleged strangulation the deceased had sustained a deep wound on right side of his forehead, a cut wound on the right ear, a bruise on the upper chest on the right side of clavicle and bruises on left side of face as well as left side of the head with blood under skin in the nostril. Internally, the pathologist observed a bruise on the neck muscle, bruises in the windpipe, blood stained fluid in the fractured windpipe and various other bruises showing that death was brutal and not accidental. The significance of this will be gone into later.

Chief Inspector Mate Murang'a (PW9) went to the scene of death and found police officers there led by chief Inspector Njoroge. He was briefed by Inspector Kyalo and thereafter took up the investigations from there and eventually traced the appellant in Naivasha. He brought him to Kiambu and allegedly obtained, a voluntary statement from the appellant.

This statement under inquiry became the subject-matter of a trial within a trial and was admitted by the learned judge as having been voluntarily made. Critism was levelled against this witness for obtaining a statement under inquiry when he knew of certain matters relating to the alleged crime. We will revert to this aspect later on in this judgment.

The evidence of the deceased's wife, apart from the finding of the body, consisted of what she heard from PW1 about the presence of the appellant in the shop that morning.She also stated that the appellant had come to the shop the previous day and was given a loaf of bread and half a kilogram of sugar. She identified the appellant as the person who was given the bread and sugar.

PW11, Margaret Mbaire, found the keys to the shop (the set which the deceased had) the next day (16th May) upon a culvert on the side of the road at Kiambaa.

Inspector Tobias Mseda (PW13) said he administered the usual caution before taking down a statement under charge from the appellant. That statement was rejected after a trial within a trial.

The appellant gave sworn testimony in his defence. On the date in question, he said he had gone to Ruaka to do his work and worked all day after he got the job and that when he returned to his house in the evening at about 6.30 p.m he was informed of the death and that he (the appellant) was seen at the scene of murder as a result of which he panicked and went away to his brother at Kabibuli for that night and to Naivasha the next day. He was arrested at Naivasha on 17th May, 1990 and taken to Karuri Police Station first and then to Kiambu Police Station. He said he was tortured on that day and taken back to cells. He was tortured again, he said, on 18th May, 1990 and told to sign some papers whose contents he did not know. He signed as he was beaten up. On 21st May, 1990 he complained to a doctor that he was beaten up. Later on the same day he was taken to Inspector Mwenga, was tortured and was made to sign some papers. He was charged the next day.

Mr. Mogikoyo who appeared for the appellant stressed that the appellant's statement under inquiry was wrongly admitted as it was taken by an officer who was investigating the alleged crime that is to say he had talked to various persons in the course of his inquiries, and had probably made up his mind to charge the appellant. Mr. Mogikoyo relied on the case of **Joseph Njaramba Karura v. Republic** [1982-88] 1 KAR 1165 to support his argument to the effect that such an officer could tailor the evidence to support the prosecution case. We have pointed out earlier that the statement was admitted after a trial within a trial. Mr. Mogikoyo referred to what was said by this Court in the Karura case (supra at page 1166:

> ***"The main ground in this appeal is on the confession statement which was retracted and repudiated and the corroborative evidence to make it admissible in evidence. The statement was taken by Inspector Mugambi (PW21) who was also the investigating officer. Counsel for the appellant submits that the Inspector being the investigator could have tailored the appellant's statement so as to suit the guilt of the appellant. This statement was retracted and repudiated by the appellant who stated that he was tortured by three police officers and forced to sign it. He gave a detailed account of***

what transpired. The statement was admitted after a trial within a trial.

We see the danger of the statement being recorded by the investigating officers.

The practice has always been that the statement is recorded by another officer, who later would produce it in his evidence, but not the investigating officer in order to avoid this sort of allegation....."

The above pronouncement by this court was made when it was not referred to the case of **Bassan & Wathioba V.R** [1960] E.A 521. The Court of Appeal for Eastern Africa considered in some depth the issue of exclusion of evidence in the form of a statement taken from the suspect by an investigating officer with particular reference to cases like **Njuguna S/o Kimani & Others vs. R.** [1954] 21 E.A.C.A. 316 an**d Israeli Kamukosle & others v. R** (1956), 23, E.A.C.A. 521. That Court said at page 533 1:

"We certainly do not think that the court in Njugunga's case, intended to lay down a rule of law that a statement recorded by an investigating officer upon charge and caution of a suspect is to be automatically excluded from evidence. Nor do we think that the Court in Israeli's case, can have intended to say that it is necessarily improper for an investigating officer to take any statement from a suspect. If it did, we must respectfully dissent. There may be many suspects in the early stages of an investigation into a case, and it is hardly a practicable proposition that a fresh and independent officer should be procured to take a statement from each."

With respect we agree with the above passage. It would not be practicable in all circumstances to get another police officer to record an inquiry statement at every stage of the investigation. It is the job of an investigating officer to investigate the circumstances leading to the crime and there is nothing wrong when he records a voluntarily made statement after having given the proper caution. With respect what this court said in this regard, in the **Karura** case was per incuriam. It is certainly true to say that once an **investigating officer has decided to charge the suspect** it would be inadvisable, if not improper for him to record an inquiry statement. It is at that stage that a new officer should take over. Perhaps it would be prudent to point out the general principle as stated by Lord Sumner in his judgment in the Privy Council in **Ibrahim v. Rex** (referred to in the case of **R.V. Voisin** (1918) 1K.B. 531 at page 537) and we quote:

"***It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."***

The learned judge ruled that the inquiry statement was admissible in evidence. He cannot be faulted for that. The statement was lengthy and tended to show that the contents thereof could not have been invented by a fertile imagination of the investigating officer. In material part it reads:

"On the 14th day of May 1990 I found that I had no money and also my brother did not have any money. At about 9.00 a.m. I went at (sic) Raini Shopping Centre in the shop owned by an old man. I found him with his wife. I gave (sic) him my problems because I saw that my wife had nothing to eat and the baby was crying. I told the old man to give me a loaf of bread and sugar on credit and he gave me.

The following day I woke up at around 7 a.m. and visited him again in his shop. I told him that I wanted another loaf of bread. When I told him that he refused and told me that he could not give me before I settled the other debt.

I got annoyed and pushed him. And since his legs are weak he fell down in (sic) the floor and I saw him bleeding from his head and he did not talk again. I entered the counter and collected all the cash from the drawer.

There were only coins in it. I took them and put in my pocket.

I went out and before that I took the padlock and the key and I locked the shop door from inside. I went with the key and I threw it in a ditch away from the house about 50 meters along the road.

On arrival in my house I counted the coins I took from the shop and found them to be (k)shs.33/=. I washed my shirt. Because I sensed danger, I went out without informing my wife and went towards Ruaraka. In the evening at about 6 p.m. my neighbour, who are Luos informed me, and therefore I decided to run away."

The learned judge had before him and accepted the evidence of PW1 who had seen the appellant in the deceased's shop on the morning of 15th May, 1990 in that portion of the shop where the deceased would normally have been and where the body of the deceased was found. There was also evidence from the wife of the deceased which evidence was also accepted that the appellant had bought on credit one loaf of bread and sugar the previous evening from the deceased. There was also the evidence of the shop being locked from outside and the keys being found not too far from the shop. All these factors not only tend to give credence to the voluntariness of the inquiry statement but are also fully corroborative thereof; corroboration is of course required when a caution statement is repudiated or retracted or both repudiated and retracted.The inquiry statement was therefore properly relied upon by the learned judge. But there were several other factors which show that the appellant was involved in the crime. He was in the shop at the material time. He was present in the shop the previous day. He was in dire need of food and money. He ran away after hearing that the police were looking for him.

Both the grounds of appeal upon which Mr. Mogikoyo relied fail. But Mr. Mogikoyo put forward an alternative argument.

He said that if this court were to accept the voluntariness and correctness of the inquiry statement then the statement only goes to prove manslaughter as opposed to murder. The fact of pushing the deceased by the appellant when the appellant was annoyed as the deceased refused to sell to him food items on credit amounted to, Mr. Mogikoyo urged, manslaughter. It is for this reason that we had earlier gone into the cause of death. The death was not caused by mere act of pushing as a result of which the deceased may have fallen and hurt himself. We have pointed out that the death was brutal. It is clear from the post-mortem report that the deceased was strangled. We cannot subscribe to the theory of manslaughter propounded by Mr. Mogikoyo.

This appeal fails and is dismissed.

Dated and delivered at Nairobi this 22nd day of May, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL